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Mr Reuben McGovern
Assistant Director
Anti-Dumping Commission

Our ref: RXW/RXW
Matter no: 9627025

By email: reuben.mcgovern@adcommission.gov.au

Dear Mr McGovern

**Investigation 507 – Power transformers exported from the People's Republic of China
Calculation on normal value under 269TAC(2)(c) – Profit determination**

We act from GE Grid Australia Pty Ltd (**GE AU**) and GE High Voltage Equipment (Wuhan) Co., Ltd (**GE Wuhan**) in relation to Anti-Dumping Commission (**ADC**) investigation 507 concerning certain power transformers exported from the People's Republic of China (**Investigation**).

GE Wuhan has received a draft exporter verification report (**Report**) from the ADC that sets out the ADC's current view as to the method of calculating the normal value to be used in determining the dumping margin for GE Wuhan. The ADC proposes to use a constructed normal value under section 269TAC(2)(c) of the *Customs Act 1901* (**the Act**) and has proposed that the normal value include an amount of profit calculated in accordance with section 45(2) of the *Customs (International Obligations) Regulations 2015* (**Regulations**).

GE Wuhan strongly believes that the ADC's proposed profit calculation is not in accordance with the Regulations and results in a normal value that is not a fair comparison to GE Wuhan's exports to Australian during the investigation period. GE Wuhan believes that the correct application of the law is that profit be determined in accordance with section 45(3) of the Regulations. The reasons for these views are set out below.

1. Guiding principle

In considering this submission, we request the ADC take into account that its purpose in calculating a profit margin is to construct a normal value under section 269TAC(2)(c) of the Act which is representative of sales of power transformers by GE Wuhan in China¹. The ADC will be well aware that the sale of power transformers to the Chinese domestic market is extremely competitive and not characterised by high levels of profits. This is both in respect of GE Wuhan and, more generally, other Chinese manufacturers.

The current approach of the ADC has the result of ignoring the usual transactions entered into by GE Wuhan [REDACTED] [profit or loss of transformer sales] and instead focuses on an unusual and unrepresentative extremely profitable transaction. The end result is not a fair comparison between exports and GE Wuhan's usual domestic supplies, but rather, compares

¹ See paragraph 55 of ADRP Report No. 88

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- c) as section 45(2) of the Regulations could not be applied, profit should have been determined under section 45(3)(a) of the Regulations. Applying section 45(3)(a) of the Regulations the ADC should have calculated a weighted average profit based on all domestic sales of the same general category of goods during the investigation period (both profitable and unprofitable).

GE Wuhan's submissions are set out in detail below.

4. Application of the OCOT Test to power transformers

It is contended that the OCOT Test cannot be applied to power transformers. In summary, the reason for this is that the OCOT test is built upon the fundamental premise of multiple sales of the same model of goods. As acknowledged by the ADC, each power transformer is unique.² It is contended that this precludes the application of the OCOT test.

4.1 Legislative test

The ADC has sought to calculate profit under section 45(2) of the Regulations which provides:

"The Minister must, if reasonably practicable, 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."

Section 269TAAD of the Act sets out a circumstance where the OCOT Test will not be met. Sections 269TAAD(1) – (3) of the Act are set out below.

"(1) If the Minister is satisfied, in relation to goods exported to Australia:

(a) that like goods are sold in the country of export in sales that are arms length transactions in substantial quantities during an extended period:

(i) for home consumption in the country of export; or

(ii) for exportation to a third country;

at a price that is less than the cost of such goods; and

(b) that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period;

the price paid for the goods referred to in paragraph (a) is taken not to have been paid in the ordinary course of trade.

(2) For the purposes of this section, sales of goods at a price that is less than the cost of such goods are taken to have occurred in substantial quantities during an extended period if the volume of sales of such goods at a price below the cost of such goods over that period is not less than 20% of the total volume of sales over that period.

(3) 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

² This is discussed further in sections 4.3 and 4.4 below

time, the selling price is above the weighted average cost of such goods over the investigation period."

4.2 Fundamental requirement of the legislative test

In order to apply section 45(2) it must be "*reasonably practicable*" to determine profit of goods sold in the OCOT. It is contended that this can only occur if the OCOT Test can be applied to the goods. The OCOT Test can only be applied to goods where there are multiple sales of the goods. This is because section 269TAAD(3) of the Act requires the application of a recovery test (**Recovery Test**). The Recovery Test specifically requires a comparison between the selling price of the goods and the weighted average cost of such goods over the investigation period.

For there to be a "weighted average" there must be multiple subsequent sales. Information can only be weighted or averaged by the combination of data from multiple sales. The requirement to test the price against a weighted average is a fundamental requirement of the OCOT Test. It recognises that not all unprofitable transactions are outside of the OCOT. The Recovery Test protects against the determination of an abnormal profit based only on profitable transactions in circumstances where there are both profitable and unprofitable domestic sales.

If the Recovery Test cannot be applied, the OCOT Test cannot be applied. The inability to apply the OCOT Test means that section 45(2) of the Regulations cannot be applied. This is because it is not "reasonable practicable" to determine the profit of the goods sold in the OCOT.

Alternatively, if the ADC seeks to apply the OCOT Test, it must find that unprofitable sales of power transformers are not by reason of unprofitability alone made outside of the OCOT. This is because the ADC will not be satisfied:

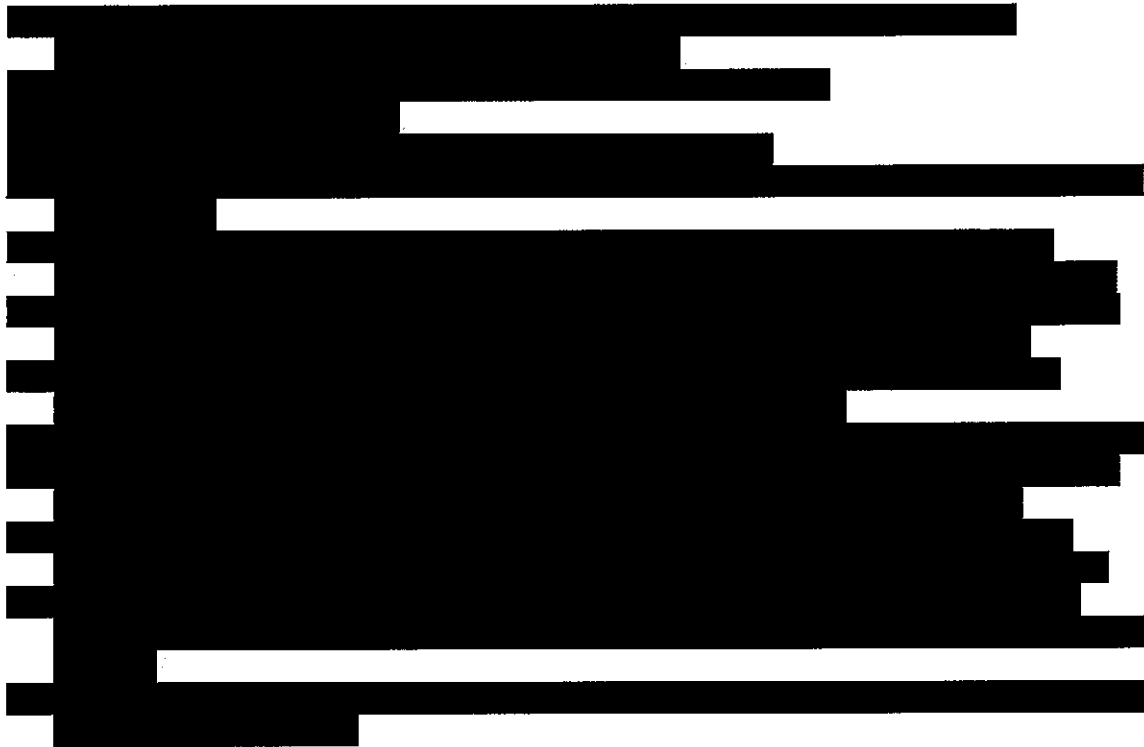
"that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period".

By reason of section 269TAAD(3) of the Act, only unprofitable goods which do not satisfy the Recovery Test fail this requirement. As the Recovery Test cannot be applied the result is that all of GE Wuhan's domestic sales during the investigation period were in the OCOT. In calculating profit the ADC should have taken into account the weighted profit outcome of all 3 **[volume of domestic sales]** transactions.

4.3 Unique nature of power transformers

The goods under consideration include power transformers with a power rating over 10MVA (with no upper limit) and a voltage rating of up to 500kV. This covers an extremely wide range of goods even if the only consideration taken into account is power and voltage specifications. In addition to variety in power and voltage are a range of design factors that make each power transformer unique including:

[REDACTED]



[Design features of GE Wuhan transformers that result in differences between each transformer]

The above factors are largely driven by specific customer requirements and mean that no two transformers are identical or easily comparable. The above information is provided at a very high level and further detail can be provided if requested.

The impact of the above variables means that each transformer is a unique design and cannot be model matched with other transformers. This would even be the case if the ADC attempted to make price adjustments to account for the differences (which we note that it has not attempted). This has the result that it not possible to compare the selling price of a particular transformer to the weighted average of "such goods" over the investigation period.

4.4 Consistency with past position adopted by the ADC

The ADC has previously considered this issue in investigation 219 relating to power transformers exported from China, Indonesia, South Korea, Taiwan, Thailand and Vietnam (**Previous Investigation**).

In Report No. 219 on page 43 the ADC stated:

"The Commission has adopted the position it proposed in the Issues Paper No. 2014/01. The ordinary course of trade provisions at s. 269TAAD are 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 unit to another. 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 Commission has not established normal values on the basis of domestic selling prices using s. 269TAC(1). Furthermore, the Commission considers that

a "weighted average cost" of goods contemplated in s. 269TAAD(3) is not meaningful for power transformers. Consequently, the recovery test cannot be conducted and the ordinary course of trade test cannot be fulfilled. The Commission considers it is not reasonably possible to calculate the profit on the sale of the goods made in the ordinary course of trade in accordance with Regulation 181A(2).

The Commission considers it is necessary to calculate the profit for use in constructed normal values using one of the provisions in regulation 181A(3)..."

The position of the ADC was repeated in Report 383 where it was stated on page 18 that:

"In Investigation 219, the Commission found that, in the case of power transformers, each unit is uniquely constructed and the costs and prices can differ significantly from one unit to another. Based on that, the Commission decided that a "weighted average cost" of goods contemplated in subsection 269TAAD(3) was not meaningful for power transformers. Consequently, the recovery test could not be conducted and the OCOT test could not be fulfilled.

The Commission maintains this view and consequently it is not reasonably possible to calculate the profit on the sale of the goods made in the OCOT in accordance with subsection 45(2) of the Regulation..."

The ADC's position set out in Reports 219 and 383 was correct and should be maintained.

4.5 Outcome if the OCOT Test cannot be applied

That the OCOT Test cannot be applied to power transformers is not surprising. Dumping investigations usually concern commodity type products where purchasing decisions are heavily driven by price. The legislation is designed for these type of goods and not for heavily engineered bespoke capital equipment.

Section 45(2) of the Regulations does not require the ADC to calculate profit by reference to sales in the OCOT. Rather, the legislator only required this method to be used where it was reasonably practicable to work out profit by reference to sales in the OCOT.

It is not reasonably practicable to determine the profit by reference to GE Wuhan's sales in the OCOT. As set out above, this is not possible as:

- a) due to the nature of the product, the OCOT Test cannot be applied; and
- b) due to the wide variety of differences between power transformers, it is not possible to make adjustments to cost of production and price to account for these differences.

The legislators contemplated that it may not be possible to calculate profit in accordance with section 45(2) of the Regulations and set out alternative methods to calculate profit in section 45(3) of the Regulations.

5. Absence of sales in the OCOT

The arguments in section 4 of this submission address whether the OCOT Test can be applied in the context of power transformers. In the alternative, it is submitted that the [REDACTED] [customer name] Transformer sale was not a sale in the OCOT. The reasons for this submission and details regarding the [REDACTED] [customer name] Transformer sale are set out below.

5.1 Section 269TAAD is not an exhaustive test

It is well established that OCOT Test is not an exhaustive test of what sales are, or are not, in the OCOT. Relevantly we note the following:

- a) the ADC's dumping and countervailing manual at pages 32-33 provides:

"The Commission accepts there can be a number of factors which can be taken into account when deciding whether sales are in the ordinary course of trade – not only sales at a loss, which is the subject of section 269TAAD ... Depending on the circumstances, profitable sales may not be in the ordinary course of trade. These circumstances can include sample sales, promotional sales made at special prices, end of season sales, low quality sales, or sales in other unusual circumstances."

- b) the Anti-Dumping Review Panel (**ADRP**) has recently recognised that factors other than profit could result in a transaction not being in the OCOT. For example, in ADPR Report No. 79 it was held that:

"It is possible that the terms of a sale could make the sale so exceptional that it was outside the ordinary course of trade."³

and

'The fact that the domestic sales used for the normal value have a [...] profit than other sales does not of itself mean that the profit from those sales cannot be used to work out the profit on a constructed normal value under s45(2) of the Regulations. A significant difference could of course indicate that the sales producing such a profit were not made in the ordinary course of trade. If so then s.45(2) cannot be used.'⁴

- c) relevant World Trade Organisation (**WTO**) appellate body decisions confirm that the test is wider than merely a profit test. The appellate body in *US – Certain Hot Rolled Steel from Japan*, WT/DS184/AB/R (**US-Hot Rolled Steel**) held:

"...generally sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product"⁵

and

"Where a sales transaction is concluded on terms and conditions that are incompatible with 'normal' commercial practices for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating 'normal' value."⁶

³ Paragraph 53

⁴ Paragraph 60

⁵ At paragraph 139

⁶ At paragraph 140

Given this, satisfaction of the OCOT Test alone will not mean that the sale of the [REDACTED] [customer name] Transformer was in the OCOT.

5.2 The [REDACTED] [customer name] Transformer

The [REDACTED] [customer name] Transformer was supplied as a spare transformer for existing transformers used at each of [REDACTED] [customer details]. Due to the aging of the existing transformers and associated quality issues, the [REDACTED] [customer name] made a decision to procure a spare power transformer. However, only one spare would be ordered and that spare transformer needed to be suitable for both the [REDACTED] [customer details]. The potential use of the power transformer on either site meant that the transformer needed to meet the physical dimension of both sites, and be compatible with not only the technical parameters of the existing power transformers but also the mechanical interfaces of each site.

This requirement is set out at section 2.1 on page 34 of the enclosed contract. While in Chinese, the English translation is:

[REDACTED]
[REDACTED]
[REDACTED] (Dual Site End
Use Requirement) [Confidential contract term]

The existing power transformers were supplied by Alstom group companies (**Original Alstom Transformers**). The ADC will recall that GE Wuhan was previously known as Alstom High Voltage Equipment (Wuhan) Co.,Ltd and was part of the Alstom group.

As the Alstom group has supplied the Original Alstom Transformer, [REDACTED] [customer name] approached GE Wuhan to manufacture the spare transformer. Due to the requirement to fit within 2 potential sites with different requirements, and the general need to be compatible with existing infrastructure, the design of the transformer required a high degree of cooperation, sharing of knowledge and technical discussion. It was not realistic that this level of cooperation would occur prior to the awarding of the contract. However, it was also the case that the transformer would not be ordered until GE Wuhan could satisfy [REDACTED] [customer name] that it could provide a transformer that meet the requirements of both [REDACTED] [customer details].

The result was that the supply of the spare transformer was not the subject of competitive bidding. GE Wuhan was the only company that worked with [REDACTED] [customer name] to design a transformer that met the technical specifications.

[REDACTED]
[REDACTED] [Discussion of
unique technical specifications of the transformer and the GE Wuhan solution]

The Dual Site End Use Requirement created a unique circumstance where the purchaser was more dependent on the design and engineering skills of the manufacturer. Further, GE Wuhan was uniquely credentialed to demonstrate these skills by reason of the original transformers

having been supplied by the Alstom group. Further, by satisfying the Dual Site End Use Requirement, GE Wuhan provided [REDACTED] [customer name] with a solution whereby only one, rather than two, transformers were required. The totality of these factors meant that GE Wuhan did not face competition and was able to charge a greater premium for its design expertise.

5.3 [REDACTED] [customer name] Transformer was not sold in the ordinary course of trade

It is contended that the [REDACTED] [customer name] Transformer was not sold in the OCOT and could not form the basis of a profit calculation under section 45(2) of the Regulations. The reasons why the transaction was not sold in the OTOT include:

1. the significant profit difference;
2. the absence of normal market pressures;
3. the end use of the transformer;
4. the absence of sustained similar transactions;

Each of these factors are discussed below.

(a) Significant profit difference

As set out above, the ADRP has expressed the opinion that a significant profit differential may indicate that a transaction is not in the OCOT. Whether this is the case would depend on the size of the profit differential. It is accepted that a profit differential would need to be significant before that differential on its own could result in a transaction not being in the OCOT.

For GE Wuhan there were [REDACTED] [volume of domestic supplies] supplies of power transformers during the period of investigation. For [REDACTED] of those supplies the average weighted [REDACTED] [profit of loss on transformers] For the [REDACTED] [customer name] Transformer the profit was [REDACTED] [Profit on transformer] The profit difference is an extraordinary [REDACTED]

The sales at a loss represent [REDACTED] of sales by revenue and [REDACTED] of sales by MVA output in China of like goods during the investigation period. It is clear that the vast majority of sales were at a [REDACTED] [profit or loss on transformers] during the investigation period. By contrast, the [REDACTED] [customer name] sale was at [REDACTED] [profit or loss on transformer].

The [REDACTED] [customer name] profit level is unusual by reference to each of the following:

- domestic sales by GE Wuhan of like goods during the investigation period (average weighted [REDACTED] as calculated by the ADC);
- domestic sales by GE Wuhan of like goods from 2014 onwards (see table 1 at appendix A);
- domestic sales of the same general category of goods by GE Wuhan during the investigation period (see table 2 at appendix A);
- exports sales by GE Wuhan of like goods during the investigation period;
- domestic sales by other privately owned Chinese manufacturers during the investigation period (the ADC will have obtained this information during the conduct of the Investigation).

GE Wuhan did not achieve an outcome on a transformer sale that was comparable to the profit calculated by the ADC on the [REDACTED] [customer name] Transformer during or before the investigation period. The profit differential was so significant that this fact alone means that the transaction cannot be considered to have occurred in the OCOT.

(b) **The absence of normal market pressures**

The ADC will have identified during the Investigation that the Chinese domestic supply of power transformers is subject to significant competition. Competition includes both suppliers that are state owned power transformer manufacturers and those that are part of multinational corporations.

As has been set out in previous submissions, price is not the first factor considered by purchasers. Before price is considered, the purchaser must be satisfied that the supplier has the technical ability to supply the desired transformer. However, it is normally the case in the Chinese market that there are a number of suppliers from whom a supplier will accept tenders. In these circumstances, in order to be competitive, suppliers need to offer prices that are very low profit, or in some cases, at a loss.

Intense price competition is more prevalent in the Chinese domestic market than in the Australian market as there are regular open bids for the supply of power transformers to 2 state owned utilities (China Southern Grid and Stage Grid). These occur approximately 5-6 times a year. As part of the bidding process, all suppliers see the pricing offered by their competitors. GE Wuhan's experience is that the price it submits is usually [REDACTED] higher than the successful bid. As a result, ordinarily the domestic supply of power transformers is characterised by intense price competition and sales at a no or a very low profit.

As set out above, these market conditions did not exist in respect of the [REDACTED] [customer name] Transformer. Unusually, there was an absence of competitive bidding.

The absence of normal market pressures and the customer's strong desire to use GE Wuhan meant that GE Wuhan could be much more aggressive in its pricing than in the ordinary course of trade. GE Wuhan is well aware that if the supply was open to competitive bidding it would have been required to greatly reduce its price in order to win the contract.

The absence of normal market forces meant that GE Wuhan was able to achieve a profit that was far in excess of the profit it achieved on any other supply of like goods during the period of investigation.

Using the language from the *US – Hot Rolled Steel* case, the sale happened under conditions that were not normal for sales of that type of good for a reasonable time leading up to the sale.

(c) **End use**

The end use of the [REDACTED] [customer name] Transformer was unique in two ways:

- the transformer was to be used in [REDACTED] [customer details]; and
- the Dual Site End Use Requirement.

[REDACTED]

[REDACTED]

[REDACTED] [Description of client and how this impacted on GE Wuhan's ability to negotiate the sale price of the transformer]

The Dual Site End Use Requirement was a contractual term and a key feature of the supply contract. This requirement greatly altered the complexity of the contract and the commercial arrangement. Satisfaction of the Dual Site End Use Requirement meant that the purchaser only needed to purchase one spare transformer and not two. The purchaser was prepared to pay a premium for this outcome.

This contractual requirement regarding end use is extremely unusual. Companies rarely purchase spare power transformers and if they do, they do not require the transformer to be compatible at multiple sites with different specifications.

The Dual Site End Use Requirement constituted a term of sale that was significantly outside what would be considered the ordinary course of trade. It significantly impacted profit as it permitted GE Wuhan to demonstrate greater design and engineering value to the client and it also resulted in a negotiation process that did not involve competition.

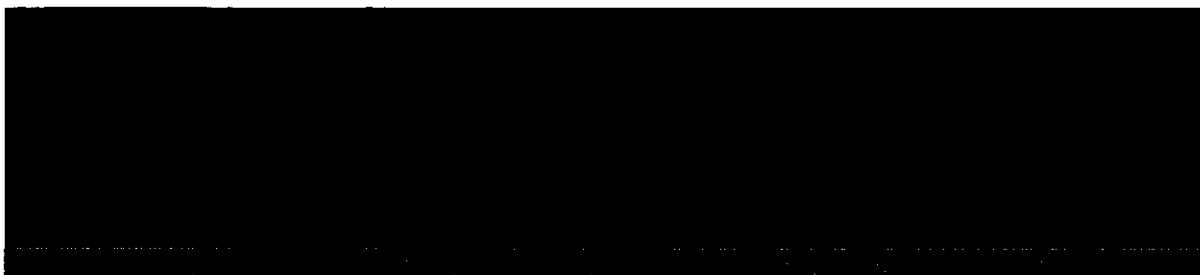
(d) **The absence of sustained similar transactions**

The ADC has elected to base its profit determination on a single transaction. It is conceivable that there would be circumstances where a single transaction by chance is representative of the supplier's other transactions. However, in this case, the following are both true:

- over a sustained period of time GE Wuhan has not made domestic supplies of a transformer with similar voltage specifications and in the negotiating conditions that existed for the [REDACTED] [customer name] Transformer;
- over a sustained period of time GE Wuhan has predominantly provided power transformers with much larger power and voltage specifications than the [REDACTED] [customer name] Transformer and in highly competitive negotiating conditions.

During the investigation period GE Wuhan supplied [REDACTED] [volume of transformers] transformers with power ratings above 10 MVA and a voltage less of [REDACTED] kV or less⁷. The details of these sales are below.

⁷ We note that the specification of the goods under consideration is a maximum of 500kV. However, for the purpose of demonstrating how unique the [REDACTED] [customer name] Transformer is, we have included the supply of a power transformer slightly above this voltage specification.



[details of transformers supplied]

The [redacted] [customer name] Transformer represents approximately [redacted] of Chinese sales by revenue and less than [redacted] of Chinese sales by MVA.

The circumstances of supply, volume and general transformer specifications reinforces that the [redacted] [customer name] Transformer is unique and does not represent a sale in the OCOT.

5.4 OCOT Summary

For the reasons set out above the [redacted] [customer name] Transformer was not in the OCOT. The result is that there were no domestic sales of GE Wuhan in the OCOT during the investigation period.

6. Correct calculation of profit

For the reasons set out above, GE Wuhan submits that profit cannot be calculated in accordance with section 45(2) of the Regulations. Put simply, it was either not possible to apply the OCOT Test or there were not transactions in the OCOT.

It is well settled that where section 45(2) is not available, the ADC can select any of the profit calculation methods in section 45(3) of the Regulations. The ADC has also made clear that its preference when applying section 45(3) of the Regulations is to calculate profit under section 45(3)(a) of the Regulations. This section calculates profit by:

"identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export"

This method does not require that the sale be in the OCOT. This means that profit would be calculated by reference to all of GE Wuhan's domestic sales in the investigation period.

[redacted]
[redacted]
[redacted] [profit or loss on transformer sales]

Please let us know if the ADC accepts that profit should be calculated under section 45(3) of the Regulations but does not propose to apply section 45(3)(a) of the Regulations. If so notified, GE Wuhan will provide a detailed submission regarding the application of section 45(3) of the Regulations.

Please contact us if you require any further information regarding the [REDACTED] [customer name] Transformer or any other transformers supplied by GE Wuhan.

Yours faithfully
Hunt & Hunt



Russell Wiese
Principal

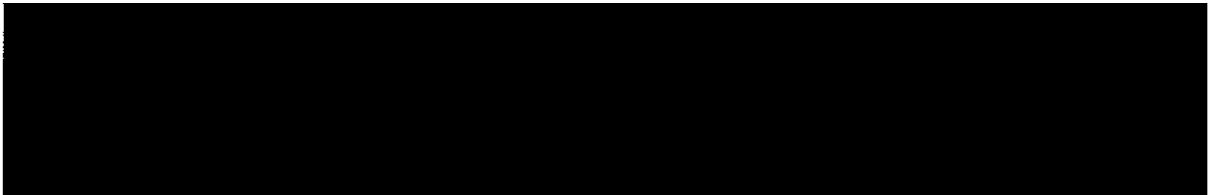
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APPENDIX A

Table 1

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Table 2

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[Details of transformers supplied by GE Wuhan]