

Mr Chris Vincent  
Anti-Dumping Commission  
Customs House  
5 Constitution Ave  
CANBERRA ACT 2601

10 June 2014

**Anti-Dumping Commission Investigation ADC 219  
Response to Issues Paper dated 2014/01  
Alstom Grid Australia Pty Ltd**

Dear Mr Vincent,

We refer the Issues Paper 2014/01 (“**IP**”) issued by the Anti-Dumping Commission (“**ADC**”) in respect of ADC Investigation 219 (“**Investigation**”). The below response to certain issues raised in the IP is made on behalf of SEC Alstom (Wuhan) Transformer Co Ltd , PT. Unelec Indonesia and Alstom Grid Australia Pty Ltd (“**Alstom**”).

The submissions set out below are in addition to, and should be read in conjunction with, the submissions made by Alstom in its submission dated 17 March 2014.

The submissions below are in respect of:

- The goods and like goods to the goods the subject of the investigation; and
- Determination of profit for constructed normal value.

Alstom reserves its position in respect of the other issues raised in the IP.

**The goods and like goods to the goods the subject of the investigation**

*(a) Good under consideration*

In the IP the ADC states that it intends to include within the goods the subject of the investigation all power transformers with power ratings of equal to or greater than 10 MVA and voltage ratings of less than 500kV. This is regardless of whether the manufacturer describes a particular good that fits within these ratings as a distribution transformer. For the reasons set out below, Alstom agrees with this approach.

By adopting the position that the goods under investigation (“**GUI**”) include distribution transformers, the ADC appears to be expanding an already wide definition. Alstom agrees that the definition of the GUI is so wide that the ADC must include distribution transformers within the GUI where the applicable power ratings are met. However, it is considered that this, by extension, further supports Alstom’s previously expressed view that the definition of the GUI is so wide as to include all equipment that transforms power, which is in effect meaningless.

As previously noted, the goods description does not impose a minimum kV rating or a maximum MVA rating. Nor does the goods description place specifications around many key elements of power transformers. The absence of substantive specifications regarding the GUI means the breadth of the GUI is extremely wide. It is Alstom’s view that this breadth cannot be limited or avoided by the

manufacturer's title or description of the goods. Such titles or descriptions are not uniform and do not alter the specifications, function or nature of the particular goods.

*(b) Like goods*

The ADC has not set out in the IP its view as to which goods are like goods within the definition set out in section 269T of the *Customs Act 1901* (“**Act**”). It is submitted that including goods described by manufacturers as “distribution transformers” within the class of GUI has an impact on which goods meet the definition of like goods.

Alstom has previously submitted that due to the lack of specificity in the description of the GUI, including an uncapped power rating and an extremely wide kV rating, the only unifying characteristic of the GUI is the ability to transform power. For this reasons, it is Alstom's view that all power transformers, regardless of the power rating, are like goods to the GUI. Hence, Alstom contends that it is irrelevant whether the like goods are described as power transformers or distribution transformers.

In this respect we note that distribution transformers, even below 2MVA, have power ratings that have greater similarity to power transformers at the lower end of goods under consideration (say MVA 10 – 60) (“**Small Power Transformers**”), than Small Power Transformers have to goods up at the upper end of the power ranges of the goods under investigation (say 250 - 500MVA).

While it is appreciated that the submitted class of like goods is extremely wide, this is a consequence of the applicant (Wilson Transformers) seeking to cover an extremely wide (and unlimited) range of goods in the one application. While it is the applicant's right to define the goods covered by the application, the application of section 269T of the Act will determine which goods are “like goods”. Although the definition of the GUI is based around the goods produced in the applicant's Glen Waverly factory, the scope of “like goods” cannot be controlled by the applicant or defined according to how the applicant structures its business. It is submitted that the distribution transformers produced by the applicant are like goods regardless of the fact that they are produced in the applicant's Wodonga factory and are treated by the applicant as a different category of goods to the GUI.

*(c) Importance of correctly identifying like goods*

The impact of correctly defining like goods extend beyond identifying which goods will be covered by any resulting dumping duties. The additional implications include:

- Whether the application met the requirements in subsection 269TB(6) of Act concerning whether the application was supported by a sufficient part of the Australian Industry;
- Whether the ordinary course of trade test in section 269TAA of Act was met in respect of particular goods;
- Consideration of what constitutes the Australian industry under section 269TAE of the Act for the purpose of assessing material injury to that industry; and
- The level of dumping and the dumping margin, in particular in establishing Normal Values.

It is clear that the ADC is not in a position to make a recommendation under section 269TEA of the Act if it has not correctly defined what are like goods. This is especially crucial in the Investigation as the market conditions in respect of goods under 10MVA are very different to those above 10MVA. The market for goods commonly described as distribution transformers is larger than the market for goods commonly described as power transformers. Further, the distribution transformer market is subject to different factors affecting purchasing decisions and is more heavily dominated by Australian manufacturers.

It is contended that the market for goods under 10MVA forms as much, if not a greater portion, of the market for like goods, than the GUI.

If the definition of like goods does include power transformers under 10MVA (including distribution transformers), the ADC cannot assess either the existence of material injury to the applicant, or the cause of that injury, without fully investigating the whole of the applicant's operation. That is, the ADC

cannot confine its analysis into matters such as the applicant's profitability, market share, volume and pricing to only goods manufactured at the applicant's Glen Waverly factory.

Given the ADC has not requested from exporters information in respect of goods outside the power rating specified by the applicant, it seems that the ADC either considers that the like goods are identical to the goods under consideration or does not believe that it needs information regarding all like goods to carry out the Investigation. It is contended that either position is incorrect.

### **Determination of profit for constructed normal value**

In the IP the ADC has stated that at this stage, it intends to determine profit for the constructed normal value in accordance with regulation 181A(3)(a) of the *Customs Regulations 1926* ("**Regulations**") which refers to the actual amounts realised by the exporter from the sale of the same general category of goods in the domestic market of the exporting country.

Alstom reserves its position on whether assessment under regulation 181A(3)(a) of the Regulations is appropriate, but notes that:

- The regulation does not either expressly or impliedly incorporate the ordinary course of trade test;
- The fact that the regulation is used when there is a failure to meet the ordinary course of trade test strongly supports the view that the ordinary course of trade test should not be read into the regulation;
- We note that on page 48 of the ADC's Dumping and Subsidy Manual ("**Manual**") the ADC adopts a similar position and states:

*"There is no requirement to test for ordinary course of trade in any of these three alternatives, nor will the Commission read any ordinary course of trade requirement into them."*

- The regulation refers to "actual amounts realized by the exporter". It is contended that this wording requires an examination of the amounts received for the sale of goods, compared to the costs of producing those goods, i.e. the profit. Such a test requires consideration of both profitable and unprofitable transactions as both transactions contribute to the actual revenue received and the actual costs of production. This is especially so in respect of capital intensive industries where the high levels of fixed costs of production are spread across all goods produced;
- Where there are no profitable domestic transactions, or the net amount realized is a loss, the amount to be added for profit should be zero. We note that the possibility of this position is accepted by the ADC in the Manual where it is stated:

*"Where no profit can be determined under Reg 181A(2) because all sales of the like goods have not been in the ordinary course of trade, and calculations under Regulations 181A(3)9a) [sic] and (b) for example show no profit, it is possible under these rules for the constructed normal value to include a zero profit in certain circumstances."*

- For the sake of clarity, we note that while the wording in the regulation refers to "actual amounts realized" which may on one interpretation be only taken to refer to revenue, the fact the regulation is entitled "determination of profit" and the Manual specifically refers to the amount to be added for profit, it is clear the wording "actual amounts realized" must refer to "profits" rather than revenue;
- Former sub-section 269TAC(13) of the Act precluded the addition of profit to the constructed normal value where the ordinary course of trade test required the normal value to be calculated under subsection 269TAC(2). In repealing that subsection the Parliament gave the Commissioner more discretion as to what level of profit to add to the constructed normal value. However, the Parliament did not prohibit the determination of a zero profit level, a restriction it could have imposed at the time of repealing subsection 269TAC(13) had it been its desire;

- Excluding non-profitable transactions from the assessment under the regulation would produce an artificial outcome that is inherently more likely to result in a finding of dumping. The existence of both non-profitable domestic transactions and profitable exports is prima facie evidence that goods are not being dumped. Any approach which disregards this evidence should not be read into the Act or Regulations unless there is clear language to that effect (such as the language used in section 269TAAD of the Act).

For the reasons set out above, it is contended that, in applying regulation 181A(e)(a) of the Regulations, the ADC should not exclude non-profitable transactions from the calculation of what profits were realised by the exporter from the sale of the same category of goods.

Please feel free to contact Russell Wiese on (03) 8650 7736 or Stephen Klotz of Norton Rose Fulbright on (02) 9330 8308 in relation to the above issues.

Yours sincerely



Marc Bunch  
Partner – Global Trade