

For Publication

Mr Geoff Gleeson
Director, Operations 1
Anti-Dumping Commission
5 Constitution Avenue
CANBERRA ACT 2600
operations1@adcommission.gov.au

8 October 2014

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 letter dated 17 September 2014 - Use of alternative approach to dumping margin assessments**

We act for Siemens Ltd. and related entities including Siemens Transformer (Guangzhou) Co. Ltd; Siemens Transformer (Jinan) Co. Ltd and Siemens Transformer (Wuhan) Co. Ltd. and refer to your letter dated 17 September 2014 (**ADC Letter**) regarding the use of subsection 269TACB(3) of the *Customs Act 1901* (Cth) (**Act**) for the purpose of calculating dumping margins.

The ADC's proposed use of subsection 269TACB(3) was first raised in a file note published on 15 August 2014. The file note indicated that entities to whom subsection 269TACB(3) would apply would be sent separate correspondence and asked to respond. Siemens did not receive any such correspondence within the 7 days before which submissions were due. As an interested party however, Siemens responded to the file note in a submission dated 22 August 2014 (**22 August Submission**).

Siemens repeats and relies upon its 22 August submission, elements of which were reflected in the ADC's statement of essential facts (**SEF**). Siemens re-affirms its view that there is no proper basis to apply subsection 269TACB(3) to Siemens.

The ADC Letter was sent to Siemens on 17 September 2014 - 1 day before the publication of the SEF. It is evident from the language used in the SEF that the ADC had already decided that subsection 269TACB(3) would be used to determine the dumping margin and not the methodology prescribed by subsection 269TACB(2). The difference between the two methodologies could not be more stark. The former leads to a positive dumping margin whilst the latter results in a negative dumping margin.

The suggestion that our client is not denied procedural fairness by the late raising of subsection 269TACB(3) because it may respond to the ADC Letter after issue of the SEF is illusory: first, the SEF suggests that the ADC has an unalterable view on the issue and will not be persuaded; and second, (having regard to the in excess of 400 days since this investigation was initiated) the amount of time given to respond is inadequate in the extreme.

The forceful and weighty legal arguments raised in the 22 August Submission have merely been recited but not engaged with in the SEF. We consider that:

- the ADC has misconstrued the legislation and failed to appropriately apply the methodology for calculating a dumping margin in conformity with the requirements of subsection 269TACB(3); and
- the ADC has failed to properly undertake the 'amalgamation exercise' for the purposes of calculating a dumping margin for the goods exported by Siemens China.

In sum, the ADC has misunderstood and incorrectly interpreted the Act and misapplied subsection 269TACB(3).

The requirements of Section 269TACB(3)

1.1 Section 269TACB(3) provides 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. (our emphasis)*

1.2 Subsections (a) and (b) establish a threshold. The Minister must be satisfied of certain jurisdictional facts, namely that:

(a) **the export prices differ significantly** among different purchasers, regions or periods; and

(b) **because of those 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.

Export price difference

1.3 Whilst the Act provides three things on which the relevant difference is to operate - that is, customer, region or time - section 269TACB(3) requires that there be a significant difference in 'export price'.

1.4 This threshold requirement is emphasised in the dumping and subsidy manual at page 115:

*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].*

1.5 Export price is defined in section 269TAB of the Act which provides the mechanisms by which the ADC can determine export prices of goods exported to Australia, depending on the circumstances of exportation. The object of section 269TAB is to enable the ADC to determine the transactional price paid or payable for the goods when sold by an exporter for home consumption in Australia.

1.6 As noted at paragraph 6.7.5 of SEF, the ADC has determined export prices for Siemens Guangzhou, Jinan and Wuhan pursuant to section 269TAB(1)(a), using the price paid by the importer less any post-exportation charges.

1.7 It is these prices, so determined by the ADC under section 269TAB (1)(a) for the purposes of the investigation, that must be compared for the purposes of section 269TACB(3) (if applicable).

1.8 The complexity of the comparison of export prices of the goods under consideration in this investigation has been well documented and recognised by the ADC. The ADC has accepted that no two transformers are identical. The ADC has repeatedly stated that so significant and complex are the differences that each unit must be appropriately regarded as its own model.

- 1.9 The ADC has correctly recognised that export prices cannot be easily compared. Indeed this complexity was repeated at page 45 of the SEF: "*The uniqueness of each power transformer unit provides a challenge for meaningful comparisons of export prices per unit.*" Siemens concurs with these views. It follows that any attempt to measure trends or differences in the price of distinct and separate units would be meaningless.
- 1.10 Any difference in price across these metrics would result in a misinterpretation of the data-set. In doing so the ADC must also accept that the test in subsection 269TACB(3) cannot be performed and it is inappropriate.

The ADC's proposed alternative

- 1.11 Notwithstanding the ADC's admitted fact that the goods under consideration (**GUC**) are bespoke items and therefore export prices cannot be compared, it now wishes to use an alternative method for assessing difference in export prices for the purposes of section 269TACB(3).
- 1.12 The ADC's analysis uses two separate verified values - export prices verified and determined pursuant to section 269TAB and the cost to make and sell (**CTMS**) for the GUC which was verified and determined under to section 269TAC(6).
- 1.13 The ADC's comparison of verified export prices and correlative CTMS is not derived from the Act in relation to the verification, or determination of export prices.
- 1.14 The product of the ADC's analysis - the 'export price/CTMS ratio' - is a test that has been constructed by the ADC that finds no basis in the Act and is separate and distinct from the verified export price of the GUC. It does not reflect or say anything about a *difference* in export price (nor any *significant* difference in export price). Indeed it does not even reflect a difference in export price as between *different* purchasers - a requisite of section 269TACB(3).
- 1.15 The comparison of transactions on the basis of this ratio does not amount to a comparison of export prices in accordance with section 269TACB(3) and is not allowed by the Act.

2. Appropriateness

- 2.2 Section 269TACB(3)(b) also 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.
- 2.3 The term 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 if the circumstances associated with the export of the goods and the methods referred to in subsection (2) of section 269TACB are inappropriate.
- 2.4 Whilst the terms of section 269TACB(3) are not identical to the terms of the second sentence of Article 2.4.2 of the AD Agreement, the Article reflects this same requirement by stating that a weighted average (**WA**) to transaction (**T**) method can only be used provided the authority explains '*why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison*'.
- 2.5 The ADC has not provided any real explanation as to why it considers that the differences that have been asserted to exist between CTMS/export price ratios of groups of transactions to

different customers cannot be taken into account within the weighted average to weighted average approach under section 269TACB(2).

- 2.6 Our client rejects the asserted price difference as between different purchasers. Indeed its rejection is strengthened because of subsection 269TACB(10). The two groups of export prices are for different power transformers which are in no way comparable. Indeed the ADC's analysis is the more inappropriate because no attempt at fair comparison has been undertaken.

Confidential variance analysis

- 2.7 Without detracting from the position above that the ADC has not, and cannot, perform the comparison of export prices contemplated by section 269TACB(3), Siemens submits that there is no reasonable basis to suggest that the differences highlighted by the ADC make the methods referred to in subsection 269TACB(2) inappropriate for use in respect of a period constituting the whole or a part of the investigation period.
- 2.8 Siemens submits that the ADC's analysis, and extrapolations have produced unreliable and irrelevant differences in the average 'ratio' of units sold for different projects/end uses.
- 2.9 As the ADC well knows, each unit of the GUC is produced to unique specifications pursuant to specific customer end-use demand. These facts are reflected in the transactional data analysed by the ADC. The data-set demonstrates that transactions are made (and identified by) the project/customer that the unit/s are manufactured for.
- 2.10 Indeed, these trends form the basis of the ADC's suggestions that significant differences in price ratio exist in relation to sales to different customers/project.
- 2.11 **[CONFIDENTIAL VARIANCE ANALYSIS].**
- 2.12 **[CONFIDENTIAL VARIANCE ANALYSIS].**
- 2.13 The above demonstrates that whilst the CTMS-Price ratio may differ as between different projects, the significance of these differences when compared against the group average is insignificant.
- 2.14 Siemens submits that the data, as analysed and extrapolated by the ADC, does not provide any justification for a view that it is inappropriate to calculate a weighted average dumping margin in respect of a period constituting the whole or a part of the investigation period.

Calculating dumping margins using Section 269TACB(3)

- 2.15 Section 269TACB(3) is to be read in conjunction with Subsection 269TACB(6). The latter provision provides the mechanism for determining:
- (a) whether dumping has occurred; and
 - (b) the dumping margin for the exporter concerned.
- 2.16 Section 269TACB(6) provides:

If, in a comparison under subsection (3), the Minister is satisfied that the export prices in respect of particular transactions during the investigation period are less than the weighted average of corresponding normal values during that period:

(a) the goods exported to Australia in each such transaction are taken to have been dumped; and

(b) the dumping margin for the exporter concerned in respect of those goods is the difference between each relevant export price and the weighted average of corresponding normal values
[emphasis added]

2.17 This section demands the calculation of a single dumping margin for the exporter concerned. The margin is calculated with reference to the T to WA analysis prescribed under section 269TACB(3). There is no further explanation as to how the transactional dumping analysis is translated into a single margin in section 269TACB. Guidance is however provided in the Dumping Manual in the following terms:

An amalgamation exercise is also required in this circumstance in order to work out a single margin of dumping for the product from the exporter concerned.

2.18 Importantly the Dumping Manual refers to the same amalgamation process that is used to determine a single margin of dumping under section 269TACB(2). It follows that irrespective of whether section 269TACB(2) or (3) is used, the manual suggests an identical process of amalgamating the data must be applied for the purposes of determining a single rate of dumping.

2.19 In practice therefore:

- (a) section 269TACB(3) operates to enable the ADC to test whether the goods have been dumped on a transactional level;
- (b) section 269TACB(6) then requires that all the margins recorded using TACB(3) is to be amalgamated to determine an overall dumping margin, determined for the product as a whole.

The ADC's approach - the use of 'zeroing'

Zeroing under the Customs Act 1901

2.20 There is nothing in the Act, or the Dumping Manual, to suggest that the *amalgamation* process to be applied in determining a rate of dumping involves the assessment of only those transactions found to have a positive margin of dumping and the arbitrary reduction of any negative margins to a neutral baseline of zero.

2.21 The ADC has justified the use of zeroing in calculating dumping margins pursuant to section TACB(6) in the following terms:

*The Commission notes that the focus of s. 269TACB(6) is on those transactions and those goods where the export price is less than the weighted average of corresponding normal values – those being goods where export prices were dumped. **The Commission considers it is important to recognise that s.***

269TACB(6) is silent on how to treat the goods exported to Australia in other transactions – those being where export prices were equal to or higher than the weighted average of corresponding normal values. In these circumstances, the Commission considers it is reasonable to not take into account offsets for negative dumping margins arising from transactions where the export price was higher than the weighted average of corresponding normal values. [Emphasis added]

- 2.22 The ADC relies upon the fact that the Act is silent in relation to the treatment of goods found not to be dumped (following the mechanical application of TACB(6)(a)) when calculating dumping margins to justify the 'zeroing' of such transactions. The ADC's reliance on silence in a statute to justify its approach is wrong in law because:
- (a) First, executive power to positively undertake any conduct or action (or apply any method) must be rooted in legislation. In the absence of any express authorisation, the executive (ADC) acts beyond power (subject to section 61 of the Australian Constitution). Silence in legislation does not amount to permission or authorisation.¹
 - (b) Second, there is no reason to suppose that Parliament intended that zeroing was a permissible methodology for calculating dumping margins. Had it so intended, it would have expressly catered for it in the Act. It has not. It must follow that zeroing is not authorised.
 - (c) Third, the policy of the ADC as reflected in the Dumping Manual is to amalgamate *all* the results. The term amalgamate is all encompassing. Had the policy of the ADC or, indeed Parliament by virtue of the Act, intended that only a subset of the GUC be amalgamated, then that too would have been made express in the Dumping Manual or legislation.

WTO jurisprudence on Zeroing

- 2.23 The ADC, in justifying the use of zeroing, has supported its view as summarised above that the approach is available under the terms of the Act with the claim that the approach '*is consistent with WTO jurisprudence*'.²
- 2.24 The ADC has provided no guidance or further explanation as to the source of the 'jurisprudence' that it has relied upon in making this statement.
- 2.25 Siemens notes that the practice of zeroing has been considered by WTO Appellate Bodies on numerous occasions. The most common offender and staunchest supporter of the zeroing practice is the United States.³ In any event, in each of the following cases the practice of zeroing has been ruled by the Appellate Body to be impermissible:
- (a) EC – Bed Linen (2001)
 - (b) U.S. – Softwood Lumber V (2004)

¹ *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 584.

² SEF 219, page 49

³ The use of zeroing in so-called 'targeted dumping' cases is the subject of request for consultations submitted to the Panel by China (WT/DS471/1. G/L/1060. G/ADP/D100/1 dated 16 December 2013).

- (c) U.S. – Zeroing (EC) (2006)
- (d) U.S. – Softwood Lumber V (Article 21.5 – Canada) (2006)
- (e) U.S. – Zeroing (Japan) (2007)

The common theme of the Appellate body in all of the above decisions was that zeroing was *unfair* and created an undue inflation of dumping margins.

- 2.26 Siemens considers that there is no substance to the claim that there is consistent jurisprudence that the practice of zeroing is permitted by Article 2.4.2 of the Anti-Dumping Agreement. Indeed the converse is true.⁴

3. Conclusion

- 3.1 The ADC should retract its use of subsection 269TACB(3), utilise subsection 269TACB(2) for the purposes of determining dumping margins for Siemens China, re-issue the SEF and correctly record that our client's dumping margin is negative - as it was advised in May 2014.
- 3.2 Subsection 269TACB(3) caters for a specific purpose, is to be applied in specific circumstances and requires evidence of significant differences in export prices. The ADC has not, and cannot, perform the requisite comparison in any meaningful way and, consequently, the use of section 269TACB(3) is not open in the circumstances of this investigation.
- 3.3 There is no basis under the Act, nor any WTO guidance upon which the ADC can justify the zeroing of 'undumped' transactions for the purposes of establishing product dumping margins for the GUC exported by Siemens China.
- 3.4 The ADC should remove the SEF from the electronic public record and amend the relevant sections dealing with the calculation of dumping margins for Siemens China to reflect its analysis that the dumping margin determined under s.269TACB(2)(b) using the *transaction to transaction* method would be negative.

Yours sincerely

Zac Chami, Partner
+61 2 9353 4744
zchami@claytonutz.com

⁴ Sungjoon Cho, Constitutional Adjudication in the World Trade Organization, Jean Monnet Working Paper 04/08