Shihlin Electric & Engineering Company's Submission on the Preliminary Affirmative Determination

On November 20, 2013, the Australian Anti-Dumping Commission ("Commission") published a preliminary affirmative determination, and announced that securities would be taken on Shihlin Electric & Engineering Corp.'s ("SEEC") exports of power transformers at an *ad valorem* rate of 20%.

SEEC makes the following submissions with regard to the preliminary affirmative determination and the decision to take securities.

I. Securities should not Apply to Existing Contracts for the Supply of Power Transformers

SEEC submits that securities should not be required or taken on power transformers exported to Australia pursuant to contracts entered into with Australian customers before 27 November 2013. SEEC's reasons for why securities should not be required or taken on such exports are set out below.

SEEC notes that, according to the Preliminary Affirmative Determination Report No. 219 ("Report"), the Delegate of the Anti-Dumping Commissioner was satisfied for the purposes of s. 269TD(1) of the *Customs Act 1901* that the product concerned is dumped and caused injury to the Australian industry.

SEEC also note that, according to Section 7.2 of the Report, the Commission:

- understands that requests for tender continue to be assessed by end-users, and that exporters of power transformers whose exports have been preliminarily found to be at dumped prices continue to submit tender offers for the supply of power transformers pursuant to such requests; and
- is satisfied that securities are warranted to prevent material injury being suffered by the Australian industry producing like goods.

Finally, the Report also states that:

> "[Australian Customs and Border Protection Service] will require and take securities under section 42 of the [*Customs Act 1901*] in respect of interim duty that may become payable. Securities will apply in respect of imports of power transformers from China, Korea, Indonesia, Taiwan and Vietnam

and entered for home consumption on or after 18 November 2013[1]."

Section 269TD(4)(b) of the *Customs Act 1901* relevantly provides that if the Commissioner has made a preliminary affirmative determination, "Customs may, at the time of making the determination or at any later time during the investigation, require and take securities under section 42 in respect of interim duty that may become payable if the officer of Customs taking the securities is satisfied that it is necessary to do so *to prevent material injury to an Australian industry while the investigation continues*". *(emphasis added)*

It would seem that by Anti-Dumping Notice No 2013/92 the Australian Customs and Border Protection Service has adopted a policy to require and take securities in respect of power transformers from the countries in question that are entered for home consumption on or after 27 November 2013. Presumably, in accordance with the *Customs Act 1901*, securities will only be taken in relation to any particular import if the officer of Customs actually taking the securities is satisfied that it is necessary to do so to prevent material injury to an Australian industry while the investigation continues.

It is unclear to us what material injury to an Australian industry would or could be prevented by the taking of securities in circumstances where the supply of the power transformer being supplied is pursuant to a contract entered into on or before the date of publication of the Report. The time at which the Australian industry would have incurred any injury would have been when the contract was awarded to a competitor, because that was the time at which it lost a potential sale.

The subsequent taking of a security on a transformer exported to Australia pursuant to that contract could obviously not prevent the injury that has had already occurred.

This was recognized by the Anti-Dumping Authority in its review in 1992 into so-called "tender dumping". As stated in Consideration Report No. 19:

> "The Minister can take action when the goods are exported, but in the circumstances contemplated by the Authority this would provide no relief for the Australian industry as the injury occurred at the time the contract was awarded." (at p. 15) (underlining added)

[1] Anti-Dumping Notice No. 2013/92 refers to this date as being 27 November 2013.

It would seem that the only injury that could be prevented by the taking of securities is in respect of power transformers exported to Australia pursuant to contracts **entered into on or after 27 November 2013** by those exporters whose exports have been found by the Commission, at least at this preliminary stage, to be at dumped prices.

SEEC respectfully submits that Anti-Dumping Notice No. 2013/92 should be amended to reflect this, or, at the very least, that a Customs officer considering whether or not to take securities ought to take that into account. Given the infrequent exportation of power transformers to Australia and the fact that an officer of Customs will request a security on each importation, evidence could be provided to the officer of Customs that the importation is pursuant to a contract entered into before 27 November 2013 and, therefore, securities are not required in respect of that importation.

If, contrary to this submission, you are of the view that the taking of securities in respect of power transformers entered for home consumption on or after 27 November 2013 is necessary to prevent material injury to an Australian industry, SEEC would be grateful if you would advise us what material injury will be prevented by the taking of such securities, and how.

II. Ex-Works Export Price

In calculating SEEC's export price, the Commission calculated a deductive export price to arrive at an ex-works export price.

In comparing the constructed normal value to the deductive export price, the Commission should not have deducted certain costs from SEEC's export price to Shihlin Electric Australia Pty Limited ("SeA") because those costs have already been captured in the cost of manufacture and, thus, in the constructed normal value. If these amounts are deducted from the deductive export price, then they also should be deducted from the constructed normal value to ensure a fair comparison of like-with-like.

III. Adding SeA's Losses and Profits to the Constructed Normal Value

In constructing a normal value for SEEC, the Commission has added certain losses incurred by SeA in commencing operations in Australia and a profit margin for SeA. It is unclear why these amounts have been added to the constructed normal value, as

they form no part of a domestic selling price. Further, it is difficult to understand how a profit margin could be added when SeA was incurring a loss. The two concepts would seem mutually exclusive.

Accordingly, we request that the constructed normal value for SEEC be re-calculated by removing from that calculation the amounts for SeA's losses and profit.

IV. Certain Start-up Production Costs Should be Amortized

In relation to SEEC's response to question G-3.8 of the exporter questionnaire, cost items in certain job orders of a "start-up" nature should be amortized over a period of 15 years.

As the Commission is aware, power transformers are complex, highly-customized products. Every power transformer is unique. Further, two power transformers having the same performance requirements may be designed and configured differently to meet local site requirements.

Australia's product standards for power transformers are materially different from Taiwan's standards. In addition, the geographical and environmental conditions in Australia are materially different from those prevailing in Taiwan, which has resulted in additional costs being incurred in adapting power transformers to those conditions, which costs are not incurred in Taiwan.

As a new entrant to the Australian market, SEEC incurred significant costs in adapting its power transformers to the Australian market and to environmental and other conditions in Australia.

This and other factors unique to Australia caused SEEC to incur additional costs during its initial entry into the Australian market, through SeA, that were not incurred in the Taiwanese market. It also is important to note that such costs were incurred only during the start-up of operations.

These additional costs would not be incurred and were not incurred in the supply of a comparable model of power transformer in the Taiwanese market.

These additional costs are of a "start-up" nature as defined in generally accepted accounting principles. Accordingly, in determining a constructed normal value for

SEEC's power transformers (i.e. the value of the same or like product sold in the ordinary course in Taiwan), such costs should be treated as "start-up" costs and should be amortized accordingly.

In addition, in accordance with the Commission's Anti-Dumping Manual ("AD Manual"), "*costs arising from exceptional wastage*" should be specifically excluded in constructing a normal value (page 41 of the AD Manual). The "start-up" costs satisfy this definition and should be excluded from the calculation of a constructed normal value for SEEC. These exceptional "start-up" costs incurred by SEEC in entering the Australian market should be excluded in the same way that exceptional wastage costs are to be excluded.

V. The Commission Should Use the Profit Rate of Domestic Sales to the Utility Customer (e.g. TPC) in the Constructed Normal Value for SEEC

In the preliminary affirmative determination, the Commission has used the profit realized in sales of like goods by SEEC to all of its customers in the Taiwanese market (i.e. it reflects an average profit across all domestic sales transactions during the period of investigation).

SEEC is of the view that the Commission should use only the profit realized by SEEC in its sales to Taiwan Power Company (TPC).

As set out in SEEC's response to question D-1 of the exporter questionnaire, SEEC sells power transformers to two types of customers in the Taiwanese market, namely, to TPC, and to non-utility customers. There are significant differences in transactions between these two types of customers, which significantly affects prices and profits.

First, the manner in which prices are determined is different between the two types of transactions. As set out in SEEC's response to question D-1 of the exporter questionnaire, TPC is a large state-owned utility power company. Its procurement of power transformers is made through public tenders in accordance with the Government Procurement Act (Attachment 1). There are no price negotiations after tender offer has been submitted. On the other hand, non-utility customers are private companies. Their tenders are not open, public tenders but, rather their requests for tender are sent to selected power transformer manufacturers and, on occasion, the

company would negotiate directly with SEEC for the supply of a power transformer without a tender or without requesting an offer from competitors of SEEC.Price negotiation after tender submission is quite often.

Second, product quality requirements between the two types of customers are different. As a power utility company with a long history of operations, TPC has significant experience and expertise in procuring power transformers, and has strict requirements on the quality of the power transformers it procures. This usually results in additional costs being incurred during the testing stage in the procurement process, which affects pricing. On the other hand, non-utility customers tend to have more lenient quality requirements and, hence, incur lower costs, especially during testing, and, again, this affects pricing. The reason for this difference in quality is because, as a utility company, TPC requires the power transformers it acquires to perform to high standards over a long period of time to ensure that it can continue to supply electricity to its customers with no or minimal disruption.

Third, TPC's long history in procuring power transformers and the quantity it purchases means that it has significant leverage in pricing that private companies do not have. Being an established and reputable supplier of power transformers, SEEC enjoys a certain reputation in the supply of power transformers in Taiwan and, consequently, can charge a premium in price negotiations with domestic non-utility customers. In addition, non-utility customers are more dependant and reliant on SEEC's technical know-how and support in designing and building their own product requirements because they do not possess the knowledge and skills necessary for the design, installation and maintenance of power transformers. SEEC has no similar advantage in its dealings with TPC and hence the price differential between the two types of customer.

Given the differences above, only the domestic sales to TPC are comparable to SEEC's supply of power transformers via SeA to customers in the Australian market. All of SEEC's Australian customers are utility companies which have a long history and considerable experience in electricity generation and, consequently, in procurement of power transformers. They purchase power transformers via open tenders and they set strict requirements on product quality. As a newcomer to the Australian market, SEEC has no reputational advantage in its supply of power transformers to Australian customers.

Accordingly, SEEC submits that only the profit that SEEC obtained from its sales to

TPC is reasonable for use in calculating a constructed normal value that is comparable to its Australian export sales to the same utility sales channel in Australia. Using the profit from other transactions in Taiwan (i.e. to non-utility customers) would simply distort the comparison and necessitate an adjustment to account for the differences in sales to utility and non-utility customers.

SEEC notes that in determining whether domestic sales are comparable to export sales, the Commission will consider "differing patterns of demand in the exporter's domestic market and the sales to Australia". (page 32 of AD Manual) We believe that this is a reasonable consideration and should be taken into account here given the differences in sales to utility and non-utility customers.

VI. Determination of Price

In Section 5 of the Report, in determining whether the subject countries' exports of power transformers to Australia undercut prices of the Australian industry, the Commission compared the applicant's prices with those of exporter's prices in only the tenders that the applicant lost. Such an approach fails to take into account those tenders that the applicant won during the investigation period and why it won those tenders. Focusing solely on tenders lost by the applicant produces a skewed result.

To properly compare import and domestic prices, the Commission should compare the prices in all tenders, regardless of who won, and should also take into account why the tender was awarded to one party and not another. Was it solely for reasons of price or was there a combination of factors that led to the tender being awarded to one party and not another? Such an analysis would be required for each tender awarded during the investigation period in order to provide a balanced view of why a tender was awarded to one party and not another.

[marketing strategy of SEEC/SeA deleted]

The price comparison chart in the Report reinforces this. Having regard to only the tenders that the applicant lost, Taiwan exporters' prices were very close and even higher than the applicant's. This fact of itself clearly indicates that Taiwanese exporters, including SEEC, not only did not compete on low prices but those tenders that Taiwanese exporters won were based on factors other than price, particularly when the power transformers were being designed, constructed and tested a considerable distance away from Australia. Consequently, it was not price

undercutting by Taiwanese exporters causing injury to the applicant but, rather, factors unrelated to pricing that were causing and injury. It invariably follows that any injury incurred by the applicant from Taiwanese exports was caused by something other than dumping.

The Commission is requested to further investigate why the Australian industry and, in particular, the applicant failed to be awarded tenders including those where its prices were about the same as or less than those exporters who were awarded tenders.

VII. In the Case of a Deductive Export Price, Domestic Selling Expense Should not be Added to Constructed Normal Value

SEEC is aware that the Commission may adopt a "deductive export price" methodology to calculate SEEC's export price to SeA. That is, the Commission may use SeA's selling price to its Australian customers and then deduct all of the costs incurred after exportation and before resale to the Australian customer to reach a deductive free on board or ex-works export price for SEEC's sales to SeA.

SEEC submits that, in that case, the Commission should not add the domestic selling expenses to the constructed normal value. [Reason for not adding domestic selling expenses is that SEEC does not incur selling expenses in sales to SeA.]

VIII Re-Calculation of Constructed Normal Value and Dumping Margin

Accordingly, we request that the constructed normal value and the dumping margin for SEEC be re-calculated in accordance with the foregoing. If you disagree that the constructed normal value and dumping margin does not need to be re-calculated in accordance with the foregoing, please let us know and provide reasons why it does not need to be re-calculated.