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Mr Matthew Williams
Director, Investigations 3
Anti-Dumping Commission

Our ref: RXW/RXW
Matter no: 9627025

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

Dear Mr Williams

Investigation 507 – Power transformers exported from the People's Republic of China

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**). We refer to ADRP Decisions No. 122 and 123 (**ADRP Decision**). The purpose of this submission is to address issues that have arisen out of the ADRP Decision.

1. ADRP Decision

We understand the following to be the findings set out in the ADRP Decision:

a) export sales between related companies were arms length transactions and the decision reached by the ADC on the application of section 269TAA(1) of the *Customs Act 1901* (**Act**) was correct;
b) based on the dumping margins calculated during the Investigation, Wilson Transformer Company Pty Ltd (**Wilson**) was more likely than not to have been the successful tenderer for a particular project (**Project X**) (paragraph 94);
c) the injury caused by the loss of Project X was not negligible (paragraph 96);
d) Wilson was not likely to the successful tenderer in respect of projects 1 – 7 (as described in the Termination Report 507 (**TER Report**)) (paragraph 94);
e) the ADC was entitled to accept that the Wilson perceived lack of experience in high MVA projects was a significant factor in Wilson being unsuccessful in certain tenders (paragraph 91);
f) the Panel Member could not assess whether the loss of Project X would amount to "material injury" (paragraph 97)
g) factors relevant to whether Wilson suffered material injury as a result of dumping included the success of tenders involving undumped goods by Siemens Jinan and Wuhan and ABB Chongquing (paragraph 97);
h) dumping did not cause Wilson to suffer loss in the form of price suppression (paragraphs 99 and 100).

Please let us know whether the ADC disagrees with any of the above conclusions as it may impact the submission that we make.

2. Loss of Project X due to dumping

2.1 Decision regarding Project X was incorrect

The Panel Member did not publicly disclose why he formed the view that Wilson would more likely than not have been the successful tenderer for Project X in the absence of dumping. To the extent that he relied on claims by Wilson that it had a 95% chance of winning Project X in the absence of dumping, the decision is based purely on Wilson's self-serving speculation and clearly does not meet the legislative requirement that a finding of causation and material injury be based on facts and not merely on allegations, conjecture or remote possibilities (Section 269TAE(2AA) of the Act). GE is particularly concerned that the panel member categorised the factors affecting the tender decision as "imponderables". The relevant factors were not impossible to assess. GE has provided objective information to the ADC that supports the non-price reasons why it was selected ahead of Wilson [redacted]

GE continues to rely on its previous submissions regarding Project X and believes that non-price factors were instrumental in the decision to award Project X [redacted]

[redacted] **[Discussion of Project X]**

3. GE dumping margin

GE maintains that the ADC has incorrectly calculated its dumping margin.

3.1 ADC position is contrary to direction of the ADRP

As set out in our submission dated 7 November 2020, the approach of the ADC is directly contrary to recent directions by the ADRP.

As communicated to the ADC by the ADRP in letters dated 4 July 2019 and 5 September 2019, it is the view of the ADRP 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*". (**ADRP Direction**)

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.

On page 44 of the TER Report 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 gods under section 269TAC(1).*" The ADC used this finding to justify using a constructed normal value under section 269TAC(2) if the Act. This is the exact issue the subject of the ADRP Direction.

In section 6.8.4 of TER Report the ADC acknowledged GE's above argument. However, the ADC provided no justification for its continued refusal to follow the ADRP Direction. Given that decisions of the ADRP are taken to be decision of the ADC (section 269ZZV of the Act) there is no justification for the ADC to ignore the ADRP Direction. The ADC's failure to address this issue will simply result in an application for review by GE to the ADRP with the predictable result that the ADC will be directed to reinvestigate the matter in accordance with the ADRP Direction.

We note that in the second preliminary reinvestigation report to the ADRP for Investigation 487 (**Wind Tower Report**) (the subject of the ADRP Direction) the ADC responded to the ADRP Direction, not by following that direction, but by instead making a finding that there were in fact sales of like goods in the market of the country of export and that normal value could be calculated under section 269TAC(1) of the Act.

The ADC has not made a similar finding in respect of power transformers. This reflects the bespoke nature of power transformers and the extremely wide nomination of the goods under consideration by Wilson. It is entirely probably, and was the finding by the ADC, that the power transformers designed and sold by GE in China would not be like goods to the power transformers it exported to Australia.

Given that the ADC has maintained that there is an absence of sales of like goods so as to enable the determination of normal value under section 269TAC(1) of the Act, the ADC no longer has the option of constructing GE Wuhan's normal value using a profit calculated in accordance with regulation 45(2) of the *Customs (International Obligations) Regulations 2015* (**Regulations**). Rather, the correct approach, is for the ADC to calculate the profit component based on the actual profit realised by GE Wuhan on its domestic sales of the same general category of goods under regulation 45(3)(a) of the Regulations.

[redacted]

[Discussion of impact of changed dumping margin]

3.2 Ordinary course of trade test not applicable to power transformers

GE maintains that the ordinary course of trade (**OCOT**) test is not applicable to power transformers. In this respect GE repeats its submission in part 4 of our letter dated 31 July 2019.

The ADC has in its past investigations (219 and 383) stated the correct position that the uniqueness of each power transformer means that the recovery test contemplated by the OCOT cannot be conducted. This is because the recovery test requires the calculation of the "*weighted average cost of such goods over the investigation period.*" This test requires the calculation of the cost of numerous goods over a period of time. This approach is not possible with power transformers as no two transformers are the same and it is not being reasonably practicable to make adjustments to account for those differences.

The ADC has in the Wind Tower Report attempted to argue that a weighted average cost test can be applied at a single model level. Under this approach, there is no comparison with other projects or models for the purpose of the recovery test. Rather, the recovery test is conducted by reference to the one model/project. Clearly, the application of the recovery test in this manner does not involve any "weighted average of costs" of such goods. Rather, there is only one data item so there can be no averaging or weighting.

The ADC was correct in investigations 219 and 383 to maintain that a weighted average test could not be applied to power transformers. The ADC took this view as the nature of "weighted average costs" requires the ADC to consider multiple goods (at least 2). We note, not

unsurprisingly, that the Macquarie Dictionary defines "average" as "*the result of dividing the sum of two or more quantities by the number of quantities*".

Interpreting the phrase "weighted average" according to its natural meaning is consistent with the approach of the WTO.

In EC — Bed Linen[1], the Appellate Body made clear that the phrase "weighted average" required more than one set of data. The Appellate Body stated:

> *"To us, the use of the phrase 'weighted average' in Article 2.2.2(ii) makes it impossible to read 'other exporters or producers' as 'one exporter or producer'. First of all, and obviously, an 'average' of amounts for SG&A and profits cannot be calculated on the basis of data on SG&A and profits relating to only one exporter or producer. Moreover, the textual directive to 'weight' the average further supports this view because the 'average' which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. In short, it is simply not possible to calculate the 'weighted average' relating to only one exporter or producer … In our view, then, the use of the phrase 'weighted average', combined with the use of the words 'amounts' and 'exporters or producers' in the plural in the text of Article 2.2.2(ii), clearly anticipates the use of data from more than one exporter or producer. We conclude that the method for calculating amounts for SG&A and profits set out in this provision can only be used if data relating to more than one other exporter or producer is available."*

GE maintains that a "weighted average" test is required by the OCOT test and that a "weighted average" test requires more than one set of data. As it is not reasonably practicable for multiple costs of power transformers to be compared, the OCOT test cannot be applied to power transformers.

This outcome is envisaged by the legislation and the result is that the profit component should be determined under regulation 45(3)(a) of the Regulations.

3.3 Transaction was not in the ordinary course of trade

GE repeats its submissions in section 5 of our letter dated 31 July 2020 that the [redacted] **[CUSTOMER NAME]** transformer sale was not a transaction in the OCOT. In making its determination that the sale was in the OCOT, the ADC appears to have focused on the negotiating conditions between GE and its customer. The ADC notes that the transaction was the result of genuine negotiation and that other parties could have supplied the relevant transformer. The ADC ignores the following factors which take the transaction outside of the ordinary course of trade:

a) while the transaction could have been the subject of genuine competition, the fact is that it was not the subject of competition. Having supplied the existing transformers to the client and given the first (and only) opportunity to demonstrate an ability to satisfy the [redacted] **[TECHNICAL REQUIREMENT]** requirement, GE's bid was not subject to competition;
b) the fact that the supply could have been subject to competition and was not, is part of what makes the transaction not in the OCOT;

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[1] WT/DS141/AB/R, EC – Bed Linen, para 74-76, pages 23-24

c) the level of profit on the transaction was nearly [redacted] as much as on the next most profitable domestic transaction for Wuhan [redacted] **[GE PROFIT MARGIN]**
d) the ADC will see from its own data that the profit on the transaction far exceeded the profit made by other Chinese suppliers on domestic supplies of transformers during the relevant period;
e) while the ADC claims that other parties could have satisfied the [redacted] **[TECHNICAL REQUIREMENT]** requirement, it ignores the reality that no other party was asked to demonstrate this. This was presumably due to GE's role as the supplier of the original power transformers. GE is not aware of any other Chinese transactions where it has had no competition.

It is for the ADC to establish that the transaction was in the OCOT for it to have the legislative right to calculate profit in accordance with regulation 45(2) of the Regulations. 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"*[2]
>
> 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."*[3]

Sales of transformers in the OCOT in China, as in Australia, are subject to competition (both on design and price). While the [redacted] **[CUSTOMER NAME]** Transformer could have theoretically been subject to competition, it was not. This meant that the transaction was not made under conditions and practices that were representative of sales of transformers by GE. GE believes that the reason for the absence of competition was the unique requirements of the [redacted] **[CUSTOMER NAME]** Transformer. The [redacted] **[TECHNICAL REQUIREMENT]** requirement on its own may not have made the sale abnormal. However, it created circumstances which produced an absence of competition and a level of profit which was far from normal for sales of transformers in China.

GE submits that the profit component of its constructed value cannot be calculated in accordance with regulation 45(2) of the Regulations due to the absence of sales in the OCOT.

4. Material injury

The ADC has found that Wilson has suffered material injury. However, it found that material injury was not caused by the dumping of power transformers exported from China. A part of the ADC's decision was that it could not be certain that in the absence of dumping Wilson would have won Project X.

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[2] At paragraph 139
[3] At paragraph 140

The aspects of the ADC's decision overturned by the ADC were that

a) based on the dumping margins calculated during the Investigation, Wilson was more likely than not to have been the successful tenderer for Project X; and
b) the injury caused by the loss of Project X was not negligible (paragraph 96);

It is necessary for the ADC to now determined whether the loss of Project X alone resulted in Wilson suffering material injury.

In the circumstances of this Investigation it is crucial that the ADC ensure that injury attributable to other factors not be attributable to the loss of Project X. Importantly, the ADC needs to take in account that:

a) Wilson's claimed injury had been occurring many years prior to the loss of Project X;
b) the impact of tenders lost by Wilson during the investigation period, other than Project X;
c) Wilsons' own claims as to what has caused it material injury;

Additionally, in assessing whether the size of the injury is material, the ADC must consider whether the injury suffered as a result of the loss of a single tender, is greater than what would ordinarily occur in the usual ebb and flow of business.

4.1 Cause of loss

(a) General rules

Section 269TAE(2) of the Act makes clear that when assessing whether dumping caused material injury, the ADC must take into account injury caused by other factors. In *ICI Australian Operations Pty Ltd v Donald Fraser and Others* [1992] FCAFC 564 the Federal Court held:

> *"The provisions of the subsection, read with s.269TG(1), make clear that the subject matter of s.269TG(1) is not material injury to an Australian industry in the abstract, but material injury causally connected to, "by reasons of" or "because of" dumping."*
>
> *"Where the Australian industry under consideration has suffered detriment from a number of causes, it will be necessary for the Minister to be satisfied that the industry has suffered detriment sufficient to meet the description "material injury" within the meaning of the legislation in consequence of the dumping of goods that have been exported to Australia, and to quantitively separate that material injury from detriment caused by other factors."*
>
> *"Whether the Australian industry has suffered detriment from a number of probable causes the section requires a determination whether there was separate material injury, or any material incremental injury caused by the dumping over and above detriment caused by other factors."*

The above is consistent with findings by WTO panels considering the issue. As an example, it was held in *US – Hot-Rolled Steel* that the investigating authority must identify factors other than dumping and:

> "*appropriately assess the injurious effects of those other factors … such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports … in the absence of such separation and*

distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury ..."[4]

(b) Timing

It is clear that the injury claimed to have been suffered by Wilson was caused by factors other than the loss of Project X. As a starting point, it is crucial to consider when Project X was awarded. We understand that Project X was awarded in May 2018 with the transformers being delivered in 2019 and 2020. On page 25 of its application in respect of the Investigation, Wilson claims that it had been suffering price and volume effects from dumped Chinese transformers from about 2013. Figure 13 on page 74 of the TER Report shows that Wilson has been unprofitable since at least 2014.

By Wilson's own admission it has been suffering reduced market share, sales and profits for many years prior to May 2018. While it attributed this injury to dumped transformers exported from China, the TER Report and the findings of the ADRP show that this claim was incorrect.

Specifically we note the ADC's findings relating to market share are based on the years 2014 – 2018. To the extent that the ADC's calculation are based on physical delivery of transformers, the transformers the subject of Project X were delivered in 2019 and 2020. Project X cannot contribute to loss of market share in 2018 in these circumstances. To the extent that the ADC's figures are based on amounts invoiced, amounts for Project X were not invoiced until 2019 and 2020. Again, Project X cannot be responsible for the loss of market share set out in figures 10 and 11.

Wilson cannot now claim that the injury it has suffered since 2013 has been caused by the loss of a single tender in mid-2018. The material injury suffered by Wilson has clearly been caused by factors existing from 2013/14 onwards.

(c) Loss caused by other exports (both dumped and undumped)

In section 8.1 of the TER Report the ADC set out the view that injury to the Australian Industry as a result of dumped goods from China was negligible due to:

- *WTC's largest competitors in terms of tenders lost were Siemens Jinan and Siemens Wuhan. Both exporters were found not to be dumping during the investigation period;*
- *Analysis of won and lost tenders, as well as responses from purchasers, show that the lowest priced bidder is not always successful, and non-price factors are often considered to be as important as price, in tender evaluations for power transformers; and*
- *Analysis of tenders lost by the Australian industry to Chinese manufacturers found to be dumping indicates that, even in the absence of dumping, the Australian industry is unlikely to have won these tenders based on the submitted bid prices*

The above analysis stands other than that the third point is subject to the finding of the 68 tenders reviewed, one would probably have been won by Wilson in the absence of dumping.

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[4] Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R

Section 8.4 of the TER Report sets out the ADC's review of 68 tenders. From this review the following is submitted:

a) of the 68 tenders, only 27 were won by Chinese manufacturers where Wilson had submitted a formal bid. This means that for the remaining 41 tenders either:
   a. Wilson won the tender;
   b. Wilson did not even submit a bid; or
   c. the tender was won by a non-Chinese exporter or another member of the Australian industry.
b) the ADC must isolate the loss caused from Wilson either losing the above mentioned 41 tenders or winning them at a price that was not profitable[5];
c) of the remaining 27 projects, 19 were won by bids that did not involve dumping;
d) of the remaining 8 projects, the ADRP found that Wilson would not have won 7 of these projects in the absence of dumping.

The ADC must review the loss caused by the 68 tenders it reviewed and ensure that the loss caused by those tenders is not in any way attributed to the loss of Project X.

In doing so we draw your attention to the claims made by Wilson in section A-9 of its application in respect of the Investigation:

a) "*the primary cause of price suppression in the Australian market is due to Chinese imports*" –Wilson is clearly referring to each of the 27 projects lost to Chinese exporters and not Project X alone.
b) "*Due to the increasing Chinese imports from 2012/13, the injury caused due to dumped imports has continued the injury originally started by imports from other countries. This has been particularly difficult for WTC due to the decline in the total Australian market*" - Wilson makes clear that it is the price of imports from 2012/13 that has caused its injury, together with a decline in the total Australian market.
c) "*...the financial performance of WTC PBU declined from 2012/13 and has continued to be difficult from that time.*" It is not doubted the Wilson has been in financial difficulty since 2012/13. However, it is clear that the cause of its difficulties are not a single lost tender in May 2018.
d) "*Siemens, with product supplied from China, has been particularly active, focussing on the Liquified Natural Gas and renewable sectors, key sectors of the market with reasonable volumes*". The ADC identified that Siemens was Wilson's main competitor. The main cause of loss to Wilson is likely to be Siemens. However, Siemens was not found to be dumping.

To the extent that Wilson suffered material injury in the form or price suppression or price depression we note that the ADRP upheld the ADC's finding that such injury was caused by the successful Siemens tenders (paragraph 100 of the ADRP Decision) and not dumping.

4.2 Business was unprofitable

To the extent that the claimed injury resulting from the loss of Project X is loss of profits, figures 12 and 13 of the TER Report shows that Wilson had not, from at least 2014, been producing profitable power transformers. If Wilson had won Project X, the findings of the ADC suggest that

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[5] We note that the ADRP dismissed Wilson's claim that dumping of Chinese exports had caused it to suffer injury in the form of price suppression.

it is probable that the transformer would have been produced and sold at a loss. Any claims to the contrary by Wilson need to be supported by compelling objective evidence given the ADC's previous findings on Wilson's profitability.

4.3 Normal ebb and flow of business

Section 269TAE of the Act does not define "material injury". In the April 2012 Ministerial Direction on Material Injury (**Direction**) it was stated that there is no threshold amount which will be determinative of material injury. However, it was stated that the injury must be greater than is likely to occur in the normal ebb and flow of business.

Project X constitutes the loss of a single tender. The ADC will have available the following data:

a) the number of tenders during the investigation period;
b) the number of tenders where Wilson was unsuccessful;
c) the number of tenders where Wilson elected not to bid;

It is submitted that it is appropriate to review the loss of a single tender in the context of the above figures. Losing tenders is part of the usual business of a transformer manufacturer. It reflects that Wilson does not have a monopoly in the market. GE's own success rate with Australian tenders is [redacted] **[GE TENDER SUCCESS RATE]**

Figure 9 on page 70 of the TER shows how regularly Wilson is unsuccessful in its tender bids.

While Wilson may claim that Project X is a tender that it did not expect to lose, it has by own admission claimed only a 95% chance of winning in the absence of dumping.[6] While the figure is expected to be self-serving and overly optimistic, Wilson still concedes that in the usual ebb and flow of business and in the absence of dumping, it would still expect to lose Project X on some occasions. We note that the ADRP only put the likelihood of Wilson winning Project X in the absence of dumping as "probable".

Both Wilsons' own estimate, and the ADRP use of the term "probable", is consistent with the loss of a single tender being within the range of what can, and does generally, occur in business. The loss would be disappointing, but not the type of loss that is outside of what can be expected in a competitive industry.

Naturally, had the ADC or ADRP found that Wilson was regularly losing tenders due to dumping, the culmination of those losses would have taken the level of loss outside of the limits of what could be expected in the usual ebb and flow of business and result in injury that was material.

To put the loss of a single project in context, the ADC found that Wilson elected not make a formal bid for 6 projects and was unaware of another 6 projects. These project for which Wilson had no involvement are 1200% greater in volume than the projects lost to dumping.

To find that the loss of a single tender is not within the normal ebb and flow of Wilsons' business would require a finding that Wilson should win every tender. It would mean that there could be no injury that is within the usual ebb and flow or business and deprive the direction from the Minister of any meaning.

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[6] Page 19 of attachment 2 to the Wilson's application to the ADRP

4.4 Ultimate finding by the ADC

Section 8.6 of the TER Report is headed "Material Injury" with the ADC finding:

"*In the analysis of 68 tenders, the Commission concluded overall that injury was not caused by dumping. Most of the tenders lost were to undumped imports, or due to non-price factors.*"

The findings of the ADRP do not change the accuracy of the above statement. One of 68 tenders were found to be lost to dumping. This is still consistent with the finding that "Most of the tenders lost were to undumped imports, or due to non-price factors".

The legislation imposes a threshold level of injury before Australia can impose dumping duties. That threshold is not merely injury, but material injury. It is submitted that the loss of the single sale cannot constitute material injury.

As the ADRP found that the only loss suffered by Wilson as a result of dumping was the loss of a single transaction, the correct outcome remains the termination of the Investigation due to dumping not resulting in material injury.

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

Yours faithfully
Hunt & Hunt

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