CLAYTON UTZ

For Publication

Email 14 January 2020

Mr Reuben McGovern
Assistant Director
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601
investigations3@adcommission.gov.au

Dear Mr McGovern

Anti-Dumping Commission (ADC) Investigation 507
Power Transformers exported from the People's Republic of China

We refer to the submissions made by Wilson Transformer Company (**WTC**) dated 12 December 2019 and 19 December 2019 and respond as follows on behalf of Siemens Ltd and its related entities Siemens Transformer (Jinan) Co. Ltd and Siemens Transformer (Wuhan) Co. Ltd (collectively, **Siemens**).

1. **WTC submissions dated 12 December 2019**

1.1 Parts 6–10 of WTC's submissions dated 12 December 2019 respond to the submission dated 29 November 2019 made by Siemens (**Siemens Submission**).

1.2 Part 6 makes 3 complaints:

(a) First, WTC complains that the analysis of whether power transformer sales were arms length transactions in the verification reports was "cursory". Whilst the ADC is required to give reasons for making factual findings in the Statement of Essential Facts (**SEF**) or in a verification report, brevity or conciseness is not a breach of a duty. As the New South Wales Court of Appeal held in *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)* [2006] NSWCA 282; (2006) 67 NSWLR 341 at 368:

> The obligation to give reasons can be satisfied in a variety of ways. The fulfilment of the obligation is not dictated by the necessity to go to all aspects of the evidence or to give extensive reasons. Brevity is not necessarily a sacrificial lamb to adequacy.

In any event, it is wrong to say that the ADC's consideration of whether Siemens' imports were arms length transactions was "cursory". The consideration given to the issue by the ADC was proper and careful.

(b) Second, WTC reiterates its complaint that the ADC failed to apply the correct statutory test under section 269TAA of the *Customs Act* 1901 (Cth) (**Act**). This complaint is misconceived for the reasons given in the Siemens Submission. Since there is no evidence that the price was influenced by a commercial relationship between the buyer and the seller, or their associates, a fortiori the price cannot "appear" to be influenced by any such relationship.

(c) Third, WTC complains that the ADC did not "*recognise the importance of arms length matters to Investigation 507*". No doubt, the ADC was required to make factual findings, have regard to relevant evidence, and give adequate reasons for its

findings. It did so. The verification reports concerning Siemens clearly show that to be the case. The ADC was not required, however, to recite in the SEF that "*arms length issues are of particular importance*".

1.3 Part 7 claims that there might be evidence that sale prices were influenced by a commercial relationship between Siemens entities or their associates, even though the ADC verification team found no such evidence. Parts 8 and 10 claim that Siemens' imports might not be arms length transactions in fact, even if they are not deemed not to be arms length transactions under section 269TAA(1) of the Act.

1.4 During the verification visit, Siemens produced considerable evidence establishing that Siemens-internal transactions are conducted on arms length terms. In particular, Siemens produced on a confidential basis:

(a) its consolidated regulations and guidelines regarding Siemens-internal business transactions;

(b) its Internal Business Procedures regarding special arrangements for cross-border business transactions and regarding payment terms for Siemens-internal business;

(c) a template agreement used for Siemens-internal transactions; and

(d) the executed Memorandum of Understanding between Siemens Ltd and Siemens Transformer (Jinan) Co. Ltd for FY2018 pursuant to which power transformers were imported to Australia from China.

1.5 As regards Parts 7, 8 and 10 of WTC's submissions, and merely for the sake of completeness, Siemens confirms that:

(a) all imports by Siemens Ltd from Siemens Transformer (Jinan) Co. Ltd and Siemens Transformer (Wuhan) Co. Ltd are arms length transactions;

(b) the prices of such imports are not influenced by a commercial or other relationship between Siemens entities or their associates;

(c) Siemens has no evidence that such imports are not arms length transactions (whether in fact or whether by virtue of section 269TAA(1) of the Act);

(d) the ADC verification team conducted a thorough verification process and its findings are consistent with (a), (b) and (c) above; and

(e) the ADC has correctly found that Siemens imports are (both in fact and under section 269TAA(1) of the Act) arms length transactions.

1.6 Finally, Part 9 again misunderstands the structure and reasoning of Part 8.4.2 of the SEF. It refers to a passage of the SEF quoted in the Siemens Submission at [6]. WTC assumes that the passage was intended as a syllogism. Obviously, however, the final sentence of the passage was intended to be read in the context of Part 8.4.2 and the SEF as a whole. In truth, the ADC found that, in the circumstances of Projects 2, 3 and 4, a price disparity exceeding the threshold made it unlikely that WTC would have won the tender in the absence of dumping. That finding does not entail an assumption that the tender was evaluated solely based on price.

2. **WTC submissions dated 19 December 2019**

2.1 Siemens responds to WTC's numbered submissions dated 19 December 2019 as follows.

"*1. The ADC failed to recognise the nature of injury suffered by WTC, loss of commercial opportunities*"

2.2 WTC makes an argument that the loss of a chance it had of winning a tender can be material injury caused by dumping, even if WTC probably would not have won the tender in the absence of dumping.

WTC is wrong to suggest "*it is settled law that loss of chance or opportunity is to be regarded as actual loss*" - relying on and citing a contracts textbook and High Court authority confined to the domain of contract law. The abstract and high-level conceptual analogies to other areas of law drawn in WTC's submissions are not useful in the specific context of an anti-dumping investigation. In an anti-dumping investigation under Part XVB of the Act, it is wrong to say that material injury to an Australian industry has been caused (for the purpose of section 269TG(1)(b)(i) of the Act) merely because the Australian industry has lost a chance that it probably would never have enjoyed even in the absence of dumping. That is because:

(a) the Minister could never be "satisfied" that material injury was "caused" unless it was, at the very least, likely that the dumping occasioned the loss of a better than 50% chance — otherwise the required state of satisfaction or the required proof of causation, or both, would be lacking;

(b) the loss of a chance that is unlikely to ever have eventuated is an immaterial injury, or a negligible injury for the purpose of section 269TDA(13) of the Act, or both; and

(c) a determination that dumping has caused material injury because it probably caused the loss of a less than 50% chance is likely to be a determination based on "conjecture" or "remote possibility" and therefore impermissible under section 269TAE(2AA) of the Act.

"2. The ADC causation analysis is myopic, static and ignores likely second order effects"

2.3 There are essentially 2 complaints made in this section of WTC's submissions.

2.4 The first complaint is that — even though WTC would not have won, in the absence of dumping, any of the tenders that were in fact won by Chinese exporters — WTC would nonetheless have suffered injury. That injury is said to be through the "*corrosive effect of dumping on the competitive process*" or the effect of dumping on "*WTC's opportunity to compete fairly*".

2.5 Even if dumping affected "*the competitive process*" or "*WTC's opportunity to compete fairly*" as alleged by WTC, that would not amount to material injury if, as the evidence shows, the dumping made no practical difference to tender outcomes. WTC's suggestions that it might win more bids over time are contrary to the evidence before the ADC. They are also conjecture and therefore cannot be treated as material injury under section 269TAE(2AA) of the Act.

2.6 The second complaint is based on a misunderstanding or mischaracterisation of the price depression analysis at Part 8.5.2 of the SEF. The point made at Part 8.5.2 is that dumping is less likely to cause price depression if it takes the form of confidential tenders. This unobjectionable remark does not assume, as WTC claims, that all injury is caused "*only*" as a "*direct response*" to a "*known dumped price in the context of a single bid*". Instead, it assumes, correctly, that when price depression is caused by dumping, that tends to be because the Australian industry is aware (to some extent and in some way, and not necessarily in the context

of a single bid) of the prices of its competitors (including competitors that are not dumping). Naturally, that awareness is less likely to occur in the power transformer market than in a market where competitors' prices are commonly known.

"*3. The ADC's framework of analysis was applied inconsistently and to WTC's prejudice*"

2.7 The essence of this complaint seems to be that, because the ADC found that WTC would not have won the tender where WTC bid prices exceed dumping-adjusted bid prices by more than the threshold, it follows that the ADC should also find that WTC would have won the tender where the difference was less than the threshold.

2.8 This misconceives the purpose of the threshold, which is to distinguish projects where WTC's price was so high that it would have lost the tender on that account. Conversely, where the WTC price was within the threshold, it cannot be assumed that WTC would have won the tender. Instead, it is a case where, as the SEF describes it, "*it is possible to assume that WTC may still win a tender despite being the higher priced bidder*". The particular bids should be considered on a case-by-case basis, taking into account both price and other factors, to determine whether WTC would have won. This methodology was applied consistently throughout the SEF.

2.9 WTC makes particular criticism of the SEF's analysis of Project 1. The cogency of that analysis ultimately depends on the confidential evidence relied on by the ADC. If, as appears to be the case, the evidence shows that WTC would have lost the tender due to non-price factors in any event, then it cannot have suffered injury as a result of dumping in relation to Project 1.

"*4. Siemens financial data cannot be relied upon*"

2.10 WTC complains that "*Siemens Jinan has very substantially revised its 2017 results*" and "*Siemens has not filed results for Siemens Wuhan for 2017 and 2018*" and that Siemens' financial data is unreliable. These complaints are wrong.

2.11 Siemens confirms that:

(a) despite what is said in WTC's submissions, Siemens Jinan has not revised its 2017 results;

(b) despite what is said in WTC's submissions, Siemens Wuhan has filed its 2017 and 2018 results;

(c) Siemens provided the same audited financial statements for 2016, 2017 and 2018 for Siemens Jinan and Siemens Wuhan to the ADC that were filed with the Chinese Companies Authority;

(d) those financial statements give a true and fair view of the company's financial position at year end and of its financial performance for the year then ended; and

(e) those financial statements have been audited by Ernst & Young (a reputable international firm of accountants) and verified by the ADC, and there is no proper basis on which to say that the financial data produced by Siemens is unreliable.

3. **Conclusion**

3.1 Given the findings made in the SEF and the matters set out in these submissions, the ADC should formally finalise the termination of the investigation in relation to Siemens Jinan and Siemens Wuhan.

Yours sincerely

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

Tom Gardner, Lawyer
+61 2 9353 4212
tgardner@claytonutz.com

Our ref: 11276/19979/80204863