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12 May 2014

The Director Operations 1
Anti-Dumping Commission
Customs House
5 Constitution Avenue
Canberra ACT 6201

Our ref: ATH
Matter no: 9572278

By email: Operations1@adcommission.gov.au

Dear Sir

**Investigation into alleged dumping of Power Transformers exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam
TBEA Shenyang Transformer Group Co. Ltd**

We refer to our previous correspondence to the ADC on behalf of TBEA Shenyang Transformer Group Co. Ltd ("**TBEA Shenyang**") in relation to the Investigation. In particular, we refer to the email from Mr John Bracic dated 17 April 2014 and the ADC's meeting with TBEA Shenyang and Andrew Hudson on 5 April 2014.

We have been instructed to make the following submission in relation to the ADC's contention that as TBEA Shenyang did not export GUC to Australia during the Investigation Period, it is not entitled to an individual dumping margin. TBEA Shenyang does not concede that dumping has occurred or, if it is ultimately found to have dumped the GUC that material injury has been caused to the Australian industry producing like goods.

Please note that this submission does not exclude further comments made throughout the Investigation and further comments on other issues. In particular, this submission does not exclude TBEA Shenyang's ability to make further submissions on amendments to the calculations made by the ADC, as discussed in our meeting.

For the purposes of this submission, all defined terms have the same meaning as set out in the attached Schedule of Definitions unless otherwise defined.

1. Date of sale of exports to Australia

TBEA Shenyang contends that the two contracts for exports of the GUC it submitted in its Exporter Questionnaire were during the Investigation Period as the date of sale of the two contracts fall during the Investigation Period.

TBEA Shenyang contends that the date of the contract is the date of sale for exports to Australia, as it is on this date when the material terms of sale are established. This is especially so considering that the sale of the GUG was a tender sale as evidenced by the highlighted sections at page 2 and 4 of "**Attachment A**".

Further, the subject goods are a customised product and the sales process is relatively long. For instance, the difference between the date of contract and the date of shipment may be more than one year.

As the ADC may be aware, TBEA Shenyang currently has only one customer in Australia since entering the market for the GUC in 2007. It won the tender to join

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[redacted – customer information] to provide the GUC for three years, executed the Panel Agreement in 2011 and subsequently signed the contract for the two GUC it referred to as part of the Exporter Questionnaire.

As a result of the Panel Agreement, the price for future contracts with **[redacted – customer and commercial information]**.

Accordingly, the material terms of the sale were made in the Panel Agreement that was entered into during the Investigation Period. Further, the contract at Attachment A was entered into during the Investigation Period.

TBEA Shenyang entered into that contract, planned and undertook the majority of the work for that contract during the Investigation Period. This included manufacturing and testing the relevant goods. TBEA Shenyang should not be penalised and denied an individual assessment for exporting the goods only 30 days after the end of the Investigation Period when the sale is clearly within the Investigation Period and particularly in light of the nature of the goods and the sales process.

2. Supporting materials

As the ADC is no doubt aware, section 269TACB of the Act provides that in assessing if dumping has occurred, the ADC refers to the export price of goods "*exported to Australia during the investigation period*".

TBEA Shenyang contends that the ADC's interpretation of this reference should not be strictly interpreted to mean the time that the goods are physically shipped and that the ADC has a wide discretion to deem that the goods are "exported to Australia during the investigation period" at times when the goods had not yet been physically shipped. Instead, the ADC has the discretion to (and it should in this Investigation) determine that the assessment of whether the goods were dumped occurs when the material terms of sale were agreed. This is the point when any alleged dumping would have arisen.

A number of resources support TBEA Shenyang's contention, as outlined in the following paragraphs.

2.1 Legislation

Section 269TDAA of the Act provides that the ADC must take into account a number of factors in formulating the SEF in addition to the ability to "*have regard to any other matters that the Commissioner considers relevant*".

The same wide discretion is given to the Commissioner in making the Minister's Report.

Further, subsection 269TEA(2) of the Act also requires that the Minister's Report (where possible) extend to any like goods not covered by the application but which are imported into Australia between the date of initiation of the investigation and 20 days after the SEF is made. This provides coverage for the "new exporters" (as defined by section 269T of the Act). TBEA Shenyang contends that it is not a new exporter as the material terms of the sale were agreed to and the majority of the work provided for in the contracts was fulfilled during the Investigation Period (as argued in paragraph 1 above).

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2.2 Case law

While there is little case law dealing with this matter, the case of *Pilkington* explored whether the Minister was required to go outside the investigation period to ascertain whether dumping had occurred for the purposes of sections 269TG(1)(a) and 269TG(2)(a).

As the ADC is no doubt aware, the court found that subsection 269TEA(2) does not operate to widen the task of the Minister in assessing whether the subject goods have been dumped during the investigation period.

TBEA Shenyang does not disagree with this position. It agrees that the ADC must have regard to relevant goods that are "exported to Australia during the investigation period" but that it simply disagrees with the ADC's position on what constitutes "exported to Australia during the investigation period". Again, TBEA Shenyang contends that in the context of this Investigation, this does not require the physical shipment of the goods but that the material terms of trade are agreed to during that period.

This, in TBEA Shenyang's view, is open to the discretion both of the ADC and the Minister.

2.3 Exporter Questionnaire

The details provided by the ADC in the exporter questionnaire for this Investigation supports TBEA's contention that its contracts were during the Investigation Period and takes into account the unique sales characteristics of the GUC.

The Exporter Questionnaire provided to TBEA Shenyang is at "**Attachment B**". The instructions for Section B indicate that date of contract should be the date of sale, and that all contracts won during the Investigation Period would be included. Namely, we refer to the following extracts on page 14:

*"You should provide details of all goods under consideration...subject to tenders that were won during the investigation period, even in circumstances where the goods were not invoiced or **shipped** to Australia during the investigation period..."*

"For tender sales, the Commission considers the contract date will normally be taken to be the date of sale."

This final point in relation to the date of sale is crucial in supporting TBEA Shenyang's contention.

2.4 CON Report

The CON Report states at page 16 that because the Investigation involves a unique tender process for the sale of the GUC, the ADC will consider the following issues with interested parties:

- *"for tenders awarded during the investigation period, which of the following dates best represent the material terms of sale – lodgement of formal offer, closing date of the tender, date of signed contract, invoice date or date of installation; and*

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- *where the date of sale reflects a date prior to the physical shipment of the goods from the country of export, whether it is reasonable to consider that the goods are taken to have been exported at that date."*

This comment demonstrates the wide discretion the ADC has in setting the parameters of the Investigation.

TBEA Shenyang notes that the PAD did not address the ADC's decisions on how it wishes to approach the issues of the date of sale and how to treat goods that are physically shipped after the Investigation Period.

It therefore considers that these matters are still open for consideration by the ADC.

3. Other Chinese exporters

Notwithstanding TBEA Shenyang's argument in the preceding two paragraphs, TBEA Shenyang wishes to bring to the ADC's attention the possibility that the Alstom Exporters may be affected in a similar way. As you are likely to be aware, the Alstom Exporters closed down their Australian factory in mid-2013. Therefore, it is likely that it would have manufactured its products in Australia up until that point and that it did not export the GUC to Australia during the Investigation Period.

If this is the case, and if the ADC maintains that the GUC submitted by TBEA Shenyang were not exported during the Investigation Period, we understand that the residual dumping margin rate for Chinese companies would be 2.6%, based on the most recent figures.

4. Inequitable consequences

The ADC's current position would result in inequitable consequences for TBEA Shenyang.

If the ADC maintains that TBEA Shenyang's is ineligible for an individual dumping margin rate, TBEA Shenyang will receive the residual dumping margin rate (currently at 23.1%). This is significantly higher than the individual rate the ADC has currently assessed for TBEA Shenyang (at 9%). Further, as discussed in the meeting with the ADC on 5 April 2014, TBEA Shenyang requests that the ADC make some minor amendments to its data, which will further bring down that rate.

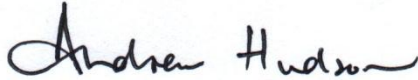
In addition, ADC's strict interpretation of the reference "*exported to Australia during the investigation period*" will create significant commercial difficulties with its client **[redacted – customer information]**. As explained in paragraph 1 above (and during our meeting), the terms of future contracts in accordance with the Panel Agreement **[redacted – commercial information]**.

Accordingly, should the ADC disagree with TBEA Shenyang's position and fail to exercise its discretion to include TBEA Shenyang as an exporter and if the minister ultimately publishes a dumping duty notice in accordance with section 269TG of the Act, TBEA Shenyang will have no choice but to move to have the matter reviewed by the ADRP in accordance with Division 9 of Part XVB of the Act.

We look forward to the ADC's urgent response to this matter.

Yours faithfully

Hunt & Hunt



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Attachments

- A** TBEA Shenyang's sales contract with [redacted – customer information]
[CONFIDENTIAL ATTACHMENT]
- B** Exporter Questionnaire provided to TBEA Shenyang

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Schedule of Definitions

- (a) "**Act**" means the *Customs Act 1901*.
- (b) "**ADC**" means the Anti- Dumping Commission.
- (c) "**ADRP**" means the Anti-Dumping Review Panel administered by Divisions 8 and 9 of Part XVB of the Act.
- (d) "**Alstom Exporters**" means SEC Alstom (Shanghai Baoshan) Transformer Co Ltd and SEC Alstom (Wuhan) Transformer Co Ltd.
- (e) "**Applicant**" means Wilson Transformer Co Pty Ltd being the applicant for the measures.
- (f) "**Application**" means the application dated 4 July 2013 by the Applicant seeking publication of dumping duty notices in respect of Power Transformers exported to Australia from the PRC, Indonesia, Korea, Taiwan, Thailand and Vietnam.
- (g) "**Con Report**" means the Consideration Report Number 219 issued by the ADC in response to the Application dated 4 July 2013 by the Applicant
- (h) "**Exporter Questionnaire**" means TBEA Shenyang's exporter questionnaire submitted to the ADC on 30 September 2014.
- (i) "**GUC**" means those Power Transformers the subject of the Application.
- (j) "**Investigation**" means the investigation by the ADC in response to the Application.
- (k) "**Investigation Period**" has the same meaning as in Con Report 219.
- (l) "**Minister**" has the same meaning as defined by the Act.
- (m) "**Minister's Report**" means the report that the Commissioner is required to make to the Minister in accordance with section 269TEA of the Act.
- (n) "**PAD Report**" means the Preliminary Determination Report No. 219 made by the ADC on 20 November 2013.
- (o) "**Panel Agreement**" means the [redacted – commercial information].
- (p) "**Pilkington**" refers to *Pilkington (Australia) Ltd v Minister of State for Justice & Customs* [2002] FCAFC 423.
- (q) "**Power Transformers**" means power transformers as described in the Application, the PAD and the Consideration Report.
- (r) "**PRC**" means the People's Republic of China.
- (s) "**SEF**" means the statement of essential facts.