

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

28 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 submission by Wilson Transformer Company (WTC) dated 8 October 2014 (Submission)

As you know 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 the submission dated 8 October 2014 made to the ADC by WTC.

Siemens disagrees with the Submission, specifically the claims made with respect to:

- The calculation of profit for the purposes of constructing normal values and the suggestion that the ADC should reassess its use of s.269TAC(3)(a);
- The use of s.269TACB(3) for the purposes of calculating dumping margins for certain exporters and the suggested methodologies for calculating margins under this provision; and
- The reassessment of the ADC's termination decision.

Determination of profit

- 1.1 The issue of determining profit for the purposes of constructing normal values pursuant to s.269TAC(2)(c) of the *Customs Act 1901 (Act)* in the context of this investigation has been considered at length by the ADC during the course of this investigation.
- 1.2 The complexity and unique issues associated with determining profit in accordance with Regulation 181A(2) was the subject of examination in Issues Paper 2014/01. Various parties responded to the Issues Paper. The responses were considered by the ADC and the subject of detailed consideration in SEF 219 at section 6.5.3.
- 1.3 Siemens supports the ADC's decision to determine profit for the purposes of s. 269TAC(2)(c) in accordance with Regulation 181A(3)(a). Siemens believes that the ADC's decision is justified by reason of the unique nature of the goods under consideration, the matters outlined in Issues Paper 2014/01, and SEF 219.
- 1.4 WTC has responded to the ADC on these issues in two formal submissions - first in response to the Issues Paper and now in its recent submission in response to SEF 219. In each submission WTC alleges that the ADC erred by determining profit under Regulation 181A(3) as an alternative to the Regulation 181A(2) on the grounds that it is only open to the ADC to calculate profit under subregulation (3) if it not reasonably possible to work out an amount in accordance with subregulation (2).

- 1.5 As Siemens has noted in previous submissions, in order to calculate profit under Regulation 181A(2), the Minister must, if reasonably possible, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade (**OCOT**).
- 1.6 The definition of sales that are regarded to be in the OCOT is provided (indirectly) pursuant to the terms of section 269TAAD of the Act. That provision defines sales that are **not in OCOT** as sales of goods at a loss occurring in substantial quantities and which do not provide for the recovery of costs within a reasonable period.
- 1.7 Section 269TAAD requires a dual-stage analysis of sales to be performed in order to test OCOT and requires the ADC to consider both whether a sale is profitable and whether, if unprofitable, it is **recoverable** within a reasonable period of time.
- 1.8 Siemens notes that section 269TAAD(3) provides that “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”.
- 1.9 Siemens considers that the ADC has adequately explained the reasons why recoverability of unprofitable sales - and consequently why OCOT testing - cannot be adequately performed in relation to sales of the GUC. These issues clearly support the ADC's finding that it was not reasonably possible to determine profit under Regulation 181A(2).
- 1.10 The ADC has eloquently and accurately summarised this rationale in the following statement in SEF 219:

The ordinary course of trade provisions are at s. 269TAAD and an important element of those provisions is determining whether the cost of goods sold at a loss are recoverable within a reasonable period. The recovery test is at s. 269TAAD(3). 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 “weighted average cost” of goods contemplated in s. 269TAAD(3) cannot be meaningfully calculated for power transformers. Consequently, the recovery test cannot be conducted meaningfully and the ordinary course of trade test cannot be fulfilled. Accordingly the ADC considers it is not reasonably possible to work out the profit on the sale of the goods made in the ordinary course of trade in accordance with Regulation 181A(2).

The ADC considers that it is therefore necessary to work out the profit for use in constructed normal values using one of the provisions in regulation 181A(3).

- 1.11 In so far as the Submission claims that the ADC failed to take into account options open to it for the purposes of testing OCOT and “in determining a profit amount in accordance with Regulation 181A(3)(a) the ADC has relied solely upon its consideration that “the recovery test per s.269TAAD(3) cannot be conducted meaningfully” in deciding that it could not be determined whether domestic sales of like goods by exporters were in the ordinary course of trade”, it overlooks the fact that the ability to test recoverability of sales is a clear element of the OCOT principles under s.269TAAD.

- 1.12 Siemens also notes that the alternative methodology for determining OCOT offered by the applicant - which would assess sales against fully absorbed cost and determine those above cost to be made in OCOT - is merely a mechanism for determining whether sales are profitable or not. That methodology caters for the test in the first limb required by s.269 TAAD but not the other essential legal elements and therefore does not satisfy the clear requirements of the Act.
- 1.13 Additionally, the proposed methodology would only serve to unreasonably and artificially inflate the margins attributable to exporters. That unreasonableness is exacerbated by financial data attributed to Siemens which:
- (a) is inaccurate (and so consequently is the corresponding graph);
 - (b) is incomplete in that it does not capture all production by Siemens China; and
 - (c) does not relate exclusively to the goods under consideration.
2. **Dumping margin assessment including 'targeted dumping'**
- 2.1 Our client's views regarding the ADC's proposed use of s.269TACB(3) for the purposes of determining dumping margins for certain exporters was outlined in our submission dated 8 October 2014. For the record, we disagree with the applicant's submission regarding s.269TACB(3) and proposed methodologies. The methods are not reasonable and further aggravate the distortion caused by the practice of zeroing.
- 2.2 Siemens considers that that proposed inclusion of so-called 'targeted export prices' for the purposes of calculating dumping margins under s.269TACB(3) is not permitted by the Act nor current ADC policy.
3. **Reassessment of termination**
- 3.1 As reflected in our client's submission to SEF219, Siemens agrees with the ADC's decision to terminate its investigation in relation to exports of the GUC from China. This decision comes after an extraordinarily long period of investigation by the ADC and an extensive and rigorous verification process in relation to each cooperative exporter of the GUC.
- 3.2 Siemens considers that there is no warrant for the ADC to reconsider its position in relation to the determination of profit in normal value calculations.
- 3.1 Furthermore, noting our ongoing concerns with the ADC's use of s.269TACB(3) for calculating dumping margins for Siemens China, Siemens' view is that WTC has not demonstrated why the ADC should re-calculate the dumping margins in the way requested by WTC.
- 3.2 Siemens urges the ADC to retract its use of s.269TACB(3), utilise subsection 269TACB(2) and amend the preliminary margin attributable to Siemens China accordingly.
4. **Conclusion**
- 4.1 The ADC should finalise the matter and terminate the investigation. Except for the s.269TACB(3) issue, which should not be utilised, the ADC's considered position as outlined in the Issues Paper and the SEF ought not be disturbed.

Mr Geoff Gleeson, Anti-Dumping Commission

28 October 2014

Yours sincerely

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