Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

[1] By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name:	**PT CG Power Systems Indonesia ("CG Power")**
Address:	**Kawasan Industri Menara Permai Kav. 10 Jl. Raya Narogong Km. 23, 852 – Cileungsi, Bogor 16820, Jawa Barat, Indonesia**
Type of entity (trade union, corporation, government etc.):	**A limited liability company domiciled in Indonesia**

2. Contact person for applicant

Full name:	**Lloyd Joseph Gerard Lucas Pinto**
Position:	**President Director**
Email address:	**lloyd.pinto@cgglobal.com**
Telephone number:	**+62 21 8230430**

Please note that all communications in relation to this application are requested to take place with and through CG Power's legal representatives. For contact details please refer to Part E of this application.

3. Set out the basis on which the applicant considers it is an interested party

Pursuant to Section 269ZZC of the *Customs Act 1901* ("the Act") a person who is an interested party in relation to a reviewable decision may apply for a review of that decision. The reviewable decision in this case relates to an application made to the Commissioner under Section 269ZA(1) for a review of anti-dumping measures. Under Section 269T of the Act an "interested party" for the purpose of that kind of a reviewable decision is defined as including, amongst others, the applicant, any person who is or is likely to be directly concerned with the importation or exportation into Australia of the goods the subject of the application; any person who has been or is likely to be directly concerned with the importation or exportation into Australia of like goods; and any person who is or is likely to be directly concerned with the production or manufacture of the goods the subject of the application or of like goods that have been, or are likely to be, exported to Australia.

CG Power was the applicant for the reviewable decision, is a manufacturer of the goods to which the decision relates, namely power transformers, which it exports to Australia. Accordingly, CG Power meets the definition of an "interested party" for the purposes of the Act and this application.

4. Is the applicant represented?

Yes ☑ No

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the Customs Act 1901 the reviewable decision was made under:

☐ Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐Subsection 269TL(1) – decision of the Minister not to publish duty notice

☒Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision

The goods the subject of the reviewable decision are:

Liquid dielectric power transformers with power ratings of equal to or greater than 10 MVA (mega volt amperes) and a voltage rating of less than 500kV (kilo volts) whether assembled or unassembled, complete or incomplete.

Incomplete power transformers are subassemblies consisting of the active part and any other parts attached to, imported with or invoiced with the active parts of power transformers. The active part of a power transformer consists of one or more of the following when attached to or otherwise assembled with one other:

- ***the steel core;***
- ***the windings;***
- ***electrical insulation between the windings; and***
- ***the mechanical frame.***

Gas filled, dry type and distribution transformers are not included in the goods subject to the anti-dumping measures.

7. Provide the tariff classifications/statistical codes of the imported goods

The imported goods are classified under the following tariff headings and statistical codes:

- **8504.22.00 (statistical code 40); and**
- **8504.23.00 (statistical codes 26, 41).**

8. Provide the Anti-Dumping Notice (ADN) number of the reviewable decision

Anti-Dumping Notice No.2017/62

If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

9. Provide the date the notice of the reviewable decision was published

The reviewable decision was dated 30 May 2017 but was not published until 6 June 2017, as evidenced by the following which has been extracted from the Anti-Dumping Commission website (see "Date Loaded"):

EPR 383

Public Record for Review - Case 383

Power Transformers Exported from Indonesia, Taiwan and Thailand

No.	Type	Title	Date Loaded
012	Notice	ADN 2017/62 - Findings in Relation to a Review of Anti-Dumping Measures (PDF 851KB)	06/06/2017
011	Report	Final Report - REP 383 (PDF 196KB)	06/06/2017

A copy of the reviewable decision is attached as Attachment A – Reviewable Decision.

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

See Attachment B, in respect of which confidential and non-confidential versions have been provided.

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

See Attachment B, in respect of which confidential and non-confidential versions have been provided.

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.

See Attachment B, in respect of which confidential and non-confidential versions have been provided.

12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

See Attachment B, in respect of which confidential and non-confidential versions have been provided.

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

PART D: DECLARATION

The ~~applicant~~/the applicant's authorised representative declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:

Name: **Alistair Bridges**

Position: **Associate**

Organisation: **Moulis Legal**

Date: **6 July 2017**

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative:	**Alistair Bridges**
Organisation:	**Moulis Legal**
Address:	**Level 39** **385 Bourke Street** **Melbourne** **Victoria**
Email address:	**alistair.bridges@moulislegal.com**
Telephone number	**(03) 8459 2276**

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

See Attachment C.

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:…………………………………………………………………………..
(Applicant's authorised officer)

Name:

Position:

Organisation

Date: / /

ATTACHMENT B

NON-CONFIDENTIAL

6 July 2017

In the Anti-Dumping Review Panel

Application for review
Power Transformers exported from the Republic of Indonesia

PT CG Power Systems Indonesia

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NON-CONFIDENTIAL

Introduction

PT CG Power Systems Indonesia ("CG") is an Indonesian manufacturer and exporter of power transformers to Australia. Following the completion of the investigation regarding power transformers exported from Indonesia, Taiwan and Thailand, China, Korea and Vietnam, anti-dumping measures of 8.7% were imposed on CG's exports of certain power transformers to Australia on 10 December 2014.

These measures were not based upon CG's own information, but rather were based upon variable factors calculated having regard to *"all relevant information"*.[1] CG maintains that it was not dumping at the time of the original investigation, and applied to the Ant-Dumping Review Panel ("ADRP") in an effort to lift these measures. That application was ultimately unsuccessful.

By way of an application to the Anti-Dumping Commission ("the Commission") on 13 October 2016, CG applied for a review of the antidumping measures applicable to its imports of certain power transformers from the Republic of Indonesia. The Commission initiated the subject review 7 November 2016.

At the conclusion of the investigation, in a decision published on 6 June 2017, the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science ("the Assistant Minister") decided to vary the variable factors on imports of CG's power transformers to Australia from Indonesia, under Section 269ZDB(1)(a)(iii) of the *Customs Act 1901* ("the Act")[2] so that the interim duty payable on such imports is 43.3%.[3]

CG seeks review by ADRP, under Sections 269ZZA(1)(c) and 269ZZC, of the decision (or decisions) made by the Assistant Minister to vary the dumping duty notice as it applies to CG.

We now address the requirements of both the form of application that has been approved by the Senior Member of the Review Panel under Section 269ZY, and of Section 269ZZE(2), in relation to CG's grounds of review, being those requirements not already addressed within the text of the approved form itself, which CG has also completed and lodged with the Review Panel.

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[1] Under Sections 269TAB(3) and 269TAC(6).

[2] A reference in this Application to "the Act", or to a "Section", "Subsection" or "Subparagraph" is a reference to a Section, Subsection or Subparagraph of the Act, unless otherwise specified.

[3] Based on the recommendations contained in *Final Report No.383 – Review of Anti-Dumping Measures Applying to Power Transformers Exported from the Republic of Indonesia by PT CG Power Systems Indonesia* ("the Report").

10 Ground A – The Assistant Minister erred in determining an amount of profit

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

The Commission has constructed normal values in accordance with Section 269TAC(2)(c) of the Act.[4] The Panel member is no doubt aware of this provision, and so we will avoid repeating it here. It suffices to say that one of the components relevant to the construction of a normal value under this is Section is *"profit*" as per Section 269TAC(2)(c)(ii). The determination of such profit *"must be worked out in such manner, and taking account of such factors, as the regulations provide for that purpose*" under Section 269TAC(5B).

The working out of profit is set out at Regulation 45 of the *Customs (International Obligations) Regulations 2015* ("the Regulations"). In determining profit for CG, the Assistant Minister has done the following:

- Because "*each unit is uniquely constructed and the costs and prices can differ significantly from one unit to another"* found that the "weighted average cost of goods" contemplated by Section 269TAAD(3) was not meaningful.[5]
- Accordingly, the Assistant Minister has determined that he could not determine which sales of the goods were in the ordinary course of trade for the purposes of Regulation 45(2).[6]
- Resultantly, the Assistant Minister has worked out the profit on the sale of goods under

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[4] This follows on from the same decision in the original investigation. The reasoning for this approach is provided at page 17 of the Report:

> *There are domestic sales of power transformers in the domestic markets of the countries subject to the investigation. However, while electrical steel and copper conductor are the most significant cost components of power transformers, many other variables affect price. For example, depending on whether the power transformer is single or three phase, the design costs, lead times and ancillary options (such as tap changers) can significantly affect price. The Commission considers that because of these many variables it is unable to meaningfully adjust relevant domestic prices of power transformers to make them comparable with export prices. Subsection 269TAC(2)(c) allows for the constructed method when there is an absence of relevant sales or because of the situation in the market the sales are not suitable. The Commission has constructed normal values because of the lack of relevant domestic sales.*

[5] Page 18 of the Report.

[6] *Ibid.*

Regulation 45(3)(c).[7]

Regulation 45(3)(c) relevantly provides:

> *If the Minister is unable to work out the amount by using the data mentioned in subsection (2), the Minister must work out the amount by:*
>
> *….*
>
> *(c) using any other reasonable method and having regard to all relevant information.*

The methodology adopted by the Assistant Minister is described as follows:

> *As explained in 4.2.1 of the of this report, the Commission was not able to verify CG Power's domestic CTMS values and therefore was not satisfied that CG Power's domestic CTMS figures were accurate and reliable. Therefore, the Commission considers that an amount of profit should be worked out under subsection 45(3)(c) of the Regulation., using any other reasonable method having regard to all reliable information. In particular, the Commission calculated CG Power's domestic profitability based on CG Power's original domestic CTMS values as it was provided with CG Power's exporter questionnaire response.*

Despite its broad terminology, the operation of Regulation 45(3)(c) is expressly limited by Regulation 43(4):

> *(4) However, if:*
>
> *(a) the Minister uses a method of calculation under paragraph (3)(c) to work out an amount representing the profit of the exporter or producer of the goods; and*
>
> *(b) the amount worked out exceeds the amount of profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export;*
>
> *the Minister must disregard the amount by which the amount worked out exceeds the amount of profit normally realised by the other exporters or producers.* [our emphasis]

The operation of Regulation 45(4) is clearly mandatory – "the Minister *must* disregard the amount by which the amount worked out exceeds the amount of profit normally realised by the other exporters or producers". *Prima facie*, a failure to apply this cap is a legal error and therefore the profit used in the construction of CG's normal value is erroneous, as is the normal value. We note that this reading of the law is consistent with the Commission's stated policy with regard to the application of Regulation 45(3), which states:

> *Regulation 45(3)(c), which provides for any other reasonable method, caps the profit that may be added. That cap is described in Regulation 45(4)—the profit added must not exceed the*

[7] *Ibid.*

> *profit normally realised by other exporters on domestic sales of the same general category of goods. The Commission will not apply this provision if it is unable to determine the capped amount. The Commission will consider claims that a profit rate to be added may not be one that is 'normally realised' on the domestic market by the exporters in question.* [our emphasis] [8]

The importance of the cap is significant, and essential, to the determination of an amount under Regulation 45(3). This is clear from relevant WTO dispute jurisprudence. Regulation 45(3)(c) and (4) is the implementation of Article 2.2.2(iii), which states that amounts of profit can be determined by:

> *(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.*

The interrelationship between the discretion to pick a reasonable methodology and the cap on the profit so derived has been explained by the WTO Dispute Panel on a number of occasions. For example:

> *Further, we note that Article 2.2.2(iii) provides for the use of 'any other reasonable method', without specifying such method, subject to a cap, defined as 'the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin'. To us, the inclusion of a cap where the methodology is not defined indicates that where the methodology is defined, in subparagraphs (i) and (ii), the application of those methodologies yields reasonable results.*
>
> *If those methodologies did not yield reasonable results, presumably the drafters would have included some explicit constraint on the results, as they did for subparagraph (iii). Thus, we conclude that the text indicates that, if a Member bases its calculations on either the chapeau or paragraphs (i) or (ii), there is no need to separately consider the reasonability of the profit rate against some benchmark. In particular, there is no need to consider the limitation set out in paragraph (iii). That limitation is triggered only when a Member does not apply one of the methods set out in the chapeau or paragraphs (i) and (ii) of Article 2.2.2. Indeed, it is arguably precisely because no specific method is outlined in paragraph (iii) that the limitation on the profit rate exists in that provision.*[9]

The cap, therefore, provides certainty that the methodology adopted produces a reasonable outcome. This is echoed in other relevant jurisprudence. For example, in *Thailand - H-Beams* the Panel made the following statement:

> *We note also the requirement in the chapeau of Article 2.2.2 as well as in subparagraphs (i) and (ii) that actual data be used. In our view, the notion of a separate reasonability test is both illogical and superfluous where the Agreement requires the use of specific types of actual data. That is, where actual data are used and the other requirements of the relevant provision (s) are fulfilled (e.g., that the 'same general category of products' is defined in a permissible way where 2.2.2(i) is applied), a correct or accurate result is obtained, and the requirement to use actual data is itself the mechanism that ensures reasonability in the sense of Article 2.2 of that (correct)*

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8 *Dumping and Subsidy Manual April 2017*, page 50.

9 *Panel Report, EC — Bed Linen*, paras. 6.96–6.98

> *result. By contrast, under subparagraph (iii) where no specific methodology or data source is required, and the use of 'any other reasonable method' is permitted, the provision itself contains what is in effect a separate reasonability test, namely the cap on the profit amount based on the actual experience of other exporters or producers. Thus, in our view, Article 2.2.2's requirement that actual data be used (and its establishment of a cap where this is not the case) are intended precisely to avoid the outcome that Poland seeks, namely subjective judgements by national authorities as to the 'reasonability' of given amounts used in constructed value calculations.*[10]

So, in failing to apply the cap, the Assistant Minister has determined a profit that is not "reasonable" and has failed to comply with a mandatory condition precedent to the adoption of regulation 45(3)(c) . The decision to calculate a profit in this manner cannot be considered to be the correct or preferable decision.

Finally, the failure to apply the cap is an error under Section 269TAC(5B), because the Assistant Minister has failed to (a) work out an amount of profit in such manner as the regulations provide for that purpose and (b) has failed to take into account such factors as the regulations provide for that purpose. So, the decision to ascertain a normal value on this basis is not the correct or preferable decision.

11 Ground A – Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10

CG is at something of a disadvantage when it comes to responding to this question. The reason for this is that after the verification of CG, the Commission purported to adopt a methodology consistent with Regulation 45(3)(a) for the determination of profit.[11] Similarly, the Statement of Essential Facts states that it would be adopting such an approach.[12] It was not until the Report was released, after the Assistant Minister had made the reviewable decision, that it was apparent that the approach had changed, and that the Commission instead recommended using the Regulation 45(3)(c) methodology. The problem with this change is that it was not explained to CG. Thus CG was unable to provide any additional information that could be used to cap the profit calculated under Regulation 45(3)(c).

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10 *Panel Report, Thailand — H-Beams*, paras 7.122–7.125.

11 *Power Transformers – PT CG Power Systems Indonesia – Exporter visit report*, page 14.

12 *Statement of Essential Facts 383 – Power Transformers – Indonesia – CG Power,* page 16.

When it became apparent that the Commission was operating under Regulation 45(3)(a) – *identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export* – CG's focus was on getting the Commission to accept its actual domestic CTMS, as per CG's submission of 6 April 2017.[13] This CTMS resulted in a [CONFIDENTIAL TEXT DELETED - number] profit rather than the [CONFIDENTIAL TEXT DELETED - number] profit that was ultimately used by the Assistant Minister. The actual CTMS was drawn from CG's system in the same manner as was the Australian CTMS that was ultimately used by the Commission. The Commission did not accept this position and, in any regard, changed the methodology through which it determined profit.

Ultimately, CG recalls that, in accordance with Section 269TAC(5B) profit *must be worked out in such manner, and taking account of such factors, as the regulations provide for that purpose*. If the Assistant Minister is unable to adopt any of the methodologies specified under the regulations, then no profit can be calculated and applied under Section 269TAC(2)(c)(ii). The correct and preferable legal outcome, therefore, is that no profit can be included in CG's normal value.

12 Ground A – Material difference between decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision

The profit adopted by the Assistant Minister was [CONFIDENTIAL TEXT DELETED - number]. If no profit is adopted, then the normal value and the dumping margin will fall by [CONFIDENTIAL TEXT DELETED - number], to [CONFIDENTIAL TEXT DELETED - number]. As a result, the interim duty payable on any future export of CG power transformers will be significantly less than it would be under the reviewable decision. Please refer to Attachment B.2 – which models this change in outcome.

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[13] As per Attachment B.1, CG had sought an extension of two weeks for the submission of the EQ response. This request was based on a number of factors, including **[CONFIDENTIAL TEXT DELETED – unavailability of key staff]**. CG indicated that this would significantly impact CG's ability to compile, among other things, the CTMS in a complete and accurate manner. The Commission rejected the extension request, so CG was required to do the best that it could in the time available to it, but, ultimately, there were errors in this data that the later submitted domestic CTMS – that which the Assistant Minister has rejected – corrected. In retrospect, this would appear to prevent the Commission from adopting the earlier domestic CTMS included in the EQ under regulation 45(3)(a), because this does not adequately reflect the "*actual amounts realised*" by CG.

10 Ground B – the Assistant Minister's determination of normal values is erroneous, as the Assistant Minister has incorrectly adjusted the normal value

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

When the normal value is constructed, it is a requirement under Section 269TAC(9) that:

> *(9) Where the normal value of goods exported to Australia is to be ascertained in accordance with paragraph (2)(c) or (4)(e), the Minister must make such adjustments, in determining the costs to be determined under that paragraph, as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods.*

The key purpose of Section 269TAC(9) is to ensure that the export price and the constructed normal value are comparable. It is clear from the language of the Section that the Assistant Minster was only empowered to adopt adjustments that are *necessary to ensure* that the normal value is properly comparable with the export price. The starting point for considering whether an adjustment to the normal value is necessary must be the export price. In this instance, the relevant export price is described as follows:

> *The Commission calculated the FOB level export price detailed for the transactions in CG Power's Australian sales listing by deducting the verified post exportation costs (costs of delivery, unloading and cranage, and erection and site testing) from the total gross DDP level price to reflect the actual FOB invoice price paid by the final customers.*[14]

The Assistant Minister has made the following adjustments to the normal value to make it comparable to this export price:

- export packing costs;
- export warranty costs;
- Australian sales office costs; and
- credit terms.

The first three of these adjustments were made in error. In adjusting the normal value in this manner, the Assistant Minister has calculated a normal value which is significantly inflated. CG will comment on each of these adjustments in turn.

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14 Page 16 of the Report.

However, at the outset, CG wishes to note that the Exporter Questionnaire ("EQ") specifically indicated that CG was not required to provide information regarding adjustments if it considered that normal values should be determined under Section 269TAC(1).[15] CG did not consider this was appropriate, due to the unique, bespoke nature of the GUC – an approach that was consistent with the one taken by the Commission in the original investigation. Accordingly, CG did not claim any adjustments. Rather, it believed that the normal value would be based on the export CTM and the domestic SG&A. CG did not consider there was a basis to grant any adjustments under subsection 269TAC(9) because the SG&A costs were allocated wholly, equally and without differentiation between domestic sales and export sales, in a manner which has been verified by the Commission.[16] As CG noted in its submission of 6 April 2017:

> *As the Commission is aware, the allocation of SG&A was the same for both export and domestic sales. It was merely the ratio of total product sales to total selling costs (or admin expenses) from the audited report, multiplied by the revenue on each power transformer. All of these figures can be checked against data collected by the Commission. Therefore, there is nothing in export SG&A that is not in the domestic SG&A and vice versa. Under this circumstances, there is absolutely no need, nor legal justification, to adjust the normal value.*

These adjustments were not requested by CG and which CG does not believe are necessary to ensure comparability between export price and normal value. Nonetheless, the Assistant Minister has applied normal value where none were needed, nor were requested by CG. In doing so, he has created a number of distortions in normal value.

(a) Export packing costs

The Assistant Minister has added an amount of export packing costs to the normal value.[17] The normal value has been determined on the basis of the export CTM of the goods plus the selling, general and administrative costs associated with domestic sales of like products.

In a submission dated 17 April 2017, CG explained to the Commission that these amounts were already included in the normal value, as they were included in the CTM for each of the goods exported. The

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15 See for example, page 27 of the EQ response, which provides:

As outlined in Section D, please complete Section E only if you would submit that the Commission should determine normal values pursuant to section 269TAC (1).

16 Page 17 of the Report.

17 Column AS, *Confidential Appendix 5 – Dumping Margin* ("*Add Australian Packing Expenses and Other Costs*").

Commission has rejected this submission. The reasoning for that is unclear. Please find attached the cost report for each of the power transformers exported to Australia during the POI.[18] Each of these has been filtered at column G, which provides the "coding" for each of the cost items as they were translated into the CTMS, to show only labour and materials. These two codes represent the "*variable manufacturing costs*" recorded in the CTMS. Packaging costs have been highlighted in yellow.

The purposes of this filtering is to show that these packaging costs have been included in the CTM. Specifically, they are included in "*raw material – other additional*" line.

[CONFIDENTIAL TEXT DELETED – table showing same values in CTMS and cost report]

Therefore, packing costs are properly represented in the normal value. Adding additional packing costs, accounts to double-counting.[19]

Finally, the adjustment, as it is added to the normal value in *Confidential Appendix 5 – Dumping Margin* includes "other costs" which have been reported at column AL of the same appendix to the Report. These other costs relate to **[CONFIDENTIAL TEXT DELETED – post-exportation events]** that arose in relation to the import of the goods. This was fully disclosed during the verification. As these costs are clearly post-exportation costs, it is not necessary to add them to the normal value to make it comparable to the FOB export price.

(b) Australian office costs

At column AR of *Confidential Appendix 5 – Dumping Margin* to the Report, the Assistant Minister has added an adjustment to the normal value, which purportedly represents an "Australian Sales Office Expense".

To reiterate, CG did not request such an adjustment be made, nor did the Commission indicate that it would be making such an adjustment until the verification report had been furnished – by which time the Commission had formed its view regarding the necessity of such an adjustment.

For background, the Australian sales office is just that – it is an office that is part of CG (the corporate

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[18] Attachments B.3 –B.9. These reports were provided to the Commission during the verification. **[CONFIDENTIAL TEXT DELETED – comment re reporting of packing costs].**

[19] Page 21 – 22 of the Report. There are some differences between the packing in these cost reports and those reported in the *Confidential Appendix 1 – Export Price*. The amounts in this latter spreadsheet are incorrect, they were estimates only of the packing cost, calculated at the time of the lodgement of the EQ. Again, CG did not claim that a packing expense adjustment was required, nor the Commission require reportage of such an adjustment, so CG did not pay significant attention to this facet of the EQ.

entity that is lodging this application) that operates in Australia. Its costs are CG's costs, and it is included in the audited accounts accordingly. Similarly, CG has sales offices in Indonesia which service the Indonesian market as well as offices that service other foreign markets, such as **[CONFIDENTIAL TEXT DELETED – country in which CG sells power transformers]**. To be clear, the functions of these offices are not limited to sales, they include other features, such as providing after sales services to customers, marketing, project management and business development.

As has been noted above, the methodology used by CG to calculate SG&A was the same for both export sales and domestic sales. As such, both the export SG&A and domestic SG&A reported by CG included an allocation of all of these sales office costs. Nonetheless, the Commission concluded, and the Assistant Minister accepted, that:

> *The Commission considers that the Australian sales office costs are specific to the export sales to Australia and therefore cannot be associated with the SG&A costs of other sales transactions.*[20]

And:

> *The Commission considers that an upward adjustment to the normal value is required for the CG Power's Australian sales office costs to ensure fair comparison to the export price.*[21]

This adjustment was achieved as follows:

> *To determine the amount of this adjustment, the Commission calculated the Australian office costs relating to sales during the relevant financial year. These costs were apportioned equally to each power transformer delivered to Australia. In doing so, the Commission removed the costs associated with CG Power's Australian sales office from CG Power's total of SG&A expenses and recalculated the weighted average amount for domestic SG&A expenses for the purposes of constructing normal values.*[22]

For the sake of completeness the SG&A has been determined as follows:

> *The Commission also considers that an amount for SG&A costs should be worked out under subsection 44(2) of the Regulation, using the verified SG&A costs associated with the sale of like goods as set out in CG Power's records. The Commission has calculated the SG&A cost as a percentage of the CTM per power transformer incurred by CG Power using CG Power's records, on domestic sales of power transformers during the review period.*

By this, CG understands that the Assistant Minister has added up the SG&A costs recorded in the Domestic CTMS CG submitted with its EQ response for the entire period of investigation (1 July 2013 –

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20 Page 20 of the Report.

21 Page 21 of the Report.

22 *Ibid.*

30 June 2016), and has removed the total "Australian office expense" calculated by the Commission for FY2013 (April 2013 – March 14).[23] The Commission has then divided that amount by total domestic sales over the period of investigation.

This is erroneous for a number of reasons:

- Firstly, the adjustment was not necessary to ensure the normal value was comparable with the export price in the first instance. The SG&A as calculated by CG included adequate allocation of relevant sales office costs to the goods under consideration. Indeed, the Commission has accepted this is appropriate by using CG's calculation of SG&A costs as the starting point. Accordingly, the adjustment was not necessary to ensure fair comparison.
- Secondly, the point of comparability for the normal value is the FOB export price. As per the Exporter Verification Report, CG Power's Australian sales office is considered to be the "importer".[24] As the Australian representatives of CG power, the Australian office is involved in all of these post-exportation activities, including costs of delivery, unloading and cranage, and erection and site testing which do not form part of the FOB export price. The costs that have been used by the Commission to determine the "Australian sales office" adjustment are equally relevant to these post-export activities undertaken by the Australian sales office. However, the export price is an FOB export price – as such it does not include post export expenses. Therefore the adjustment adversely impacts the comparability of export price and normal value.
- Thirdly, even if the adjustment was necessary to ensure fair comparison, the way in which it has been applied is erroneous. Specifically, the Assistant Minister has not determined a corresponding downward adjustment for domestic and third country sales office expenses. By failing to do so, the primary purpose of Section 269TAC(9) has been subverted, as the adoption of an asymmetric adjustment results in a normal value that includes an allocation of both domestic/third country sales office expenses plus a direct allocation of Australian sales office expenses. If it is the Assistant Minister's view that market specific prices only reflect market specific costs, than this is an untenable outcome. This issue has been raised with the Commission, which rejected it outright:

> *In calculating the normal value under subsection 269TAC(2)(c), page 44 of the Manual explains that "Subsection 269TAC(2)(c) requires that the selling, general and*

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23 As all goods were exported to Australia in FY2013-14

24 *Power Transformers - PT CG Power Systems Indonesia - Exporter Visit Report*, page 7.

administrative expenses so ascertained are those that would be incurred on sales on the domestic market." It follows that, the SG&A should typically include the domestic selling costs such as the costs incurred by the Indonesian sales office. As explained above, the Commission had already removed the Australian sales office costs from the domestic SG&A calculations. Hence, the Commission maintains that there have been no errors made in calculations of the domestic SG&A of CG Power for the purposes of calculating the normal value under subsection 269TAC(2)(c).[25]

This underlines the error. Section 269TAC(2)(c) is the starting point of the consideration. The Commission is correct insofar as it considers that the SG&A be based upon domestic sales of the like goods. Section 269TAC(9) then required that the Assistant Minister make such adjustments, *in determining the costs to be determined under that paragraph as are necessary to ensure the normal value so ascertained is properly comparable with the export price.* By failing to make an allowance for domestic and third country sales office costs, the normal value does not allow for a fair comparison with export prices. As a result, the adjusted normal value is significantly overstated, and so too is the dumping margin.

- Fourthly, there must be some question regarding the appropriateness of the SG&A after the Commission has removed the Australian office sales expenses for FY2013. This is because all other Australian sales office expenses for the period April 2014 – June 2016 will still be included in the resultant "domestic SG&A". CG did not make any sales to Australia in the intervening years, however, the Australian sales office continued to operate over this period, and, so, the costs associated with the Australians sales office over this period are now included in the Domestic SG&A. This does not appear to be logical.

- Fifthly, there appears to be some fundamental misunderstanding with regard to what these costs relate to. The information upon which the adjustment has been calculated is attached.[26] This is a report of all of the costs booked against relevant Australian office profit centres for FY2013 which has been extracted from SAP, and was provided to the Commission during the verification.[27] The Report for the purposes of this review states:

  In calculating the quantum of the Australian office costs, the exporter visit team from the

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25 Page 21 of the Report.

26 Attachment B.10.

27 **[CONFIDENTIAL TEXT DELETED – discussion of cost centres]**

> *Commission has worked with CG Power to identify and eliminate costs that are not related with the sales transactions considered in this review. Therefore, the Australian sales office costs that are attributed to the sales of goods under consideration do not include any costs that are not related to the sales of the power transformers that are considered within this review.*[28]

If this is so, the Commission has materially misunderstood the information. The data used by the Commission largely relates to general office costs, which are not attributable to any particular sale or service. This should be clear from the Commission's calculation of the adjustment which will identify the costs as being posted to the following general ledger accounts:

[CONFIDENTIAL TEXT DELETED – relevant general ledger account names]

The majority of these costs are not generally attributable to any particular sale or service. CG does not understand why the Commission considers otherwise. The very fact that these costs continue to be incurred after exports to Australia ceased shows that they cannot be attributed to imports. Moreover it appears that the only things that have been eliminated are costs reported under the cost centres [CONFIDENTIAL TEXT DELETED – relevant general ledger account names] and [CONFIDENTIAL TEXT DELETED – relevant general ledger account names]. The reason given for this is that they were *"part of sales cost but not business development expenses*". CG is perplexed by this explanation. It is correct that they be excluded from any consideration of SG&A, [CONFIDENTIAL TEXT DELETED – CG accounting practices]. However, none of the costs that remain relate solely to business development expenses.

Accordingly, CG submits that the decision to adopt the Australian sales office adjustment was both incorrect and not preferable, as that adjustment ensured that the normal value was not properly comparable to the export price.

(c) Export warranty

The Commission has adjusted the normal value for an amount representative of the export warranty expenses. The reason for this is unclear. The FOB export price does not reflect any warranty claims, indeed, the existence of such claims will not be known until well after the FOB export price is set. Therefore, there is no basis to adjust the normal value in respect of these claims, as such an adjustment does not ensure that the export price and normal value are comparable.

Accordingly, it was not the correct or preferable decision to adjust the normal value by an amount

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28 Page 21 of the Report.

representing export warranty costs.

11 Ground B – Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10

The correct or preferable is that:

- That no adjustment be made for export packing;
- That no adjustment be made for Australian sales office expenses, and that the domestic SG&A not be altered to remove this cost; and
- That no adjustment be made for export warranty expenses.

These decision are correct and preferable, because:

- It was not necessary for the Assistant Minister to make these adjustments, as they were not necessary to ensure comparability with the export price.
- The removal of these adjustments ensures that the normal value is properly comparable with the export price.

12 Ground B – Material difference between decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision

Based on CG's calculations, the adoption of the correct and preferable decision will significantly lower the normal value. The impact of this on the dumping margin when these decisions are taken in isolation is:

Decision	**Impact on dumping margin**
That no adjustment be made for export packing	Decrease of [CONFIDENTIAL TEXT DELETED - number] percentage points
That no adjustment be made for Australian sales office expenses, and that the domestic SG&A not	Decrease of [CONFIDENTIAL TEXT DELETED -

be altered to remove this cost	number] percentage points
That no adjustment be made for export warranty expenses.	Decrease of [CONFIDENTIAL TEXT DELETED - number] percentage points
Total	Decrease of [CONFIDENTIAL TEXT DELETED - number] percentage points

Please refer to Attachment B.11 which illustrates this conclusion.

10 Ground C – the Assistant Minister has incorrectly fixed the variable factors

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

The reviewable decision arose at the conclusion of a *"review of anti-dumping measures*" undertaken in accordance with Division 5 of Section XVB of the Act. It is worth underlining that such a review is a review of the anti-dumping measures, and in particular, the variable factors imposed by those anti-dumping measures, on 12 December 2014. Although CG does not believe this to be a contentious proposition, it is nonetheless supported by the following:

- The requirement that the application include a *statement of the variable factors that are taken to have changed*, *the amount by which each such factor has changed* and *information that establishes that amount.*[29]
- The requirement that the Commissioner must initiate a review provided he is satisfied that there appear to be reasonable grounds that *the variable factors relevant to the taking of anti-dumping measures have changed.*[30]
- The requirement that the Statement of Essential Facts is a statement of the facts upon which the Commissioner proposes to base a recommendation to the Minister in relation to the review of

29 Section 269ZB(2)(c)(i)-(iii).

30 Section 269ZC(2)(b)(i).

anti-dumping measures.[31]

- The requirement that the Commissioner must, *after conducting a review of anti-dumping measures,* give the Minister a report recommending that the anti-dumping notice remain unaltered or that the notice have effect in relation to a particular exporter or exporters generally, as if different variable factors had been ascertained.[32]
- The fact that the Assistant Minister's powers are limited to declaring that the anti-dumping notice remain unaltered, or that it have effect as if the Minister had fixed different variable factors relevant to the determination of duty.[33]

On this basis, it is clear that the focus of an anti-dumping measures review is whether the variable measures relevant to the determination of duty imposed by anti-dumping measures have changed. If they have, the Assistant Minister may vary the measures. If not, the Assistant Minister may not.

For the sake of clarity, the term *"anti-dumping measures*" refers to the *"publication of a dumping duty notice or a countervailing duty notice".*[34] The term *"dumping duty notice*", being the only anti-dumping measures applicable to CG's exports, is defined to be *"a notice published by the Minister under subsection 269TG(1) or (2) or 269TH(1) or (2)*".[35]

Finally, the term "*variable factors"* is relevantly defined to be:

> *(4E) In this Act, a reference to variable factors relevant to the review under Division 5 of anti-dumping measures, or to the conduct of an anti-circumvention inquiry in relation to a notice published under subsection 269TG(2) or 269TJ(2), in respect of goods is a reference:*
>
> > *(a) if the goods are the subject of a dumping duty notice--to the normal value, export price and non-injurious price of goods of that kind <u>as ascertained, or last ascertained, by the Minister for the purpose of the notice</u>…*

In this case, the relevant anti-dumping measures subject to the review were imposed on 10 December 2014, via the publication of an anti-dumping notice under Section 269TG(2) of the Act. In accordance with Section 269TG(3)(b), (c), (d) and (e) the relevant variable factors were ascertained *at the time of the*

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31 Section 269ZD(1).

32 Section 269ZDA(1)(a)(i) and (iii), noting that (ii) only applies where a revocation notice has been published, as per Section 269ZDA(1A)(a).

33 Section 269ZDB(1)(a)(i) and (iii), noting that (ii) only applies where a revocation notice has been published, as per Section 269ZDB(1AA).

34 269T of the Act.

35 *Ibid.*

publication of the notice.

After conducting the review of anti-dumping measures as they applied to CG, the Commissioner completed his report to the Assistant Minister. On the basis of the review of anti-dumping measures, the Commissioner found that:

> *….during the review period:*
>
> - *the ascertained export price has changed;*
> - *the ascertained normal value has changed; and*
> - *the ascertained NIP has changed.*[36]

However, the review period is the period 1 July 2013 to 30 June 2016, meaning that a portion of that period occurred prior to the time that the variable factors the subject of the review had been ascertained. Note that the term *"review period*" is not mentioned in the Act, let alone given any degree of legal weight. The question before the Commission in not whether the variable factors changed during the review period, but, rather, whether they have changed since they were last ascertained.

The export sales upon which the new ascertained export price and corresponding normal values have been determined were all delivered to Australia between [CONFIDENTIAL TEXT DELETED – dates]. The variable factors the subject of the review were ascertained on 12 December 2014. It is neither correct nor preferable to determine new variable measures on the basis of transactions that occurred prior to the ascertainment of the variable factors the subject of the review.

11 Ground C – Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10

The Commission accepted that there were grounds for asserting that the variable factors relevant to the taking of the measures had changed. This still remains the case. The simple matter of fact is that CG has not exported any power transformers to Australia since the anti-dumping measures were imposed. In the absence of relevant export sales, CG submits that the correct and preferable decision is that the Assistant Minister exercise his power under Section 269ZDB(1)(iii) of the Act and fix an ascertained export price as at zero.

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36 Page 26 of the Report.

Similarly, as the Commission has stated:

> *There are domestic sales of power transformers in the domestic markets of the countries subject to the investigation. However, while electrical steel and copper conductor are the most significant cost components of power transformers, many other variables affect price. For example, depending on whether the power transformer is single or three phase, the design costs, lead times and ancillary options (such as tap changers) can significantly affect price. The Commission considers that because of these many variables it is unable to meaningfully adjust relevant domestic prices of power transformers to make them comparable with export prices. Subsection 269TAC(2)(c) allows for the constructed method when there is an absence of relevant sales or because of the situation in the market the sales are not suitable. The Commission has constructed normal values because of the lack of relevant domestic sales.*

CG submits that, in the absence of export sales, it would be unreasonable and prejudicial to attempt to determine normal values given the bespoke nature of the products. There are no relevant costs of production for the purpose of Section 269TAC(2)(c), nor any properly representative domestic prices for the purposes of Section 269TAC(1). Accordingly, CG submits that the correct and preferable decision would be that the Assistant Minister exercise his power under Section 269ZDB(1)(iii) of the Act and fix an ascertained normal value as at zero.

Finally, in the review, the Assistant Minister followed the position taken when originally ascertaining the non-injurious price. That is to say, because power transformers are *"complex items of capital equipment built to the specifications of the purchaser, where it is unlikely that any two power transformers are identical*" the Commission set the non-injurious price equal to normal values.[37] There is no basis to deviate from this approach. Accordingly, the correct and preferable decision is that the Assistant Minister exercise his power under Section 269ZDB(1)(iii) of the Act and fix an ascertained non-injurious as at zero.

12 Ground C – Material difference between decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision

The result of the reviewable decision was that there was a 43.3% difference between the normal value and the export price, thus an importer is required to pay interim dumping duty equal to 43.3% of the FOB export price of any CG power transformer exported to Australia.

37 Page 23 of the Report.

If the correct and preferable decision, as outlined above, the level of interim dumping duty payable on imports of CG power transformers will be 0%.

Note that this is a different outcome to the revocation of the measures – the measures still apply, it is merely the variable factors that have been fixed differently.

Conclusion and request

The decision to which this application refers is a reviewable decision under Section 269ZZA of the Act. Where references are made to the Commission and its recommendations, it is those recommendations which were accepted by the Assistant Minister and form part of the reviewable decision that CG seeks to have reviewed.

CG is an interested party in relation to the reviewable decision.

CG's application is in the approved form and has otherwise been lodged as required by the Act.

We submit that CG's application is a sufficient statement setting out its reasons for believing that the reviewable decisions are not the correct or preferable decisions, and that there are reasonable grounds for that belief for the purposes of acceptance of its application for review.

This application contains confidential and commercially sensitive information. An additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information is included as an Attachment to the application.

The correct or preferable decisions that should result from the grounds that CG has raised in the application, and their individual effect on the outcome of each, are dealt with in A and B above.

Accordingly, being fully compliant with the requirements of the Act, CG requests the Review Panel to undertake the review of the reviewable decision, as requested by this application, under Section 269ZZK of the Act.

The Review Panel is requested to recommend to the Assistant Minister that, in accordance with Section 269ZZM the reviewable decision (being the decision under Section 269ZD(1) of the Act)) be revoked with effect from 6 June 2016 and be substituted by another decision to publish a dumping duty notice in the same terms as that made on 6 June 2016 and with effect from that date but amended so that different variable factors apply to CG from that date.

Lodged for and on behalf of PT CG Power Systems Indonesia

Alistair Bridges
Associate

Moulis Legal