

FOR PUBLIC RECORD

Level 5, 114 William Street, Melbourne VIC 3000
GPO Box 1533, Melbourne VIC 3001 | DX 252 Melbourne
T +61 3 8602 9200 | F +61 3 8602 9299

hunt & hunt
lawyers

7 November 2019

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
Response to Statement of Essential Facts**

We act for 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**). The purpose of this letter is to provide GE AU's and GE Wuhan's response to the Statement of Essential Facts published in 17 October 2019 (**SEF**).

1. GE Wuhan dumping margin

GE remains strongly of the view that the ADC has incorrectly applied the *Customs Act 1901* (**the Act**) and the *Customs (International Obligations) Regulations 2015* (**Regulations**) when calculating GE Wuhan's normal value.

1.1 Ordinary course of trade test not applicable to power transformers

GE's submission dated 31 July 2019 set out GE's view that due to the unique nature of each power transformer, the ordinary course of trade test in section 269TAAD of the Act (**OCOT Test**) was inapplicable.

The SEF sets out that the ADC dismissed these arguments. The ADC has stated in the SEF that its approach in respect of the GE Wuhan normal value reflected its current approach to the application of the OCOT Test. The ADC provided investigation 487 as an example of the ADC's current approach.

The approach adopted by the ADC in investigation 487 was reviewed by the Anti-Dumping Review Panel (**ADRP**) and by letters dated 4 July 2019 and 5 September 2019 where the relevant ADRP member made clear that the ADC's approach to the application of the OCOT Test was incorrect.

In both of the letters referred to above, the ADRP member made clear that there cannot:

"...be a finding consistent with the legislation that for the purpose of using a constructed value under s. 269TAC(2) there is an absence (as opposed to low volume) of domestic sales of like goods by the exporter in the OCOT but for the purpose of Regulation 45(2) there are such sales".

That is, the ADC cannot for one purpose of the Act say that there no sales of like goods but for another purpose find that there are such sales.

237001697v1_HXH

On page 46 of the SEF the ADC states:

"...the Commission is of the view that there is an absence of sales of like goods in the market of the country of export that would be relevant for the purposes of determining a price of goods under section 269TAC(1)."

The ADC used this finding to justify using a constructed normal value under section 269TAC(2) of the Act. This is the exact issue the subject of guidance from the ADRP in ADRP Investigation 100.

The ADC can only maintain its approach to the calculation of GE's profit as set out in the SEF if it elects to ignore the clear position of the ADRP communicated in ADRP Investigation 100.

The position of GE remains that the nature of power transformers means that the OCOT Test cannot be applied. GE Wuhan's profit should be calculated by reference to amounts realised in the same general category of goods pursuant to section 45(3) of the Regulations.

1.2 Purported application of the OCOT Test

GE's alternative argument was that even if the OCOT Test should be applied as suggested by the ADC, the [Customer name] Transformer was not in the OCOT.

In the SEF the ADC put forward the following reasons in support of its view that the [Customer name] Transformers was in the OCOT:

- a) the transaction was entered into with an unrelated party;
- b) GE did not demonstrate that the transaction was not negotiated in a way that lacked genuine negotiation;
- c) other parties could have satisfied the "Dual Site End Use Requirement" or end use of the transformer;
- d) the price was still through a competitive process;
- e) the purchaser was not precluded from sourcing the goods from a third party supplier had the negotiations been unreasonable.

The ADC's approach to the OCOT test is essentially limiting its inquiry to asking whether the transaction was arm's length. The ADC has only addressed whether the parties were unrelated and whether there was, or could have been, competitive bidding.

The OCOT does not simply mean "arm's length". If this was the legislator's intention, it would have expressed this as it has in other sections of the Act. Rather, the legislation indicates that OCOT does not merely encompass an arms length test. We say this because section 269TAC of the Act on 6 occasions qualifies the phrase "ordinary course of trade" with the words "*arms length transactions*". The italicised words would not be necessary if the phrase "OCOT" was merely synonymous with "arms length".

Further, the approach of the ADC goes against its own stated policy, ADRP decisions and WTO decisions. 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."

In its manual the ADC correctly references that sales in unusual circumstances can be a basis for finding that the sale was not in the OCOT. The ADC in the above passage references "end of season sales" and "promotional sales". These sales are very likely to be arm's length. However, they are not in the OCOT as the pricing is lower than the standard pricing for the relevant good.

The [REDACTED] [Customer name] Transformer is a sale in unusual circumstances. Those unusual circumstances were:

- contrary to the claims of the ADC, the actual absence of a competitive bidding process;
- the need for [REDACTED]

[REDACTED] [Description of confidential details of the transformer]
 This is an end use requirement that is very unusual for power transformers. Even if there was a competitive process, the unusual end use requirements of the transformer would have meant that the profit on the transformer was not achieved in the ordinary course of business.

The WTO appellate body adopted an approach to OCOT that was much wider than a mere or arms length test. In *US – Certain Hot Rolled Steel from Japan*, WT/DS184/AB/R (**US-Hot Rolled Steel**) the appellate body held that:

"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."

The appellate body was focused on whether the terms and conditions of sale were normal when compared to other sales of a like product in the market.

Similarly, 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 is was outside the ordinary course of trade."²

Terms and conditions of sale could be abnormal even if the contract was the subject of negotiation or was subject to intense competition. Even if there was intense competition, all competitors would be impacted by the unusual terms and conditions. For instance, in respect of the [REDACTED] [Customer name] Transformer, even if there were multiple bidders, each supplier would have to meet the Dual Site End Use Requirement and each supplier could use its ability to satisfy that requirement to negotiate a greater than usual profit margin.

In the SEF the ADC incorrectly limited its consideration to whether other suppliers could have satisfied the Dual Site End Use Requirement. The correct approach was to ask whether the Dual Site End Use Requirement was an abnormal term or condition such that the supply of the [REDACTED] [Customer name] Transformers was not in the OCOT.

¹ At paragraph 140

² Paragraph 53

GE wishes to stress that it is not only the highly profitable nature of the [Customer name] Transformer that means that the transaction is outside of the OCOT. Further, GE does not suggest that other suppliers could not have achieved similar profits (if they could satisfy all the customer's unique requirements). Rather, GE believes the focus should be the underlying features of the [Customer name] Transformers that enabled GE to achieve [Reference to profits on the transformer] and whether those underlying features took the transaction outside of the OCOT.

1.3 Approach in the Report

If the ADC intends to repeat the findings in the SEF in respect of GE's normal value, we request that the ADC also set out:

- a) what GE Wuhan's dumping margin would be if it found that the OCOT Test could not be applied due to the absence of sale of like goods in the OCOT (**Alternative Wuhan Margin**); and
- b) whether the ADC's causation analysis is altered if the Alternative Wuhan Margin is applied.

Given that the ADC's approach in the SEF is contrary to the direction of the ADRP, it is likely that if the ADC maintains that approach, GE will apply for Federal Court review. Having the above requested information set out in the report may assist the Federal Court in any orders made as a consequence of that proceeding.

2. Approach to causation analysis

Generally GE supports the ADC's approach to causation being one that focuses on whether the alleged dumping caused the loss of particular projects. GE believes that such an approach is preferable to a more general whole of industry approach as:

- a) power transformers are bespoke projects that are influenced by a wide range of unique factors. Due to this, any generalised industry wide findings are likely to be far less causative of injury than the transaction specific factors;
- b) the relative low volume of tenders over the investigation period means that the ADC was able to review the large majority of tenders impacting Wilson Transformer Company Pty Ltd (**WTC**);
- c) the existence of a large number of non-dumped Chinese transformers and transformers from third countries means that the impact of any dumped Chinese transformers can only be determined by way of a tender by tender analysis; and
- d) the limited extent to which price is a deciding factor in buyer decisions. The ADC has correctly noted that the price of a transformer is only one factor and that there are instances where the lowest priced tender is not successful.

Due to the difficulties with isolating the impact of dumping over the variety of other factors, it was necessary for the ADC to undertake a tender by tender analysis. To do otherwise would have involved the ADC engaging in mere speculation without any credible basis on which to separate injury caused by dumping from injury caused by other factors.

2.1 Project [redacted]

In section [redacted] of the SEF the ADC set out details of a tender lost by WTC to the importer of a Chinese transformer. We understand that "Project [redacted]" refers to a contract to supply [redacted] [Details of the relevant project]. This was a tender won by GE AU.

In the SEF the ADC noted that even when adjusted for alleged dumping, the GE AU bid was still lower than the WTC bid. [REDACTED]

[REDACTED] [Details identifying the relevant project] Below we provide the ADC with the further information known to GE that is relevant to this issue.

2.2 Further details of the tender for Project [REDACTED]

(a) Highly technical project

As the ADC is likely to be aware, this tender was not a simple supply and install contract. Rather the scope of work was for the design, manufacture, delivery, installation and commissioning of [REDACTED] transformers to replace the existing transformers located at [REDACTED] [Project details]

The replacement element of the scope of work presented significant challenges being:

[REDACTED]

[Technical details of the project]

These factors meant that GE AU and GE Wuhan (GE) focused on its technical capabilities when seeking to demonstrate its competitive advantages to [REDACTED] [Customer name]. GE believed that its ability to provide a risk free technical solutions for the replacement of the transformers was a key element of its tender. To this end GE made representations to [REDACTED] [Customer name] regarding its extensive experience in the replacement of transformers.

GE believes that technical expertise was a key factor for [REDACTED] [Customer name] due to the following:

- prior to shortlisting GE, [REDACTED] [Customer name] technical and commercial representatives visited GE Wuhan's manufacturing facility in China and undertook an extensive factory audit. The [REDACTED] [Customer name] auditors stated that they were very impressed with GE Wuhan's industrial capabilities;
- GE was required to supply references from other utility companies that it has supplied. GE was informed that [REDACTED] [Customer name] contacted both of [REDACTED]

[Details of references and previous projects]

(b) Timing

It was also made clear to GE that the delivery timeframe, particularly for the first 2 transformers, was of critical importance to [REDACTED] [Customer name]. The timeframe for the site delivery of the

first 2 transformers was [redacted] [timeframe] from the time the contract was awarded. GE expressly confirmed as part of the tender that it would meet [redacted] [Customer name] project schedule.

GE has a good track record in the delivery of replacement transformers within a short period of time. This was not a mere self-serving claim. A specific reason GE put to [redacted] [Customer name] regarding why it was better placed than competitors to meet short timeframes was that [redacted]

[redacted] [Details of how GE is able to delivery transformers in a short timeframe]

Additionally, GE has a good reputation in the Australian market for the on-time delivery of replacement transformers. GE knows that [redacted] [Detail of customer reference] who could have attested to their experience of GE successfully delivering transformer replacement projects within the required timeframe.

(c) Services

As the ADC would be well aware, the manufacture and supply of a transformer is only part of the tender. Other tendered services include delivery to site, supply of oil, pre-commissioning work and installation (**Transformer Services**).

It is relevant to note that GE AU has an Australian based team that provides these services in connection with GE AU supplied equipment, equipment supplied by third parties and existing equipment (**GE Services**). [redacted]

[redacted] [Information on tender strategies adopted by GE

Relevantly, the GE Services team had previously successfully completed transformer refurbishment work on [redacted] [Customer name] existing transformers prior to the awarding of Project [redacted] to GE AU.

Further, [redacted] [date] subsequent to Project [redacted] being awarded to GE AU, GE Services separately won a contract for the work associated with [Customer name and description of services] [redacted]. In winning this services work, GE Services directly competed against WTC. In our view, it is reasonable to infer from this that at the time of evaluating the Project [redacted] bids, [redacted] [Customer name] considered GE Services to be a preferred supplier of Transformer Services.

[redacted] [Customer name] would have been well aware that GE Services would have been performing the "onshore" work in respect of the Project [redacted] transformers. [redacted]

[redacted] [Detail on non-cost factor relevant to GE winning the project]

[redacted] [GE views of factors affecting the market perception of WTC] Naturally, it will be up to the ADC to inquire with [redacted] [Customer name] as to its view of the reputation of WTC's service team compared to GE Services.

(d) Analysing the project

[Confidential details of the project and why GE believes that it was the successful supplier]

Ultimately the ADC must make a decision as to whether there is a factual basis upon which it can say that the alleged dumping caused GE to be successful. The legislation specifically prohibits the ADC from making a causation finding on mere allegations, conjecture or remote possibilities.

In this case the ADC is aware that [REDACTED] [the customer] weighted the technical and non-technical criteria equally. It is also aware that even in the absence of alleged dumping, the GE bid would have been lower than the WTC bid.

GE has above presented objective factual information setting out non-price factors relevant to its successful tender. To the extent that the ADC wishes to speculate that price, and not technical factors, resulted in GE being successful, the ADC is aware that a non-dumped GE price would have been lower than the WTC price.

In arguing that price would have resulted in a different buyer decision, the ADC is speculating that price is a very strong factor in the [REDACTED] [Customer name] buying decisions. If that speculation is correct, it follows that the ADC must find that the lowest price tender (GE) would have been successful.

It can be accepted that for some customers the lowest price will not always win the tender. However, the ADC cannot attribute this mindset to [REDACTED] [Customer name] if it at the same time finds that [REDACTED] [Customer name] was strongly influenced by price.

2.3 Material injury caused by exports related to project [REDACTED]

It is clearly a significant step to impose dumping duties and the WTO members only authorises its members to impose dumping duties in limited circumstances. Specifically, the Minister must be satisfied that the alleged dumping has caused material injury to the Australian industry.

If contrary to the above submissions the ADC finds that in the absence of dumping WTC would have won project [REDACTED], it needs to find that exports connected with project [REDACTED] on their own caused material injury.

In this respect it is important to note that only [REDACTED] of the [REDACTED] transformers the subject of project [REDACTED] were exported during the investigation period. Those transformers were exported on 23 December 2018. The export of the remaining transformers cannot be taken into account in assessing injury prior to 2019 as:

- only one other transformer has actually been exported and this was outside of the investigation period;
- the other [REDACTED] transformers have not been exported;
- the dumping margin for the [REDACTED] transformers not exported in the investigation period has not been calculated. Given the profit element of GE Wuhan's normal value referenced a single abnormal domestic transaction, it should not be presumed that exports in a different period would be found to be dumped. Rather, it is more likely that a normal value in a subsequent period will encompass data from different, less profitable, domestic sales.

(a) Timing of any Injury

While the ADC has found that WTC suffered material injury, it is necessary for the ADC to isolate the injury alleged to have been suffered by WTC due to the export of the [REDACTED] transformers on 23 December 2018 from other injury. Given that these transformers did not even arrive in Australia until after the investigation period it seems very unlikely that the export of those transformers could have caused injury during the injury analysis period.

For example, had WTC won project [REDACTED], would it have supplied the transformer and received any revenue prior to 31 December 2018?. The ADC should inquire whether any revenue by WTC would only have been received in 2019 on delivery of the transformers. If this is the case, in 2018 WTC would only have incurred the costs of manufacturer (assuming it had begun manufacture) without the revenue. That is, during the injury analysis period, it is possible that winning Project [REDACTED] would only have resulted in the incurring of additional costs without additional revenue.

(b) Materiality of any injury

The legislation requires that the injury caused by the alleged dumping be "material". If the ADC finds that the alleged dumping caused the loss of Project [REDACTED], it needs to determine whether the injury resulting from exports connected to the loss of project [REDACTED], was material.

The terms "material" is not defined in the legislation. As noted in the Ministerial direction on Material Injury, "material injury" must be greater than likely to occur in the normal ebb and flow of business. It is important to appreciate that the loss of Project [REDACTED] represented the loss of one tender. Figures 7 and 8 on pages 64 of the SEF show that in 2018 the Australian Industry lost the vast majority of tenders (whether judged by project or value). The ADC will know the exact figures, but it appears from figures 7 and 8 that the Australian industry lost over 90% of tenders in 2018.

In these circumstances, the injury associated with a single tender must fall within what was expected in the normal ebb and flow of WTC's business. In 2018 WTC was not operating a business where the loss of a tender was unexpected. Rather, it was the norm and the overwhelming majority of such lost bids was not caused by the alleged dumping of Chinese exports.

Additionally, the materiality of injury must be considered in the context of the size of the Australian industry. Naturally, GE does not know the price of the unsuccessful WTC bid. However, it does know that FOB purchase order value of the two allegedly dumped transformers in 2018 was [REDACTED] per unit. Given the information in [REDACTED] [Reference to project number] of the SEF, GE assumes that the value of the lost 2018 transformer sale revenue would have been less than [REDACTED] per unit (for the relevant [REDACTED] units).³

Of course, the above amounts are only the lost revenue, and lost revenue on its own is a poor indication of material injury. Rather, it is the profit achieved on the revenue that is significant. Figure 12 on page 68 of the SEF shows that WTC has adopted a business model of selling transformers at a loss. Figure 12 does not take into account the impact of Project [REDACTED] as Project [REDACTED] was not won by WTC. Rather, figure 12 shows WTC's business as unaffected by dumped exports from China. Given the ADC's other findings regarding dumping, it cannot be said that

³ These costs exclude transport, installation and other non-production costs

dumping has resulted in WTC producing power transformers at a loss. This is a business model of WTC unconnected to alleged Chinese dumping.

Based on the ADC findings in figure 12 it must be found that even if WTC had won project ■, it would have been unlikely to make a material profit on that sale. Rather, the evidence suggests that had WTC won project ■, it would have produced and sold the transformers at a loss.

It is unnecessary for GE to speculate on why WTC has structured its business to produce transformers at a loss. It sufficient that the ADC has found that dumping from China did not impact on the revenue obtained from, or the costs incurred in respect of, the transformers produced by WTC during the injury analysis period (as opposed to any lost tender).

In these circumstances, WTC has not demonstrated a business model where the winning of Project ■ would have caused a change to its financial position. Rather, figure 12 of the SEF suggests that if anything, WTC would have produced the transformers at a loss and worsened its financial position.

2.4 Cause of the injury

The *Customs Act 1901* specifically directs the ADC to take into account the volume of goods that have been found to have been dumped and equally the volume of goods that have not been dumped. In the SEF, the ADC has set out that:

1. WTC lost a significant number of tenders to Chinese exports that were not dumped; and
2. even where Chinese exports were dumped, WTC would have suffered injury even in the absence of those dumped exports.

It is clear that the injury suffered by WTC was due to non-dumped exports (be it from China or other locations). This is entirely consistent with the claims made by WTC to the ADC in WTC's original application. Specifically, WTC highlighted exports by Siemens as a cause of its injury (pages 32 and 3 of the WTC application). The ADC will be aware that Siemens was found not to be dumping.

GE would welcome the opportunity to discuss the above issues at the ADC's convenience. If the ADC proposes to adopt an approach in its final report that is significantly different to the approach in the SEF, and that approach is contrary to the interest of the GE, it is submitted that procedural fairness requires the ADC to first raise the issue with GE and seek its comment.

Yours faithfully

Hunt & Hunt



Russell Wiese

Principal

Contact:

Russell Wiese

D +61 3 8602 9231

E RWiese@huntvic.com.au

