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15 August 2014

Mr Geoffrey Gleeson
Director Operations 1
Anti-Dumping Commission
Customs House
5 Constitution Avenue
CANBERRA CITY, ACT 2601

Dear Mr Gleeson,

Anti-dumping investigation into power transformers exported from China, Indonesia, Korea, Taiwan, Thailand and Vietnam

Please accept a supplementary submission by Wilson Transformer Company (WTC) in response to the issue of profit determination for constructed normal values outlined in the Anti-Dumping Commission's (ADC) issues paper published on 27 May 2014. This submission should be read in conjunction with our previous submission of 24 July 2014[1] which outlined WTC's initial views.

<u>Ordinary Course of Trade</u>

WTC reiterates its view that the ADC is applying an unfairly limited interpretation of the ordinary course of trade provisions outlined in s.269TAAD of the *Customs Act 1901* (the Act). WTC agrees that the Act allows for domestic sales at prices below costs to be included in the determination of normal values. The Act provides that such sales can be considered as being in the ordinary course of trade if, and only if, the losses on those sales are recoverable over a reasonable period of time.

Therefore, for an unprofitable domestic sale to be considered to be made in the ordinary course of trade, the two conditions of s.269TAAD(3) must be met. That subparagraph states:

> *Costs of goods are taken to be recoverable within a reasonable period of time if, although the selling price of those goods at the time of their sale is below their cost at that time, the selling price is above the weighted average cost of such goods over the investigation period.*

It has been argued by some exporters to the investigation, and in principle accepted by the ADC it would appear, that the recovery test cannot meaningfully be performed in the case of power transformers due to the unique nature of the goods. The issues paper states:

> *In the case of power transformers, each unit is uniquely constructed and the costs and prices can differ significantly from one model to another. Indeed, it is the inability to make reasonable adjustments to prices of models sold domestically, to ensure fair comparison with export prices, that explains why the ADC will not establish normal values on the basis of domestic selling prices (s. 269TAC(1)).*

[1] Public record for investigation – Case 219, No 131.

WTC wishes to make the following observations in response to these views:-

1. The determination of profit in accordance with Regulation 181A(2), requires the Minister, 'if reasonably possible', to work out the profit on sales of like goods in the ordinary course of trade. This use of 'reasonably possible' suggests something less than precise or exact. In the context of US General Accepted Accounting Principles, 'reasonably possible' is defined as "more than remote but less than likely". This is in contrast with 'probable' which is "likely to occur" and 'remote' where the "chance of occurring is slight".

   Therefore, the method proposed by WTC in this submission is considered sufficient to work out the profit of like goods by the exporters in the ordinary course of trade.

2. The concept of 'models' is not defined or referred to in any part of the Act, including s.269TAAD. Whilst it is certainly open to the Commission to establish 'model' categories for the purposes of ensuring fair and proper comparison between the weighted average per unit normal value and the weighted average per unit comparable export price, there is nothing within s.269TAAD that requires the recovery test to be conducted on that same 'model' basis.

3. WTC wishes to reiterate that Article 2.1 of the Anti-Dumping Agreement has been interpreted by the WTO Appellate Body as not purporting 'to exhaust the range of methods for determining whether sales are "in the ordinary course of trade", nor even the range of possible methods for determining whether low-priced sales are "in the ordinary course of trade".' Therefore, it is possible and open to the ADC to calculate whether unprofitable sales are recoverable using multiple methods.

   In WTC's view, it is simply not adequate for the ADC to advise that the ordinary course of trade provisions and its standard recovery test used in the vast majority of dumping investigations, 'cannot be conducted meaningfully and the ordinary course of trade test cannot be fulfilled' in the case of power transformers.

4. WTC notes that the US Department of Commerce in its power transformer investigation was able to assess recoverability by comparing weighted average unit selling prices with weighted average unit costs[2].

   > *Pursuant to section 773(b)(2)(C)(i) of the Act, we did not disregard below-cost sales that were not made in "substantial quantities," ie., where less than 20 percent of sales of a given product were at prices less than the COP. We disregarded below-cost sales when they were made in substantial quantities, ie., where 20 percent or more of a respondent's sales of a given product were at prices less than the COP and where "the weighted average per unit price of the sales is less than the weighted average per unit cost of production for such sales." See section 773(b)(2)(C)(ii) of the Act.*
   >
   > *Finally, based on a comparison of prices to the weighted average COPs for the POR, we considered whether the prices would permit the recovery of all costs within a reasonable period of time. See section 773(b)(2)(D) of the Act.*
   >
   > *Therefore, for Hyosung, we disregarded below-cost sales of a given product of 20 percent or more and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.*

[2] Federal Register / Vol. 77, No. 32 / Thursday, February 16, 2012 / Notices; (FR DOC # 2012-37160)

Therefore, WTC does not accept the ADC's view that the recovery test cannot be meaningfully undertaken for power transformers.

Cost Recovery, Normal Value and Profit in Exporters Domestic Sales

WTC advances the following method for determining whether unprofitable domestic sales of power transformers are recoverable over a reasonable period of time. Our method is based on the ADCs initial view that each power transformer is unique and therefore each one represents a separate model. Sales which should be excluded from the normal value are those where:

a) 20 percent or more of a respondent's sales of a given product or model are at prices less than the cost to make and sell, and
b) The margins on such sales are less than the weighted average margin for all power transformers sold on the domestic market over the investigation period.

This is very similar to the US and EU approach of comparing the weighted average unit selling price with the weighted average unit cost to make and sell for the investigation period. The difference being that the averaging of prices and costs for power transformers can be misleading and distortive given the large range of prices and costs. Therefore, it is more appropriate to examine and compare the margins achieved on below-cost sales with the average margin achieved on all domestic sales over the three year investigation period.

The tables below show example of 16 domestic transactions with hypothetical selling prices, corresponding costs and the profit or loss positions. The principles detailed above are included in the tables.

Example 1

Case & Total	Price	Cost to Make and Sell	Profit/(Loss)	Profit Margin %	Normal Value Profit - Exclude if at a loss and % loss < weighted average margin for all cases	Weighted Average Profit margin for all cases
1	1,000,000	800,000	200,000	25.0%	Y	Y
2	800,000	750,000	50,000	6.7%	Y	Y
3	550,000	620,000	(70,000)	-11.3%		Y
4	250,000	300,000	(50,000)	-16.7%		Y
5	2,500,000	2,200,000	300,000	13.6%	Y	Y
6	1,200,000	1,250,000	(50,000)	-4.0%		Y
7	800,000	780,000	20,000	2.6%	Y	Y
8	260,000	340,000	(80,000)	-23.5%		Y
9	280,000	320,000	(40,000)	-12.5%		Y
10	350,000	340,000	10,000	2.9%	Y	Y
11	260,000	280,000	(20,000)	-7.1%		Y
12	400,000	380,000	20,000	5.3%	Y	Y
13	1,800,000	2,300,000	(500,000)	-21.7%		Y
14a	760,000	770,000	(10,000)	-1.3%	Y	Y
14b	760,000	770,000	(10,000)	-1.3%	Y	Y
15	320,000	280,000	40,000	14.3%	Y	Y
16	12,290,000	12,480,000	(190,000)	**Profit Margin**	**8.77%**	**-1.52%**

Cases at a loss and non recoverable ($ Price) = 37.4%

Example 2 (Prices increased by 10% over Example 1)

Case & Total	Prices Increased by +10%	Cost to Make and Sell	Profit/(Loss)	Profit Margin %	Normal Value Profit - Exclude if at a loss and % loss < weighted average margin for all cases	Weighted Average Profit margin for all cases
1	1,100,000	800,000	300,000	37.5%	Y	Y
2	880,000	750,000	130,000	17.3%	Y	Y
3	605,000	620,000	(15,000)	-2.4%		Y
4	275,000	300,000	(25,000)	-8.3%		Y
5	2,750,000	2,200,000	550,000	25.0%	Y	Y
6	1,320,000	1,250,000	70,000	5.6%	Y	Y
7	880,000	780,000	100,000	12.8%	Y	Y
8	286,000	340,000	(54,000)	-15.9%		Y
9	308,000	320,000	(12,000)	-3.8%		Y
10	385,000	340,000	45,000	13.2%	Y	Y
11	286,000	280,000	6,000	2.1%	Y	Y
12	440,000	380,000	60,000	15.8%	Y	Y
13	1,980,000	2,300,000	(320,000)	-13.9%		Y
14a	836,000	770,000	66,000	8.6%	Y	Y
14b	836,000	770,000	66,000	8.6%	Y	Y
15	352,000	280,000	72,000	25.7%	Y	Y
16	13,519,000	12,480,000	1,039,000	**Profit Margin**	**17.03%**	**8.33%**

Cases at a loss and non recoverable ($ Price) = 25.5%

Example 3 (Prices increased by 15% over Example 1)

Case & Total	Prices Increased by +15%	Cost to Make and Sell	Profit/(Loss)	Profit Margin %	Normal Value Profit - Exclude if at a loss and % loss < weighted average margin for all cases	Weighted Average Profit margin for all cases
1	1,150,000	800,000	350,000	43.8%	Y	Y
2	920,000	750,000	170,000	22.7%	Y	Y
3	632,500	620,000	12,500	2.0%	Y	Y
4	287,500	300,000	(12,500)	-4.2%		Y
5	2,875,000	2,200,000	675,000	30.7%	Y	Y
6	1,380,000	1,250,000	130,000	10.4%	Y	Y
7	920,000	780,000	140,000	17.9%	Y	Y
8	299,000	340,000	(41,000)	-12.1%		Y
9	322,000	320,000	2,000	0.6%	Y	Y
10	402,500	340,000	62,500	18.4%	Y	Y
11	299,000	280,000	19,000	6.8%	Y	Y
12	460,000	380,000	80,000	21.1%	Y	Y
13	2,070,000	2,300,000	(230,000)	-10.0%		Y
14a	874,000	770,000	104,000	13.5%	Y	Y
14b	874,000	770,000	104,000	13.5%	Y	Y
15	368,000	280,000	88,000	31.4%	Y	Y
16	14,133,500	12,480,000	1,653,500	**Profit Margin**	**20.30%**	**13.25%**

Cases at a loss and non recoverable ($ Price) = 18.8%

In the forgoing examples:

i. If all cases were profitable, the weighted average margin for all cases would equal the normal value profit margin.
ii. The 20% guideline has been applied at the product or model level, which WTC supports.
iii. If the 20% guideline were applied to all sales, there would be a step drop in the profit margin once the volume by price of loss products reduced below 20%. This is not logical and it is suggested that the profit be the average of the normal value profit column and the weighted average profit margin column. ie Average of 20.30% & 13.25% = 16.78%

Determination of profit under Regulation 181A(3)

In response to WTC's submission of 24 July 2014, Siemens China states that the use of Regulation 181A(3)(c) promoted by WTC is 'not reasonable'. Unlike the provisions of s.269TAAD, which provide little guidance on the methods or manner in which unprofitable sales are to be assessed as being non-recoverable, the determination of profit in accordance with Regulation 181A(3) have been clearly interpreted by the WTO Panel[3] which made the following finding:

> *In our view, there is no basis on which to judge which of these three options is "better". Certainly, there were differing views during the negotiations as to how this issue was to be resolved, and there is no specific language in the Agreement to suggest that the drafters considered one option preferable to the others. Given, as explained above, that each of the three options is in some sense "imperfect" in comparison with the chapeau methodology, there is, in our opinion, no meaningful way to judge which option is less imperfect – or of greater authority – than another and, thus, no obvious basis for a hierarchy. And it is, in our view, for the drafters of an Agreement to set out a hierarchy or order of preference among admittedly imperfect approximations of a preferred result, and not for a panel to impose such a choice where it is not apparent from the text.*

Therefore, the determination of profit under Regulation 181A(3)(a) is no more reasonable than the profit to be determined under Regulation 181A(3)(c). However, whilst each of the three methods is imperfect as noted by the Panel, in this particular circumstance the inclusion of unprofitable sales under Regulation 181A(3)(a), simply because the ADC believes it cannot meaningfully undertake the recover test is unreasonable.

Conclusion

WTC continues to be deeply concerned by the ADC's lack of willingness to follow accepted methodologies used by other jurisdictions for assessing whether unprofitable sales have been made in the ordinary course of trade. Accordingly, we have proposed a method considered sufficient to comply with the requirements of section 269TAAD and Regulation 181A(2) and which is very similar to the approach adopted by the US and the EU.

We would be pleased to discuss this matter further.

Yours sincerely

Robert Wilson

Robert Wilson
Managing Director

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[3] WT/DS141/R – European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India; para 6.61, page 22