

**For Publication**

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Dear Mr Gleeson

**Investigation 219**

**Alleged Dumping of Power Transformers exported from the People's Republic of China, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam**

**Response to File Note - Potential for use of an alternative approach to dumping margin assessments in terms of subsection 269TACB(3) of the Customs Act 1901**

We refer to the file note published on 15 August 2014, and issues discussed therein by the ADC regarding the potential use of subsection 269TACB(3) of the *Customs Act 1901* (Cth) (**Act**) for the purposes of calculating dumping margins.

Our client, Siemens China, disagrees with the ADC's proposed recalculation of dumping margins for exporters of the goods under consideration in relation to investigation 219 by reference to section 269TACB(3) of the Act. There is no proper basis to consider that the method specified in section 269TACB(2) is inappropriate.

The suggested use of section 269TACB(3) reflects an unwarranted departure from the ADC's prevailing view regarding the unique aspects of the manufacture and sale of power transformers which have influenced many significant aspects of the ADC's investigation thus far.

Additionally, the publication of the most recent file note falls on day 382 since initiation of this investigation - that is, 227 days beyond the statutory timeframe of 155 days that applies to Anti-dumping investigations. This delay and the failure to identify reasons for the departure from the methodology adopted to date is unfair in the extreme.

**1. Background**

1.1 The ADC has requested, and our client has complied with, a rigorous programme of verification of exports to Australia. The rigor and complexity of this investigation is reflected in the fact that, to date, the ADC has requested, and the parliamentary secretary has granted, 3 separate extensions of time to issue the statement of essential facts

1.2 From our client's experience, this process has involved:

- The preparation of a complete exporter questionnaire response
- The facilitation of a comprehensive on-site verification of commercial information by ADC staff members;
- Subsequent provision of detailed and highly complex financial and cost information;
- Engagement with the ADC in response to specific requests for information; and

- Detailed response to the issues paper published by the ADC regarding specific issues under consideration by the case management team.
- 1.3 It appears, from publicly available information posted on EPR 219, that our client's experience is shared by the majority of cooperative exporters. Our client takes no issue with the ADC's commitment to ensuring that it conducts an appropriately rigorous and comprehensive analysis of the alleged dumping of the GUC and the injurious impact on the Australian industry. However, our client submits that the publication of Issues Paper 219 (and the considered responses received from exporters) signalled a crucial, and decisive point, of the ADC's investigation. The tenor of the issues paper, the precise articulation of the ADC's proposed methodology therein and the consensus received from numerous interested parties regarding these issues clarified the final outstanding issues of contention that were raised throughout the exporter verification programme.
- 1.4 It should be noted that the issues that have remained under discussion during, and following, the exporter verification programme related to specific elements of verification - namely:
- (a) the goods and like goods;
  - (b) identification of which export shipments should be used for dumping margin calculations;
  - (c) determination of profit for constructed normal values;
  - (d) calculation of a credit adjustment for differences between domestic and export sales; and
  - (e) exchange rates used for converting currencies in dumping margin calculations.
- 1.5 Our client notes that the ADC has not, at any stage during the exporter verification visit programme, raised any concerns with the methodology for calculating dumping margins. That is, exporter visit reports for all exporters reflect that the ADC has consistently:
- Focused on exports that were contracted and exported during the investigation period;
  - Compared each export transaction with the corresponding normal value; and
  - Calculated a weighted average product dumping margin for the cohort of exports analysed.
- 1.6 The methodology is consistent with the provisions of section 269TACB(2)(a) of the Act. The ADC's use of that methodology in this investigation is enabled by the rigorous verification of the relevant variables - that is:
- FOB level export prices for transactions deemed to be within the POI;
  - Appropriately adjusted, normal values constructed from the CTMS for Australian sales; and
  - Other variables relevant to the appropriate comparison of the above for the purposes of ascertaining dumping margins under the Act.
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- 1.7 Our client is concerned that the ADC's proposed use of section 269TACB(3) is a sudden, inexplicable development.
- 1.8 The approach to the determination of dumping that is proposed by the ADC, undermines the specificity of the ADC's verification of export transactions and the rigor of cost verification and normal value construction to ensure appropriate, reasonable comparison of normal values and export prices.
2. **The proposed alternative methodology**
- 2.1 There is no explanation provided in the ADC's file note as to the reasons for the ADC's proposed departure from the approach to dumping margin calculation under the provisions of section 269TACB of the Act.
- 2.2 The file note deals, in extract, with the overarching mechanism of section 269TACB(3) and the relevant operational policy associated with the application of this section under the ADC's manual. It does not, however, provide any guidance to parties as to:
- (a) why the ADC now considers that circumstances exist in relation to exports of the GUC in this investigation such that the Minister would be satisfied that the threshold criteria of section 269TACB(3) are enlivened; and
  - (b) how the ADC proposes to ascertain relevant variable factors that are required to undertake transactional dumping analysis under section 269TACB(3).
- 2.3 In short, the file note does little more than summarise the terms of section 269TACB(3).
- 2.4 On this basis it is difficult for our client to meaningfully provide comment on any specific issues in the ADC's file note other than as set out below.

### Section 269TACB(3)

- 2.5 Section 269TACB(3) operates secondarily to section 269TACB(2).
- 2.6 That is, the primary position under the Act is to calculate applicable margins of dumping under section 269TACB(2) which includes, inter alia, the comparison of weighted average normal values and export prices over the whole of the investigation period.
- 2.7 The terms of section 269TACB(3) set out that if the Minister is satisfied:
- (a) that the export prices differ significantly among different purchasers, regions or periods; and*
  - (b) that those differences make the methods referred to in subsection (2) inappropriate for use in respect of a period constituting the whole or a part of the investigation period;*
- the Minister may, for that period, compare the respective export prices determined in relation to individual transactions during that period with the weighted average of corresponding normal values over that period.*
- 2.8 The construction of this section requires careful consideration. It requires the Minister to be satisfied of certain jurisdictional **facts**, namely:

- (a) that the export prices differ significantly among different purchasers, regions or periods; and
- (b) that, because of these differences, it is inappropriate to calculate a weighted average dumping margin in respect of a period constituting whole or a part of the investigation period.

2.9 Where the threshold elements are satisfied, the Minister may (i.e. a discretion not an obligation), under 269TACB(3), ascertain dumping margins for a defined period ('that period') by comparing individual transactions during 'that period' with the weighted average of corresponding normal values over that period.

#### Export price difference

2.10 The section clearly demands that the Minister be satisfied that there is a difference in export prices of the GUC among purchasers, regions or periods.

2.11 This threshold requirement is emphasised in the dumping and subsidy manual at page 115 which states:

*The weighted average to transaction method of comparison is provided for in s. 269TACB(3) and this method **may only be used where the export prices vary significantly between purchasers, regions or over time.** [Emphasis added].*

2.12 The difference can either be temporal, geographic or commercial. However, the Act, and the dumping manual, clearly require that there be a tangible, quantifiable difference observable across the whole or part of the period of investigation.

2.13 The Act clearly demands that an analysis be performed to demonstrate a material difference across the relevant period. The determination of such difference in turn requires a metric for testing the existence, and degree, of a variation from a defined 'norm'.

2.14 The reference to 'the export prices' is important to a reading of this section. It is also critically important when this section is applied to the unique circumstances of the GUC in the present investigation.

2.15 The ADC has, throughout the course of this investigation, posited the view that each power transformer is unique and therefore each one represents a separate model. This view, which is incontrovertible both factually and as a matter of technical specification, underlay many of the critical investigative methodologies applied by the ADC during the course of verifying exports of the GUC during the POI.

2.16 The significance of the bespoke nature of the goods in relation to the ADC's operational methodologies was clearly and succinctly explained in Issues Paper 219 when discussing the difficulties in testing OCOT for the purposes of calculating a margin of profit in constructing normal values. The ADC noted:

*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)). Furthermore, the ADC considers that a "weighted average cost" of goods*



*contemplated in s. 269TAAD(3) cannot be meaningfully calculated for power transformers.*

- 2.17 Our client submits that the nature of the GUC, and the fact that, to repeat the eloquent phrasing of the ADC itself, *each unit is uniquely constructed and the costs and prices can differ significantly from one model to another*, destroys, or at least significantly impairs, the ability of the ADC to fairly or meaningfully measure variation in export prices by any metric be its period, region or customer.
- 2.18 As the ADC has publicly recognised - each unit is unique. It follows that any attempt to measure trends or differences across the POI in distinct, stand-alone sales, would be meaningless. Furthermore, any difference in price across these metrics would be the result of a misinterpretation of the data-set.
- 2.19 Further, it is instructive to note the following passage from the WTO's Technical Information paper:

***"Calculation of dumping margins***

*The Agreement contains rules governing the calculation of dumping margins. In the usual case, the Agreement requires either the comparison of the weighted average normal value to the weighted average of all comparable export prices, or a transaction-to-transaction comparison of normal value and export price (Article 2.4.2). A different basis of comparison can be used if there is "targeted dumping": that is, if a pattern exists of export prices differing significantly among different purchasers, regions or time periods. In this situation, if the investigating authorities provide an explanation as to why such differences cannot be taken into account in weighted average-to-weighted average or transaction-to-transaction comparisons, the weighted average normal value can be compared to the export prices on individual transactions."*

- 2.20 It is apparent from the above passage that section 269TACB(3) is concerned with "targeted dumping" - that is, where it can be shown that a "pattern" exists of export prices differing significantly among different purchasers, regions or time periods.
- 2.21 In a situation where it is recognised that each unit is unique it is improbable that any such pattern could be properly shown to exist.

**'Appropriate' method**

- 2.22 The second limb of section 269TACB(3) requires that the minister be satisfied that, because of the differences in export prices that have been determined across the POI (or part thereof), it is "inappropriate" to calculate a weighted average dumping margin in respect of a period constituting whole or a part of the investigation period.
- 2.23 The word inappropriate is important. Section 269TACB(3) is not a discretionary alternative to determining weighted average dumping margins under subsection 269TACB(2). It is only enlivened when circumstances associated with the export of the goods and the methods referred to in subsection 2 of section 269TACB are inappropriate.

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<sup>1</sup> See World Trade Organisation, *Anti-Dumping Technical Information*, accessed online at <[www.wto.org/english/tratop\\_e/adp\\_info\\_e.htm](http://www.wto.org/english/tratop_e/adp_info_e.htm)> on 21 August 2014.

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- 2.24 It would be patently wrong to suggest that constructed 'differences' that may or may not be extrapolated from the analysis of power transformer sales to Australia are sufficient to satisfy the Minister that it would be inappropriate to determine weighted average dumping margins for the POI in accordance with section 269TACB(2).
- 2.25 Our client submits that the calculation of dumping margins, in the context of the unique nature of the goods, can meaningfully, accurately and appropriately be determined using a weighted average methodology under section 269TACB(2).
3. **Conclusion**
- 3.1 The ADC should reject the use of section 269TACB(3) for the purposes of determining dumping margins.
- 3.2 Section 269TACB(3) caters for a specific purpose and is to be applied in the context of specific circumstances. Such circumstances do not exist in the context of investigation 219.
- 3.3 The use of section 269TACB(3) at this late stage of the investigation would severely undermine the ADC's considered analysis of the GUC upon which many material methodological decisions have been based.

Yours sincerely



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