CLAYTON UTZ

For Publication

Mr Geoff Gleeson
Director, Operations 1
Anti-Dumping Commission
5 Constitution Avenue
CANBERRA ACT 2600

operations1@adcommission.gov.au

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Dear Mr Gleeson

Investigation 219
Alleged Dumping of Power Transformers exported from the People's Republic of China, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam

Response to Issues Paper 2014/01
Siemens China

We refer to Issues Paper 2014/01 (**Issues Paper**) published by the Anti-Dumping Commission (**ADC**) on 27 May 2014.

The Issues Paper outlines the background to and calls for comment on the ADC's proposed position in relation to the following issues:

a. goods and like goods;
b. identification of which export shipments should be used for dumping margin calculations;
c. determination of profit for constructed normal values;
d. calculation of a credit adjustment for differences between domestic and export sales; and
e. exchange rates used for converting currencies in dumping margin calculations.

The comments of interested parties will be considered by the ADC and assist it to formulate its statement of essential facts.

Our clients have reviewed the ADC's discussion of the above issues and the ADC's proposed position on each. Having assessed the relevance of those issues to the export of power transformers from Siemens China to Australia, our client wishes to comment in relation to the following issues only:

a. The calculation of profit for constructed normal values; and
b. The calculation of a credit adjustment for differences between domestic and export sales.

Siemens supports the ADC's proposed position in relation to the determination of profit for constructed normal values and the calculation of credit adjustment for differences between domestic and export sales. The fact that our client does not comment on other matters in the Issues Paper is not to be taken as acceptance or acquiescence of the ADC's proposed position.

1. **Calculation of profit for constructed normal values**

General

1.1 Pursuant to 269TAC(2)(c) of the *Customs Act 1901* (Cth) (**Act**), the normal value of the goods when constructed, is the sum of:

(a) cost of production or manufacture of the (exported) goods; and

(b) on the assumption that the goods had (instead of being exported) been sold on the domestic market in the *ordinary course of trade*, amounts for the administrative selling and general costs and **the** profit on those sales.

1.2 The Act does not prescribe the method for calculating the profit that is to be allocated within the construction of the normal values under section 269TAC(2)(c)(ii).

1.3 Regulation 181A of the *Customs Regulations 1926* (Cth) (**Regulations**) provides the mechanism by which the Minister must, for subparagraph 269TAC(2)(c)(ii), work out an amount (***the amount***) to be ***the*** profit on the sale of goods.[1]

1.4 Regulation 181A is hierarchical. The preferred approach to calculating profit is specified under regulation 181A(2), which states that the Minister must, **if reasonably possible**, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods **in the ordinary course of trade** (**OCOT**).

1.5 The definition of sales that are regarded to be in the 'ordinary course of trade' is provided (indirectly) pursuant to the terms of section 269TAAD of the Act. That provision defines sales that are **not in the ordinary course of trade** as sales of goods at a loss occurring in substantial quantities and which do not provide for the recovery of costs within a reasonable period.

1.6 The term 'if reasonably possible' in regulation 181A(2) is critically important. If it is not reasonably possible to calculate profit in accordance with the terms of subparagraph (2) of regulation 181A (that is, using OCOT sales), then the Minister can utilise any of three methods specified in regulation 181A(3).

1.7 Section 269TAAD requires a dual-stage analysis of sales to be performed in order to test OCOT, that is:

- whether the sale is profitable (comparison of unit sales price and unit CTMS for the relevant quarter of sale); and

- whether the sale is recoverable within a reasonable period of time (typically taken to be a 12 month period). In this regard section 269TAAD(3) provides that "*Costs of goods are taken to be recoverable within a reasonable period of time if, although the selling price of those goods at the time of their sale is below their cost at that time,* ***the selling price is above the weighted average cost of such goods over the investigation period***" [emphasis added].

1.8 At page 5 of the Issues Paper the ADC confirms that its *initial* view in this case was that each power transformer is unique and therefore each one represents a separate model. On this basis, the ADC considered that the unit cost was also the weighted average cost for that model. Hence, any domestic sale at a loss was also deemed to be non-recoverable.

[1] Section 269TAC(2)(c) reflects the dictates of Article 2.2 of the Anti-Dumping Agreement. Article 2.2 of the Anti-Dumping Agreement requires that the addition for profit be a "reasonable amount". Although the restriction that profit be a reasonable amount does not appear in s.269TAC(2)(c) of the Act, it must be inferred that the application of regulation 181A by the ADC would accord with the Anti-Dumping Agreement. In other words, the ADC would not apply a rate which is, in all the circumstances, unreasonable and unrepresentative.

1.9 Siemens has previously expressed concern that the ADC's approach to the calculation of profit did not satisfy the legal requirements of regulation 181A(2). More particularly, the ADC's methodology for testing OCOT of sales did not address all the legal elements or the OCOT parameters in section 269TAAD of the Act - that is, *cost recoverability of the goods*. In this way, the inability to properly undertake recovery testing under section 269TAAD(3) means that regulation 181A(2) does not operate.

1.10 Siemens submits that due to the unique construction and nature of the goods under consideration, the ADC cannot test OCOT to a sufficiently reliable degree or in a sufficiently reliable manner.

1.11 Consequently, Siemens submits that it is not **reasonably possible** to work out the amount of profit to be allocated to the constructed normal value by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade pursuant to regulation 181A(2).

1.12 The ADC has specifically raised these same concerns regarding the unreliability of weighted average CTMS calculations, and the difficulties in testing recoverability of sales for the purposes of determining OCOT in its recent issues paper. These concerns have formed part of the ADC's considerations which support its proposed position to calculate profit with reference to regulation 181A(3).

1.13 Siemens is of the view that the determination of profit with reference to the 'general category of goods' is an appropriate methodology in the circumstances.

1.14 *[Confidential - Siemens' calculations of profit using 'general category of goods'*[2]].

2. **Credit adjustment**

General

2.1 The Issues Paper traverses the proposed (preferred) position of the ADC that credit adjustment calculations be performed by determining separate weighted average credit periods for domestic and export sales (with reference to invoice or contract credit terms applied to each progress payment) and thereafter factoring in an adjustment for difference.

2.2 A credit adjustment is only warranted if it is "*necessary*" to ensure that the constructed normal value so ascertained is properly comparable with the export price of goods.[3] To test whether such an adjustment is necessary, the terms of trade in relation to actual domestic and export transactions must be examined and compared.

2.3 Siemens notes that the ADC's proposed methodology as set out in the Issues Paper recognises the inherent flaws in its preliminary credit adjustment methodology (which, in essence, proposed to apply an arbitrarily constructed average rate of profit for all exporters).

2.4 Siemens supports the ADC's revised methodology set out in the issues paper, in so-far as it recognises that the need for credit adjustment to be made for the purposes of reasonable

[2] The goods under consideration are, relevantly, liquid dielectric power transformers with power ratings of equal to or greater than 10 MVA and voltage of less than 500 KV but not distribution transformers or gas filled and dry type power transformers.

[3] See s.269TAC(9).

comparison between export prices and domestic prices must be assessed in relation to the specific circumstances of the commercial terms of sale for each exporter involved in the present investigation.

2.5 Furthermore, Siemens notes that this proposed methodology is consistent with the verification framework adopted by the ADC visit team during the verification visit in November 2013 which sought to verify:

(i) the average credit terms offered to domestic customers in China; and

(ii) the average credit terms offered to Australian customers.

2.6 *[Confidential – Siemens' credit terms, credit analysis, methodology and conclusions]*

3. Conclusion

3.1 As stated above, Siemens supports the ADC's proposed position in relation to the determination of profit for constructed normal values and credit adjustment for differences between domestic and export sales. We do so because we consider that the Act and Regulations compel the approach being considered by the ADC to each of these issues.

3.2 If we can be of further assistance or any additional information is required of Siemens, please let us know.

Yours sincerely

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

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