

FOR PUBLIC RECORD

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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
Wilson Transformers Company's Further 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 comments on the submission lodged by Wilson Transformer Company Pty Ltd (**WTC**) dated 19 December 2019 (**WTC Further Submission**).

1. Alleged loss of commercial opportunity

WTC has submitted that it has suffered loss in the form of loss of commercial opportunity. WTC reaches this position by drawing a parallel between loss of chance/opportunity recognised as loss at common law and an assertion that it was deprived of tender opportunities by alleged dumping.

Given that WTC did in fact lodge tenders against alleged dumped imports, the suggested loss of opportunity must comprise of:

- a) the difference between its actual likelihood of a successful tender and any increased likelihood of success in the absence of dumping; and
- b) (assuming Wilson was successful), the likelihood of that project being profitable.

There are significant flaws with the WTC submission being:

- a) The supposed opportunity could not be given or taken away by WTC's competitors. Rather, the chance was given by the Australian customer. Any alleged dumping did not result in WTC losing its chance to tender. There could be cases where dumping causes an Australian industry to lose sales. However, an inquiry into lost sales is not the same as an inquiry into loss of chance/opportunity. In this Investigation, the ADC has rightly examined whether any alleged dumping caused lost sales and found that it did not. Changing the identification of injury to "loss of opportunity" does not cure this deficiency. Rather, it further highlights the causation problem faced by WTC. As exporters cannot withdraw the relevant opportunity, exports by those exporters cannot have caused WTC's newly identified alleged injury;
- b) Before dumping duties can be imposed, there must be a finding of "material injury". This is a very different standard to contract law where nominal damages can be awarded if such damages result from a breach. Dues to this, it is possible for nominal contractual damages to be awarded for loss of chance. However, it would be a legislatively incorrect

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- leap to apply principles from contractual case law to a legislative scheme that requires a finding of material injury.
- c) While common law does recognise loss of chance as damages in some instances, the Court must still consider issues of causation and remoteness of damage. This is the same process that the ADC has embarked upon and it has found that the alleged dumping did not cause loss to WTC.
 - d) Courts will not award damages for loss of chance where the chance is so dependent on the unrestricted volition of another, or so speculative that it is impossible to say that there is any assessable loss resulting from the breach. In the Investigation, the business opportunity said to have been lost is a sale to an Australian customer. The party fully in control of the awarding of that sale is the Australian customer. That is, the occurrence of the so called chance, is fully dependant on the unrestricted volition of the Australian customer. The ADC has correctly looked at what factors influenced that customer and could not say that any alleged dumping resulted in the loss of sales to WTC.

The reality is that contractual law concepts of loss of chance apply most often where one party agrees to confer a chance upon another and then in breach of that agreement, denies the other party of that chance. This simply does not apply in a dumping context. Exporters did not take away any chance belonging to WTC.

If WTC's material injury is the business opportunity associated with tendering, then it needs to be considered to what extent is WTC the author of its own material injury. The ADC is able to determine in what instances WTC elected not to submit a tender therefore causing its own loss of opportunity.

Further, by seeking to categorise the loss suffered by WTC as loss of chance, WTC defines its loss as merely speculative and, which due to all the factors that could impact the occurrence of that chance, the alleged loss has a remoteness which defies categorisation as material injury.

2. Causation analysis

The WTC criticism of the ADC causation analysis ignores the unique nature of the Investigation. The ADC was faced with investigating a relative small volume of sales of bespoke equipment where purchasing decisions were based on a variety of factors. In this context, it was entirely appropriate for the ADC to investigate each tender and analyse on a project by project basis, whether dumping caused material injury to WTC.

This allowed a factual analysis. This analysis should not be replaced with WTC's general speculation that it would win a fair share of opportunities if it did not have to compete with dumped exports. This is especially so when the ADC's factual analysis showed that WTC did not lose a single project to dumped exports. In these circumstances, what is the basis for WTC's assertion that it would win more business in the absence of dumped exports?

WTC adopts similar flawed reasoning to support its criticism of the ADC price depression analysis. WTC makes claims that the presence of dumped prices in the market becomes apparent over time and causes WTC and other non dumping suppliers to respond by dropping prices. Such claims are appropriate for commodity products where competitor pricing is well known and price is the dominant purchaser consideration. However, the ADC investigation has shown that in respect of power transformer there is a very low level of industry knowledge regarding both competitor pricing and which competitor made the successful bid. The ADC made its causation finding based on facts obtained from the Investigation. These findings of what in fact happened, should not be replaced by WTC's general speculation about what might happen in the future.

3. Application of the ADC analysis

GE disagrees with the WTC claim that the ADC inconsistently applied its framework of analysis. The framework of analysis was consistently applied according to the following rules:

- a) if the winning price adjusted for dumping exceeded the WTC price by a certain amount, it was considered that the adjusted price would still have been successful without further analysis;
- b) if the winning price adjusted for dumping did not exceed the WTC price by a certain amount, the ADC reviewed the project further to see if there was evidence that dumping caused material injury to WTC.

In conducting its analysis of projects the ADC could not identify clear evidence that in the absence of dumping the WTC bid would have been successful. WTC submits that for projects 1 and 6 it was open to the ADC to find that dumping caused loss. However, it was also open to the ADC to find that a party other than the WTC would have been successful. In this respect, at the very least the exported good (adjusted price) was the lower priced good. Moreover, the ADC (relying on information from Australian customers) are much better placed than WTC to evaluate the impact of non-price factors.

While WTC puts forward arguments in support of its view that it would have won projects 1 and 6, the fact that the ADC does not find these arguments more compelling than the position of exporters, does not mean that the ADC has acted inconsistently. Rather, it would be inconsistent of the ADC to identify a pricing threshold which warranted close consideration of non-price factors, and then abandon that close consideration merely because WTC presented arguments that supported its own position.

4. Arms-length transactions

GE has provided the ADC with considerable confidential evidence both in its exporter/importer questionnaire responses and during verification visits that demonstrates that GE internal transactions are conducted on arms-length terms. How GE sets its price is, by its nature, commercially confidential and GE does not intend to compromise that confidentiality in response to unfounded allegations by WTC. For the sake of clarity, GE makes the following points:

- a) the pricing of all transformers purchased by GE AU from GE Wuhan is not influenced by the relationship between the parties;
- b) GE's pricing outcomes are determined by set methodologies which apply equally to all transformer sales, regardless of whether those sales are to GE AU or a third party;
- c) the claims in paragraphs (a) and (b) above have been reviewed and verified by the ADC during its verification visits. Any perceived brevity of ADC reporting on this issue is consistent with the ADC commitment to the confidentiality of commercially sensitive information and should not form the basis for any view as to the thoroughness of the ADC investigation.

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Please contact us if you would like to discuss these issues further.

Yours faithfully
Hunt & Hunt

A handwritten signature in black ink that reads "RWiese".

Russell Wiese
Principal

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