

12 December 2019

Mr Matthew Williams
Director, Investigations 3
Anti-Dumping Commission
Level 35, 55 Collins Street
Melbourne VIC 3000

PUBLIC DOCUMENT

Dear Matthew,

Anti-Dumping Commission (ADC) Investigation 507 Power Transformers (PTs) exported from the People's Republic of China (China) Wilson Transformer Company's (WTC's) response to submissions of GE and Siemens regarding Statement of Essential Facts 507 (SEF 507)

WTC makes the following responses to GE's submission dated 29 November 2019 (GE submission):

1. GE is wrong that the ADC may be excused from following the legislation merely because doing so may involve activities that are not minor or because that would involve a substantial investigation of complex issues.
2. GE wrongly asserts that s 269TEA(4) applies in the current circumstances, ie where the ADC is not proposing to give a report to the Minister.
3. GE wrongly argues, in effect, that the ADC and the Minister may adopt different tests under s 269TAA(1)(b).
4. GE wrongly argues, in effect, that the Minister may form views and opinions regardless of the statutory framework and in spite of important and obvious matters that have not been investigated.
5. GE observes that its related party transactions have been closely reviewed in recent years by customs and taxation authorities but misses the rather obvious inference that such reviews would invariably lead or require a multinational to exert influence over prices between its subsidiaries.

WTC makes the following responses to Siemens' submission dated 29 November 2019 (Siemens submission):

6. Siemens wrongly claims that arms length matters were carefully analysed in verification reports; such analyses were at best cursory and, in any event, did not use the correct statutory test.
7. Siemens raises a pivotal question of whether evidence exists of prices being influenced within the Siemens group but declines to answer the question (as only it could).
8. Siemens wrongly confuses the criteria in s 269TAA(1)(b) with a test of arms length in fact.
9. Siemens' explanation of the ADC's reasoning regarding injury is confused.

WTC considers that the multinational PT suppliers wrongly confuse the tests in s 269TAA(1) with a test of arms length in fact. Satisfaction of any of the criteria in s 269TAA(1) merely means that the transaction must not be *treated* as arms length; that is not the same as a finding that transactions are not arms length in fact.

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1. GE is wrong: ADC not excused from following the legislation because doing so involves non-minor activities or because that involves substantial investigation of complex issues

WTC considers that GE is wrong that the ADC somehow may be excused from following the legislation merely because doing so may involve activities that are not minor or because that would involve a substantial investigation of complex issues.

GE complains that the ADC reconducting its investigation (in the manner proposed by WTC) into arms length issues with multinational PT suppliers would involve activities that are “not minor” and that it would be a “substantial reinvestigation of complex issues”.¹

GE’s complaint rather proves WTC’s point that the ADC must undertake a non-minor and substantial investigation into arms length matters; such an investigation has not yet been made in Investigation 507.

In any event GE is wrong that the ADC may be excused from following the legislation merely because doing so may involve activities that are not minor or because that would involve a substantial investigation of complex issues. WTC considers rather that the ADC is tasked, resourced and required by the legislation to properly investigate arms length issues as a primary issue notwithstanding any complexities; GE’s concern that this would be a non trivial exercise does not remove the obligation on the ADC to properly assess arms length matters.

2. GE is wrong: s 269TEA(4) does not apply in the current circumstances

WTC considers that GE is wrong in asserting that s 269TEA(4) applies in the current circumstances, ie where the ADC is proposing to terminate and not give a report to the Minister.

GE argues that s 269TEA(4) allows the ADC in the current circumstances to not have regard to WTC’s submission.²

However s 269TEA(4) is clear on its terms (emphasis added):

The Commissioner is not obliged to have regard to any submission made in response to the statement of essential facts that is received by the Commissioner after the end of the period referred to in subparagraph (3)(a)(iv) if to do so would, in the Commissioner’s opinion, prevent the timely preparation of *the report to the Minister*.

The provision expressly applies to circumstances where the ADC proposes to prepare a report to the Minister. That is *not* the circumstance in Investigation 507 where the ADC is not proposing to give a report to the Minister but rather is proposing to terminate the investigation.

WTC observes that the ADC extended the time in this investigation.³ This appears to recognise that s 269TEA(4) does not allow it to disregard submissions in the current circumstances. WTC considers that that would be the correct position.

WTC considers that the ADC may and must properly investigate the matters before it in Investigation 507, including arms length matters; this is regardless of GE (and Siemens) urging it to hastily proceed to a decision in its favour with hollow assurances that, in effect, state “there is nothing to see here”.

3. GE wrongly argues that the ADC and the Minister may adopt different tests

WTC considers that GE is wrong when it argues, in effect, that the ADC and the Minister may adopt different tests under s 269TAA(1)(b).

¹ GE submission at page 1.

² GE submission at page 1.

³ ADN 2019/144.

GE's reasoning is questionable. GE submits that the ADC approach to s 269TAA(1)(b) "is of no consequence and does not prevent the correct application" of the provision.⁴ This is because, GE argues, the test in s 269TAA(1)(b) is "a test to be applied by the Minister";⁵ that apparently allows the ADC to do as it pleases in making arms length assessments provided only that the Minister must base his or her opinion as to the existence of an appearance of influence on the ADC's resultant finding.⁶

GE's landing point is curious to say the least and, if it was adopted generally by the ADC, would see the ADC's investigations and the Minister's deliberations depart in unexpected ways. However WTC considers that there is no need to point to the absurd outcomes of GE's reasoning when GE's position is expressly countered by s 269TE(2).

Subsection 269TE(2) provides that:

If the Commissioner is required, in making a recommendation or decision, to determine any matter ordinarily required to be determined by the Minister under this Act or the Dumping Duty Act, the Commissioner must determine the matter:

- (a) in like manner as if he or she were the Minister; and
- (b) having regard to the considerations to which the Minister would be required to have regard if the Minister were determining the matter.

On that basis the ADC must determine the matter in s 269TAA(1)(b) in like manner as if it was the Minister and having regard to the same considerations. Accordingly GE is wrong that how the ADC determines the matter in s 269TAA(1)(b) is of no consequence; the ADC must determine the matter in s 269TAA(1)(b) in the same manner as the Minister would.

4. GE is wrong: Minister may not form views and opinions regardless of statutory framework and in spite of important and obvious matters that have not been investigated

WTC considers that GE is wrong when, in effect, it argues that the Minister may form views and opinions regardless of the statutory framework and in spite of important and obvious matters not being investigated.

GE takes exception at WTC's submission stating that the starting point for the ADC's assessment of arms length matters for multinational PT suppliers is "beyond obvious".⁷ WTC merely considers, to put it in simple terms, that if a thing quacks like a duck and walks like a duck then a person tasked with assessing such matters should reasonably further inquire into whether the thing is in fact, a duck; further, that person should be sceptical of claims that the thing is not a duck.

GE falls back repeatedly on a claim that it is the Minister who must form the relevant views and opinions and that is on the basis of "all available information".⁸ This lift-a-finger-to-the-wind approach appears to abandon the statutory framework, including the statutory framework concerning arms length matters, and invites the Minister (and ADC) to reach a view in spite of important and obvious matters that have not been properly investigated. WTC considers that neither the Minister nor the ADC may do that.

Neither is it the case, as GE alludes, that the ADC must default to a view favourable to a multinational PT supplier in circumstances where "all available information" is not sufficient to make an arms length assessment.⁹ If the ADC is satisfied that information relevant to an arms length assessment has not been made available, export price and normal value could presumably be determined under s 269TAB(3) and s 269TAC(6) respectively.

⁴ GE submission at page 2.

⁵ GE submission at page 2.

⁶ GE submission at page 3.

⁷ GE submission at page 3.

⁸ GE submission at page 3 in sections 2 and 3.

⁹ GE submission at page 3.

5. Review of related party transactions by authorities would lead or require a multinational PT supplier to influence prices between its related entities

GE observes that its related party transactions have been closely reviewed in recent years by customs and taxation authorities¹⁰ but misses the rather obvious inference that such reviews would invariably lead or require a multinational such as GE to exert influence over transfer prices between its related entities. Indeed, it would be a brave assumption that GE wasn't exerting such influence prior to such reviews.

Nonetheless GE tacitly invites the ADC to unquestioningly accept the proposition that GE has, for example, no internal policies, guidelines or directives concerning transfer prices between GE related entities. It appears to WTC that the ADC has, to date, accepted that proposition without question.

At risk of stating the obvious WTC considers that the ADC should as a minimum ask multinational PT suppliers for any internal policies, guidelines or directives concerning transfer prices between related entities. There is every indication that the ADC has not asked for that information.¹¹

Similarly, it would be open to multinational PT suppliers to have group CFOs or similar personnel make statutory declarations to the effect that there were no internal policies, guidelines or directives concerning transfer prices between the group's related entities. If the ADC accepted such declarations as correct, then that may address the s 269TAA(1)(b) issue (although questions may remain concerning whether transactions were arms length in fact).

6. Siemens wrongly claims that arms length matters were carefully analysed

WTC considers that Siemens is wrong when it claims that arms length matters were carefully analysed in verification reports.

Siemens claims that arms length matters were carefully analysed in verification reports.¹² As WTC details in its 26 November 2019 submission such analyses were at best cursory and, in any event, did not use the correct statutory test.¹³ The failure to use the correct statutory test was fatal as it led to the ADC failing to make the inquiries it should in an arms length assessment. Even a careful analysis using the wrong analytical framework will yield an unsound conclusion.

Siemens also claims that WTC gives no reasons or evidence for its submission that the ADC failed to recognise the importance of arms length in Investigation 507.¹⁴ Siemens appears to forget that the ADC published SEF 507 and a number of verification reports detailing its reasons and approach; as those documents evidence, at no point does the ADC recognise the importance of arms length matters to Investigation 507. The reasons why arms length issues are of particular importance in Investigation 507 are set out in section 1 of WTC's 26 November 2019 submission.¹⁵

7. Siemens raises a pivotal question of whether evidence exists of prices being influenced within the Siemens group but declines to answer the question

WTC considers that the Siemens submission raises a pivotal question of whether evidence exists of prices being influenced within the Siemens group. Having raised the pivotal question Siemens then declines to answer it

¹⁰ GE submission at page 3.

¹¹ See generally the exporter and importer questionnaires and visit reports on the EPR for Investigation 507.

¹² Siemens submission at [1].

¹³ WTC 26 November 2019 submission at section 2.

¹⁴ Siemens submission at [1].

¹⁵ See WTC 26 November 2019 submission at section 1.

notwithstanding that Siemens is the only one who could answer it (although others might reasonably infer the existence of such evidence).

Siemens states (emphasis added):¹⁶

... if there is no evidence that the price was influenced in the way referred to in section 269TAA of the Act, then the price cannot “appear to be influenced” in that way.

This statement of Siemens only raises the question as to whether such evidence exists. Siemens does not answer the question when it is the only one who is in a position to definitively do so. WTC considers that the existence of such evidence could be reasonably inferred; such evidence might include internal policies, guidelines or directives concerning transfer prices between the Siemens group’s related entities.

Siemens cites a Siemens verification report stating that a verification team “found no evidence” of certain matters however, as WTC has detailed here and in its submission of 26 November 2019, the verification teams failed to ask the relevant questions and did not apply the correct statutory test.

8. Siemens wrongly confuses the criteria in s 269TAA(1) with a test of arms length in fact

WTC considers that Siemens wrongly confuses the criteria in s 269TAA(1) with a test of arms length in fact.

Siemens complains that WTC’s 26 November 2019 submission (emphasis added):¹⁷

... proceeds from an assumption that sales between related entities cannot be at arms length within the meaning of section 269TAA(1).

WTC observes that this statement flies in the face of judicial opinion on s 269TAA(1). That judicial opinion clearly states that s 269TAA(1) does not define the expression “arms length transactions”, rather it provides that certain sales and purchases are not to be *treated* as arms length transactions.¹⁸

WTC’s further comments on this erroneous confusion of s 269TAA(1) with an arms length assessment are in section 10.

9. Siemens’ explanation of the ADC’s reasoning regarding injury is confused

WTC considers that Siemens’ explanation of the ADC’s reasoning regarding injury is confused.

If, as Siemens claims, the ADC’s findings were not made on the basis that tender valuations were based solely on price¹⁹ then the concluding sentence in passage from the SEF that Siemens quotes simply does not logically follow from the sentences preceding it. WTC considers that its criticism of the ADC’s approach to injury remains valid.

10. Multinational PT suppliers wrongly confuse the criteria in s 269TAA(1) with an assessment of whether transactions are in fact not arms length

WTC considers that the multinational PT suppliers wrongly confuse the criteria in s 269TAA(1) with an assessment of whether transactions are in fact not arms length (in the ordinary sense).²⁰

Rather, as Lehane J observed in *Nordland* (emphasis added):²¹

In the ordinary sense of the term, a transaction of a kind described in any of the paragraphs of s 269TAA(1) might, or might not, be an arms length transaction. Even paragraph (b), which comes closest to the ordinary concept of “arms

¹⁶ Siemens submission at [2].

¹⁷ Siemens submission at [3].

¹⁸ *Nordland Papier AG v Anti-Dumping Authority* [1999] FCA 10 at [17].

¹⁹ Siemens submission at [6].

²⁰ See for example Siemens submission at [1] and [3].

²¹ *Nordland Papier AG v Anti-Dumping Authority* [1999] FCA 10 at [19].

length transaction”, is not, I think, an exception: the fact that there is a commercial relationship between buyer and seller which influences price does not necessarily result in the purchase or sale being other than an arms length transaction in the ordinary sense. *However that may be, the effect of each of the three paragraphs is that, for the purpose of ascertaining normal value, any sale or purchase described by any of the three paragraphs of subs (1) is deemed not to be an arms length transaction.*

Further, s 269TAA(1) allows for no exception: if one of the criteria is satisfied, then the transactions must not be treated as arms length. It follows that, if one of those criteria is satisfied, it would be unnecessary and fruitless for the ADC to make an assessment of whether transactions are in fact not arms length (in the ordinary sense) because the statute requires that the transactions must not be treated as arms length regardless of the outcome of that assessment.

WTC considers that a multinational PT supplier might take some comfort from a finding that prices between entities appear to be influenced by the relationship between those entities (a non-pejorative finding that would surprise nobody) and a subsequent *deeming* of transactions as non arms length. That may be preferable to a fulsome assessment of whether transactions are not arms length in fact; such an assessment would carry the possibility of a finding with adverse impacts outside the anti-dumping system.

In any event WTC observes that treating transactions as non arms length will merely result in calculations that are designed to eliminate any effects of non arms length pricing (ie by calculating deductive export prices). In principal, a multinational PT supplier who sets internal transfer prices as the price that might pertain in an arms length transaction should have nothing to fear from such calculations.

Yours sincerely,

A handwritten signature in black ink that reads "Robert Wilson". The signature is written in a cursive, slightly slanted style.

Robert Wilson
Executive Chairman