



Australian Government

Anti-Dumping Review Panel

ADRP Report No. 60

Power Transformers Exported to Australia
from the Republic of Indonesia by PT CG
Power Systems

September 2017

ADRP Report No. 60

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Recommendation

This is a review of the decision of the Hon. Craig Laundy, the Assistant Minister for Industry, Innovation and Science made on 31 May 2017 (“Reviewable Decision”) under s 269ZDB(1)(a)(iii) of the *Customs Act 1901* to declare that the dumping duty notice applying to the goods exported to Australia by PT CG Power Systems be taken to have effect as if he had fixed different variable factors relevant to the determination of duty. Notice of the Reviewable Decision was given by Anti-Dumping Notice 2017/62.

For the reasons given in this Report, I recommend that:

- 1 the Reviewable Decision be revoked; and
- 2 the Minister make a declaration under s 269ZDB(1)(a)(iii) that the dumping duty notice applying to the goods exported to Australia by PT CG Power Systems be taken to have effect as if he had fixed variable factors relevant to the determination of duty different from the variable factors ascertained for the purposes of the dumping duty notice applying to those goods, those new variable factors being in accordance with the Schedule A to this Report.



Scott Ellis
Panel Member
Anti-Dumping Review Panel
26 September 2017

Summary

- 1 On 31 May 2017, the Hon. Craig Laundy, the Assistant Minister for Industry, Innovation and Science (“Minister”) made a declaration (“Reviewable Decision”) under s 269ZDB(1)(a)(iii) of the *Customs Act, 1901*¹ altering the variable factors relevant to the dumping duty notice applicable to power transformers exported from Indonesia by PT CG Power Systems (“CG Power”). The effect of the Reviewable Decision and the associated determination under s 8(5) of the *Customs Tariff (Anti-Dumping) Act 1975* (“*Dumping Duties Act*”) was to increase the rate of dumping duty from 8.7% to 43.3%.²
- 2 CG Power was aggrieved by the Reviewable Decision and applied for review under ss 269ZZA(1)(c) and 269ZZC on the following grounds:
 - (a) in working out the profit component of the normal value under s 269TAC(2)(c) and Regulation 45 of the *Customs (International Obligations) Regulation 2015*,³ the Minister wrongly failed to take into account Regulation 45(4) (Ground A);
 - (b) in determining the normal value, the Minister made incorrect adjustments in respect of:
 - (i) export packing;
 - (ii) Australian sales office costs;
 - (iii) export warranty expenses (Ground B); and
 - (c) the Minister could not have found that the variable factors relevant to the rate of dumping duty had changed because there had been no exports to Australia since the variable factors were last ascertained (Ground C).
- 3 I consider that the Reviewable Decision was not the correct or preferable decision. Although it was appropriate to make an adjustment in respect of the Australian office costs, the normal value should not have included both domestic selling, general and administrative costs (“SG&A costs”) and Australian office costs. Also, an adjustment to the normal value should not have been made in respect of export packing.
- 4 Accordingly, I recommend that the Minister revoke the Reviewable Decision. I recommend that he substitute for the Reviewable Decision a decision declaring that

¹ References in this Report to sections are to sections of the *Customs Act 1901*, unless stated otherwise.

² Notice of the Reviewable Decision was given by Anti-Dumping Notice 2017/62.

³ References in this Report to Regulations are to provisions of the *Customs (International Obligations) Regulation 2015*.

the dumping duty notice applicable to CG Power's goods be taken to have effect as if he had fixed variable factors based on the Schedule A to this Report.

Background and Procedure

- 5 The goods to which this application relates ("the goods") are goods exported to Australia by CG Power falling within the following description:

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, complete or incomplete.

Gas filled, dry type and distribution transformers are not included in the goods.

- 6 Dumping duty was initially imposed on the goods in 2014, when the Hon. RC Baldwin, who was at the time the Parliamentary Secretary to the Minister for Industry ("Parliamentary Secretary"), declared that s 8 of the *Customs Tariff (Anti-Dumping) Act 1975* ("Tariff Act") applied to the goods ("Original Decision"). Notice of the Original Decision was published in the Government Gazette on 10 December 2014. The dumping margin and effective rate of duty applicable to CG Power's goods was 8.7%.

- 7 The Original Decision followed an investigation by the ADC and the publication of Anti-Dumping Commission Report No. 219. The Parliamentary Secretary accepted the reasoning in Report 219.

- 8 Report 219 indicated that the normal value was worked out by reference to the cost to make and sell under s 269TAC(2)(c), rather than by reference to domestic sales of transformers in the Indonesian market under s 269TAC(1). The Commissioner explained this approach in Report 219:

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.⁴

- 9 During the course of Investigation 219, the Commissioner treated CG Power as a non-co-operative exporter and worked out the normal value and the export price

⁴ Report 219 at pp 32 -33.

based on the best available evidence, largely information provided by the Australian industry. The dumping margin was calculated on a transaction to transaction basis under s 269TACB(2)(b).⁵

- 10 By an application dated 11 October 2016 (“Div 5 Application”),⁶ CG Power applied under s 269ZA for review of the variable factors being, relevantly, the normal value, the export price and the non-injurious price (“NIP”).⁷ The Div 5 Application requested that the review period be the three-year period between 1 July 2013 and 30 June 2016.⁸ The Div 5 Application was based on the assertion that during the period 1 July 2013 to 30 June 2016, the price of copper on the world market had fallen substantially. Copper is a major component of transformers. The Div 5 Application said that this would have had the effect of reducing each of the variable factors by 9%.
- 11 In response to the Div 5 Application, an investigation was initiated, Investigation 383.⁹ The review period was fixed at 1 July 2013 to 30 June 2016, as requested by CG Power.
- 12 A Statement of Essential Facts (“SEF 383”)¹⁰ was published on 17 March 2017. A final report was published on 1 May 2017 (“Report 383”).¹¹ In Report 383, the Commissioner adopted the passage from Report 219 quoted above. In making the Reviewable Decision, the Minister accepted the recommendations and reasons for the recommendations in Report 383, including all the material findings of facts and law, in Report 383. The dumping margin was also calculated under s 269TACB(2)(b) on a transaction to transaction basis s 269TACB(2)(b).
- 13 CG Power applied for review of the Reviewable Decision by the Panel by application dated 6 July 2017 (“Panel Application”).
- 14 The Senior Member determined that I should constitute the Panel for the purpose of the Review.
- 15 The Commissioner provided submissions dated 28 August 2017.

⁵ Report 219 at p66.

⁶ EPR1.

⁷ See s 269T(4E)(a).

⁸ EPR1, Attachment 1, pp 6 and 7.

⁹ ADN 2016/119, EPR3.

¹⁰ EPR8.

¹¹ EPR11.

The Moulis Letter

- 16 On 18 September 2017, Moulis Legal, the solicitors for CG Power, sent me a letter (“Moulis Letter”) via the Panel Secretariat.
- 17 Section 269ZZK(4)(b) limits the materials to which I may have regard in making my recommendation under s 269ZZK(1). It provides:
- (4) Subject to subsections (4A) and (5), in making the recommendation, the Review Panel:
 - (a) must not have regard to any information other than the relevant information; and
 - (b) must only have regard to the relevant information and any conclusions based on the relevant information that are contained in the application for the review or in any submissions received under section 269ZZJ within the period of 30 days referred to in that section.

I cannot, therefore, have regard to the Moulis Letter to the extent that it addresses the substance of my recommendation. However, it is appropriate to have regard to and address the issues raised in the Moulis Letter in so far as they relate to procedural matters and the conduct of the Review, rather than the merits of my recommendation.¹²

- 18 One contention in the Moulis Letter was that the Commissioner failed to provide submissions which complied with s 269ZZY. Section 269ZZY stipulates that persons who provide confidential information to the Panel must, at the time the information is given, also give a summary of that information for inclusion in the public record maintained under s 269ZZX. Section 269ZZK(5) provides that the Panel must not have regard to a submission if the person giving the submission claims that information in the submission is confidential but fails to give a summary of that information in accordance with s 269ZZY.
- 19 The Commissioner provided private and public versions of his submissions. They were the same base document, although the public version had portions redacted. All but one of the redactions were redactions of figures. For example, one part of the public submissions read: “The amount of profit I determined for PT. Unelec Indonesia during the original investigation period was █████ per cent (Confidential Attachment 1)”. A failure to provide a summary of the redacted number is trivial because the subject matter of the redacted information is apparent from the context. It is difficult to summarise further the redacted information.
- 20 However, on the fourth page of the Commissioner’s submissions, a passage setting out information obtained during the site verification visit was included. It has been

¹² Issues of this nature are addressed at paragraphs 18 to 20, 31 to 32 and 36 to 37.

redacted in the public version of the submission. A summary of the redaction was required by s 269ZZY but was not provided. Applying s 269ZZK(5), I cannot have regard to “the submission” and I will not do so. I consider “the submission”, for present purposes, to be the contention based on the unsummarised confidential information. This does not prevent me having regard to the balance of the submissions made by the Commissioner.

The Issues

- 21 Of the three variable factors identified under s 269T(4E)(a) in respect of goods the subject of a dumping duty notice, namely, the normal value, the export price and the NIP, the Panel Application raised issues only in respect of the normal value. No challenge was made in respect of the export price and the non-injurious price. The Grounds advanced in the Panel Application in respect of the normal value are identified at paragraph 2 above. I will deal with them in turn.

Ground A: Profit

Summary

- 22 CG Power contended that, in calculating the profit component of the normal value under s 269TAC(2)(c) and Reg 45(3)(c), the Commission wrongly failed to have regard to Reg 45(4). Regulation 45(4) caps the amount of profit under Reg 45(3)(c) at the amount 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. CG Power also contended that, as the Minister had abandoned working out the profit under Reg 45(3)(a) and as it was not possible to determine the profit under Reg 45(3)(c), the amount of profit should be zero.
- 23 I consider that the Minister did not work out the profit under Reg 45(3)(c) but worked out the profit under Reg 45(3)(a). It is not possible to now justify working out the profit figure using Reg 45(3)(c) because there is no information to which I can have regard dealing with the profit of other exporters or producers. However, it is still open for the profit to be worked out under Reg 45(3)(a) for the purposes of Reg 45(4). It was open for the Minister to use the data identified in Confidential Appendix 3 to Report 383 to work out profit because the Minister’s use of that data was directed to ascertaining the actual amounts realised by CG Power from the sale of the same general category of goods.

The Legislation

24 Where the normal value is calculated under s 269TAC(2)(c), Regs 45(3) and 45(4) deal with how the Minister is to work out the profit component of the normal value. They provide:

- (3) 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:
 - (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; or
 - (b) identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or
 - (c) using any other reasonable method and having regard to all relevant information.
- (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.

The issues

25 The following questions arise in connection with this ground of review:

- (a) did the Minister work out profit under Reg 45(3)(c)?
- (b) can the profit be worked out under Reg 45(3)(c)?
- (c) can the profit be worked out under Reg 45(3)(a)?

I will deal with these questions in turn.

Did the Minister work out profit under Reg 45(3)(c)?

26 CG Power complained that the Commission failed to apply Reg 45(4).

27 CG Power's submission proceeded on the assumption that the Minister had calculated profit under Reg 45(3)(c). This assumption is understandable. Report 383 said as much:¹³

¹³ Page 18. Regulation 44(3)(c) is also referred to at pages 13 and 26 of the Report.

... the Commission considers that an amount for profit should be worked out under subsection 45(3)(c) of the Regulation, using any other reasonable method having regard to all relevant 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. CG Power's revised domestic sales listing and profitability calculation is at Confidential Appendix 3.

- 28 The Commissioner submitted that the references to Reg 45(3)(c) in Report 383 were an error.
- 29 This submission is supported by the calculation at Confidential Appendix 4 of Report 383. The calculation of the normal value in Confidential Appendix 4 incorporates the profit margin of ██████, arrived at in Confidential Appendix 3 of Report 383. Confidential Appendix 3 is described as "CG Power's revised domestic sales listing and profitability calculation." It was not disputed that CG Power did not make domestic sales of goods like the goods the subject of the application. It is also apparent from description of the goods in Confidential Appendix 3 that the sales are of transformers with different power ratings and voltage ratios to the goods. The data in Confidential Appendix 3 therefore relates to "the sale of the same general category of goods in the domestic market of the country of export", within Reg 45(3)(a) of the Regulation.
- 30 Further, the data in Confidential Appendix 3 to the Report is the same data found in Confidential Appendix 3 to the SEF. In the SEF, the Commission stated that the profit component of the normal value was calculated in accordance with Reg 45(3)(a).¹⁴ The profit worked out in the SEF was the same as the profit worked out in the Report, as was the methodology.
- 31 The Moulis Letter contended that it was not open to the Commissioner to submit that the reference to Reg 45(3)(c) was an error.¹⁵ It argued that the Reviewable Decision was a decision of the Minister, not the Commissioner. CG Power contended that, in making the Reviewable Decision, the Minister said that he adopted the reasoning set out in Report 383 and that it was not possible to go behind the Reviewable Decision or the adoption by the Minister of the reasons and findings articulated in the Report.
- 32 I do not accept this submission. It is preferable that the real basis for the calculation of the profit should be addressed. Further, a review under Div 9 of the Act is a review of the decision, rather than the reasons for the decision or the process by

¹⁴ SEF at p16.

¹⁵ I may have regard to this submission because it is directed to the type of submission the Commissioner can make, rather than being directed specifically at my recommendation. I accept that the distinction between submissions directed to the merits and submissions directed to "procedure" is not always clear cut, and that procedural submissions can have substantive effect.

which the decision was arrived at. Consequently, the Commissioner is not confined to making submissions which justify the Reviewable Decision on the grounds advanced in Report 383 and may make submissions which might be thought to go behind the reasoning articulated in the Report.

33 Profit was worked out applying Reg 45(3)(a).

Can the profit be worked out under Reg 45(3)(c)?

34 In the Panel Application, CG Power contended that the profit component of the normal value should be found to be zero in circumstances where the Minister is unable to adopt any of the methodologies specified under Reg 45(3).¹⁶ This submission was made in the context that CG Power contended that the Minister's purported adoption of Reg 45(3)(c) was ineffective and calculating profit under Reg 45(3)(a) had been abandoned in Report 383. It argued that the amount of profit should be zero. It is necessary, therefore, to consider whether the profit could be worked out under either, or both of, Reg 45(3)(a) and (c).

35 In his submissions, the Commissioner sought to support the profit on the basis of Reg 45(3)(c) by referring to the amount of profit that had been worked out in respect of PT. Unelec Indonesia ("Unelec"), an Indonesian producer of transformers. Unelec had been involved in Investigation 219 and had co-operated with the Commission. The profit worked out by the Commissioner during that Investigation was said to be [REDACTED] to the figure worked out for CG Power and would be used for the purposes of Reg 45(4). The Commissioner contended that this would have the consequence that the amount of profit calculated under Reg 45(3)(c) "would not necessarily be capped at zero", as CG Power contended. Presumably, the profit would be capped at the level of the Unelec profit.

36 In the Moulis Letter, CG Power objected to the use of the Unelec profit figure.¹⁷

37 I agree that I am not able to support the profit figure using the Unelec profit. I cannot have regard to information about the Unelec profit. That information does not fall within s 269ZZK(4) and (5) of the Act. It was not information to which the Commission had regard under s269ZZK(6)(c). It was not information to which the Commissioner was required to have regard because it was information that did not relate to the Review Period in this matter and was not obtained in the course of the Review.¹⁸

¹⁶ Panel Application, Attachment B, p7.

¹⁷ I am able to have regard to this aspect of the Moulis Letter because it is directed to procedural aspects of the Review and, in particular, the information to which I can have regard in making my recommendation under s 269ZZK(1).

38 Accordingly, there is no information about the profit normally realised by other exporters or producers within Reg 45(4) which I can take into account. Profit should not be worked out under Reg 45(3)(c).

Can the profit be worked out under Reg 45(3)(a)?

39 The final question which arises in respect of this Ground is whether it was open to the Minister to work out the profit under Reg 45(3)(a).

40 CG Power submitted that it was not open to work out the profit under Reg 45(3)(a) because the information which had been relied on by the Commissioner in calculating profit under Reg 45(3)(a) in the SEF (and in the Exporter Verification Report) did not “adequately reflect the *“actual amounts realized”* by” CG Power.¹⁹

41 The background to this submission is:

- (a) CG Power provided information to the ADC prior to the site visit conducted by ADC officers;
- (b) during the site visit, it was discovered that the spreadsheet provided by CG Power showing the Australian cost to make and sell (“CTMS”) was based on bills of materials rather than the actual costs as recorded in something called the “work breakdown structure”, which was part of CG Power’s financial records. This problem extended to the spreadsheet provided by CG Power which showed the domestic CTMS;²⁰
- (c) CG Power provided revised versions of both spreadsheets after the site visit was complete, but before the ADC officers left Indonesia;
- (d) the ADC officers were not able to conduct an onsite verification in respect of the revised spreadsheets but did attempt to reconcile the revised spreadsheets with other data in their possession;
- (e) the Commissioner used the revised data to calculate the CTMS of the Australian sales, which was the basis of the normal value; and
- (f) the Commissioner used the original domestic data to work out the profit.

42 The Commissioner’s use of the original domestic data was the subject of a submission by CG Power in response to the SEF.²¹ The submission was to the effect that the original domestic CTMS data should not be used to work out the profit under Reg 45(3)(a) because the transformers CG Power sold domestically were bigger and had greater raw material costs than the Australian transformers. This

¹⁹ Footnote 13 in Attachment B to the Panel Application.

²⁰ Exporter Verification Report (EPR7).

²¹ Letter dated 6 April 2017 from Moulis Legal.

issue arises whether the original domestic data was used to work out profit under Reg 45(3)(a) or under Reg 45(3)(c).

- 43 This submission and the steps taken by the ADC in relation to the data provided by CG Power were discussed in Report 383:

4.2.1.1 The Commission's consideration

... the Commission tested the reliability of the revised domestic CTMS data using all information that was available. In doing so, the Commission had regard to the raw material to total cost to make ratio, raw material to selling price ratio and proportion of raw materials consumed in domestic production to the total consumption of raw materials as reported in CG Power's income statement. The Commission observed that CG Power's revised domestic CTMS data does not return ratios that are consistent with its export sales and all other sales, which brings in to query its reliability.

In addition, the Commission calculated the raw materials to total cost to make and raw materials to sales price ratios for all power transformers having different power ratings that CG Power sold in its domestic market throughout the review period. The Commission observed that there was no direct relationship between the power rating of the power transformer and the raw material to total cost to make and raw material to sales price ratios.

Based on the above analysis and because the Commission was not provided the opportunity to verify CG Power's revised domestic CTMS data at the in-country verification visit, the Commission maintains that CG Power's revised domestic CTMS was not suitable for the purpose of calculating its domestic profitability and has chosen to rely on the previously verified domestic CTMS data.

The Commission's analysis of CG Power's original domestic CTMS data and revised domestic CTMS data and subsequent analysis are at **Confidential Attachment 1 – Ratio Analysis**.

Report 383 also said:²²

As explained in section 4.2.1 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.

- 44 I am not satisfied that the Minister was precluded from using the original domestic CTMS data to work out profit. In the passages from Report 383 quoted above, the Commissioner asserts that, in his opinion, the original domestic CTMS spreadsheet was probably a more accurate reflection of the actual amount of profit realised by CG Power than the revised domestic CTMS spreadsheet and the reasons why that opinion was formed. In working out profit under Reg 45(3)(a) and the "amount actually realised", the Minister is not confined to a single piece of information or document. The Minister is entitled to evaluate pieces of information or documents, in the context of all the information available. The Commissioner also provided

²² At p18.

reasons for rejecting the argument that there was a disparity in raw material usage between the goods under consideration and the same general category of goods.

- 45 The matters discussed in the passages from Report 383 quoted above and identified in Confidential Attachment 1 to Report 383 form a reasonable basis for using the data contained in data contained in Confidential Appendix 3 to Report 383 to work out the profit under Reg 45(3)(a). I am not persuaded that the profit figure worked out by the Minister and used in the normal value calculations is not the correct or preferable figure.

Ground B: Adjustments to the normal value

- 46 The Minister made four adjustments when calculating the normal value. CG Power said that three were wrong:

- (a) export packing costs;
- (b) Australian office costs; and
- (c) export warranty costs.

It is convenient to deal with the Australian office costs first and to leave the export warranty costs till last.

Australian office expenses

Summary

- 47 During the Review Period, CG Power maintained an Australian office. The issue is how the costs of the Australian office ought to be treated in calculating the normal value.
- 48 I consider that it was appropriate to include the Australian offices costs in the normal value but that it was not appropriate to include both the CG Power's domestic SG&A costs and the Australian office costs. The CTMS should have been calculated by reference to the domestic CTMS, but with an adjustment representing the additional costs associated with the Australian office. Calculations are set out in the Schedule A to this Report.

The process of ascertaining the normal value

- 49 Calculating the normal value under s 269TAC(2)(c) may be regarded as a four-stage process. First, the Minister arrives at the cost of production or manufacture of the goods ("CTM") in the country of export (ie Indonesia), applying Reg 43. Second, the Minister adds the SG&A costs associated with the sale, calculated on the assumption that the goods had been sold for home consumption in the ordinary course of trade in the country of export, rather than having been exported. This involves applying Reg 44. Third, the Minister adds a component in respect of profit

on the sale, applying Reg 45. Finally, s 269TAC(9) requires the Minister to make any adjustments “necessary” to ensure that the normal value ascertained by the previous steps (“provisional normal value”), “is properly comparable” with the export price of those goods.

- 50 The Australian office costs were involved in the second and fourth stages of the determination of the normal value.
- 51 CG Power provided information to the ADC about its SG&A costs. This information included costs related to domestic sales, the Australian office, and the costs of other overseas offices (“global SG&A costs”). The ADC isolated the costs associated with the Australian office from the global SG&A costs. From the Australian office costs, the ADC then deducted various costs described as [REDACTED]. The remaining Australian office costs included items such as [REDACTED]. It may be inferred that the Commissioner considered that the remaining Australian office costs were SG&A costs. The Commissioner then deducted these Australian SG&A costs from the global SG&A costs originally by CG Power. This deduction was made on the basis that the Australian office costs were “specific to the export sales to Australia and therefore cannot be associated with the SG&A costs of other sales transactions”.²³ The provisional normal value therefore included the SG&A costs identified by CG Power, less the Australian SG&A costs.
- 52 The third stage of determining the normal value, namely working out the profit component, was the subject of Ground A.
- 53 In the fourth stage of the process, the Commissioner then adjusted the provisional normal value by adding the Australian office costs.²⁴ The adjustment was effected by adding a proportion of the share of the Australian office costs to the provisional normal value of each of the CG Power’s sales during the Investigation Period. The portion added was the same for each of CG Power’s transactions during the Review Period.

The issues

- 54 CG Power identified five problems with the treatment of the Australian office costs: first, the adjustment was not necessary because CG Power’s global SG&A costs included adequate allocation of the Australian office costs; second, the costs associated with the Australian office are “equally relevant”²⁵ to post exportation activities; third, the Minister failed to adopt an equivalent downward adjustment on account of domestic and third country sales office expenses, with the consequence

²³ REP at 20.

²⁴ Ie the total Australian office costs less [REDACTED] and [REDACTED].

²⁵ Panel Application, Attachment B at p12.

that the normal value included an allocation for domestic and third party sales office expenses, as well as an allocation for Australian office costs; fourth, the Minister only removed the Australian office costs for the 2013 - 2014 financial year, so the domestic SG&A component still included the Australian office costs for the period April 2014 to June 2016; and fifth, the Minister included in its relevant costs, costs which were not “generally attributable to any particular sales or service”.²⁶

- 55 In the Panel Application, CG Power said that removing this adjustment would decrease the dumping margin by [REDACTED] per cent.²⁷

The Legislation

- 56 In the present case, the statutory authorisation for adjusting the normal value is found in s 269TAC(9) of the Act:

(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.

- 57 Subsection 269TAC(8) deals with the adjustments that may be made where the normal value is determined by reference to the domestic price. It is a “sound guide”²⁸ to the way in which adjustments should be made under s 279TAC(9) and provides:

Where the normal value of goods exported to Australia is the price paid or payable for like goods and that price and the export price of the goods exported:

- (a) relate to sales occurring at different times; or
- (b) are not in respect of identical goods; or
- (c) are modified in different ways by taxes or the terms or circumstances of the sales to which they relate;

that price paid or payable for like goods is to be taken to be such a price adjusted in accordance with directions by the Minister so that those differences would not affect its comparison with that export price.

²⁶ Panel Application, Attachment B at p14.

²⁷ CG Power also complained that the ADC has lead CG Power to believe that adjustments would not be made by the terms of the exporter questionnaire. However, it appears that the need for an adjustment was not evident to the ADC until after the exporter questionnaire was sent to CG Power. In any event, CG Power had the opportunity to raise issues about adjustments after the Exporter Verification Report was published by the ADC.

²⁸ *Mullins Wheels Pty Ltd v Minister for Customs and Consumer Affairs* (2000) 171 ALR 40; [2000] FCA 357 at [12] (Lehane J).

Discussion

- 58 The Commissioner sought to support, at least in part, the upwards adjustment of the normal value by referring to the approach it had taken to the export price.²⁹ The Commissioner considered that the price recorded in CG Power's Australian invoices, which were made on a delivery duty paid basis, overstated the FOB export price. Although the invoices disclosed certain freight costs, the ADC ascertained that CG Power bore additional transport costs which were not identified on the invoices. The Commissioner ascertained the FOB price by deducting those additional costs. This part of the Commissioner's calculations was not challenged. However, the rationale for the adjustment of the invoiced price does not bear upon the appropriateness of the adjustment to the normal value.
- 59 The Commissioner also contended that by including the Australian office costs in the SG&A expenses of the business as a whole, CG Power was essentially "under-allocating these export specific costs to its Australian export sales".³⁰
- 60 However, the effect of the Commissioner's adjustment is that the selling expenses forming part of the normal value included both the SG&A expenses associated with Indonesian domestic sales *and* the Australian office costs. This is the thrust of CG Power's third proposition. I do not accept that including the whole of both these costs is appropriate. CG Power sold its transformers by submitting tenders to potential purchasers.³¹ The goods were not commodities and were tailor made to the requirements of the purchaser. It appears that SG&A costs were associated with preparing tender documents and designing the transformers to meet the requirements of potential purchasers. It seems unlikely that this process would be carried out twice, once in Indonesia and once in Australia for the same transaction. It would be in CG Power's commercial interests to minimize duplication. The adjustment made for the Australian office costs was not the correct or preferable one.
- 61 I do not, however, accept that the Australian office costs were referable primarily to costs incurred after export, CG Power's second proposition. The sales were sales by tender, so sales costs were incurred before the goods were built or exported from Indonesia.
- 62 I do not accept that the SG&A costs were adequately accounted for in the figures provided by CG Power, CG Power's first proposition. The Domestic SG&A figure,

²⁹ Commissioner's submissions at the section entitled "Ground 2(a)".

³⁰ Commissioner's Submissions at section entitled "Ground 2(a)".

³¹ See item GP3 of the Verification work program, being Confidential Attachment 1 to the Exporter Visit Report.

after deduction of the Australian SG&A costs [REDACTED]. The cost per transaction of the Australian office [REDACTED] came to [REDACTED]. This suggests that the costs of sale for the Australian transactions were higher than the domestic costs of sale and that an adjustment was appropriate in order to enable proper comparison with the export sales. An upward adjustment to the normal value was appropriate.

- 63 A more appropriate treatment of the SG&A costs would be for the normal value to include the domestic SG&A costs and for that provisional normal value to be adjusted by the amount by which the Australian office costs exceeded the domestic SG&A costs. This adjustment can be arrived at by deducting an amount equal to the domestic SG&A costs (after deducting the Australian office costs) from the normal value identified in Report (which currently includes both domestic SG&A costs and Australian office costs).
- 64 CG Power's fourth and fifth propositions were advanced in a context where CG Power's domestic SG&A costs formed part of the normal value along with the Australian office costs. CG Power's domestic SG&A costs were said to have included costs associated with offices outside Indonesia. As originally calculated by the Minister, inclusion of these "overseas" costs in the "domestic" SG&A expenses would have increased the normal value. However, the inclusion of overseas costs in the domestic SG&A costs does not substantially affect the final normal value in this case, because the Australian office costs exceeded the domestic SG&A costs, even including the "overseas" costs. I am not persuaded, in any event, that the inclusion of these expenses in the domestic SG&A costs is likely to give rise to any substantial change in the normal value. These costs were originally included by CG Power as part of the global SG&A costs.
- 65 The overall outcome is that there should be a downward adjustment to the normal value (as ascertained in the Report) which is identified in the Schedule A.

Export packing costs

- 66 The provisional normal value was adjusted upwards to take account of the costs of packing the goods for export. CG Power contended that this was an error because the costs of export packing were already included in the "provisional" normal value as they were part of the CTMS of the Australian goods.
- 67 CG Power is correct. Costs identified as "transformer packing" costs were included in the revised Australian CTMS data.³³ The transformer packing costs became a

³² See Confidential Attachment 3 to the Commissioner's Submissions, "DOM SGA Recalc" worksheet.

³³ Attachment GP12B to the Verification Work Program being Confidential Attachment 1 to the Exporter Verification Report.

component of the Australian CTMS data, which formed the basis of the normal value. It was not, therefore, appropriate to make an adjustment in respect of export packing costs even if it was not the practice of CG Power to specially pack transformers which it sold locally.

- 68 The amount of the transformer packing costs that were included in the normal value in the Commissioner's calculations should be deducted from the adjusted normal value. This is set out in the Schedule A.

Export warranty

- 69 The Commissioner's calculation of the normal value included an allowance in respect of an export warranty.
- 70 CG Power contends that this was incorrect. It pointed out that the FOB Price does not reflect warranty claims and that the extent of such claims would not be known until after the FOB price was set.
- 71 I do not accept CG Power's argument. A vendor of equipment may make provision in its costing on account of warranty claims that might be made in the future or, alternatively, may purchase insurance to cover the risk of warranty claims in the future. Confidential Appendix 4 to the Commissioner's submissions shows an allowance for an export warranty expense. There was no equivalent provision in CG Power's domestic sales data.
- 72 I consider that the material referred to by the Commissioner warrants the adjustment made by the Minister.

Ground C: Change in the variable factors

- 73 The third ground of review raised by CG Power was that the Minister could not properly have determined different variable factors relying on sales made prior to 10 December 2014 and ought to have determined that each of the variable factors was zero.
- 74 CG Power argued that:
- (a) the focus of a review of Anti-Dumping measures under Division 5 Part XVB of the Act is whether there has been change to the variable factors relevant to the determination of the duty;³⁴
 - (b) the variable factors relevant to the dumping duty in this case were previously ascertained on 10 December 2014, which was the date of publication of:

³⁴ Panel Application, Attachment B at p17.

- (i) notice of declarations by the then Parliamentary Secretary to the Minister for Industry under s 269TG(1) and (2) of the Act that s 8 of the *Dumping Duty Act* applied to the Goods; and
 - (ii) Anti-Dumping Notice 2014/132, which set out findings in relation to Investigation 219;
- (c) CG Power had not exported goods to Australia since 10 December 2014. The transactions which formed the basis of the Reviewable Decision occurred before then; and
- (d) consequently, there was no change in the variable factors since the Original Decision was made.

75 I do not accept this Ground.

76 The effect of the Reviewable Decision is that, as at the date of the Reviewable Decision, 31 May 2017, the Minister considered that the variable factors were as identified in Report 383. The values ascertained in the Reviewable Decision were different from the values ascertained for the purposes of the Original Decision of the Parliamentary Secretary published on 10 December 2014. The variable factors had changed and the Minister was able to make a declaration under s 269ZDB(1)(a)(iii).

77 The Minister relied on evidence about events which occurred prior to 10 December 2014, specifically Australian sales made by CG Power prior to 10 December 2014. He did so to establish the variable factors as at 31 May 2017. The Minister is not required to consider the variable factors at different times within the Review Period, and specifically, during the period 1 July 2013 to 10 December 2014.

78 The evidence in Investigation 219, which was relied upon in making Original Decision, related to a period of time prior the making of the Original Decision. The Parliamentary Secretary did not ascertain the variable factors in respect of any of the transactions the subject of Investigation 383 in making the Original Decision. Nor did the Minister rely on the transactions investigated in Investigation 219. There was no duplication in the use of the transactions which occurred in the period 1 July 2013 to 10 December 2014.

79 I note that the Div 5 Application relied on events during the period between 1 July 2013 and 30 June 2016 and that it proposed the Investigation Period adopted by the Commissioner.

Conclusion

- 80 For the reasons given above, I consider that the Reviewable Decision was not the correct and preferable decision.
- 81 I consider that:
- (a) a negative adjustment should be made to the normal value as ascertained in Report 383 to avoid duplication in the domestic SG&A costs; and
 - (b) no adjustment on account of export packing should have been made in calculating the normal value.
- 82 A calculation of the amount of the normal value reflecting these adjustments is the Schedule A to this Report. There was no submission that the other variable factors fixed by the Minister in the Reviewable Decision should be changed.



Scott Ellis
Panel Member
Anti-Dumping Review Panel
26 September 2017

Abbreviations

Term	Meaning
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
CG Power	PT. CG Power Systems Indonesia
CTM	Cost to Make
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the ADC
Div 5 Application	The application made by CG Power dated 11 October 2016 under s 269ZA for review of the variable factors the subject of the Original Decision
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
FOB	Free on Board
goods	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, complete or incomplete
IDD	Interim dumping duty
Minister	The Hon. Craig Laundy, the Assistant Minister for Industry, Innovation and Science
Moulis Letter	The letter dated 18 September 2017 from Moulis Legal, the solicitors for CG Power
NIP	Non-injurious price
Original Decision	The decision of the Parliamentary Secretary that s 8 of the <i>Dumping Duty Act</i> applied to the goods, notice of which was published in the Australian Gazette on 10 December 2014
Panel Application	The application by CG Power to the Panel for review of the Reviewable Decision dated 6 July 2017
Parliamentary Secretary	The Hon. RC Baldwin, who was as at 10 December 2014 the Parliamentary Secretary to the Minister for Industry

Report 383	The report published by the ADC in relation to Investigation 383 dated 6 July 2017
REP 219	The Report published by the ADC in relation to Investigation 219 dated 2 December 2014
Reviewable Decision	The decision of the Minister to make a declaration under s 269ZDB(1)(a)(iii) of the <i>Customs Act 1901</i> , notice of the decision was the subject of ADN 2017/62
Review period	1 July 2013 to 30 June 2016
SEF 383	The Statement of Essential Facts No. 383 dated 17 March 2017
SG&A costs	Selling, general and administrative costs
Unelec	PT. Unelec Indonesia, an Indonesian exporter of transformers

Schedule A

For the reasons given in the body of this Report, I consider that the normal values as determined by the Reviewable Decision should be adjusted in the following respects:

- The normal value arrived at in ADC Report 383 should be reduced by the amount of the domestic SG&A costs; and
- The normal value arrived at in ADC Report 383 should be reduced by the export packing costs originally included.

The export prices and the NIP should have the values ascertained in the Original Decision.

Calculations supporting the calculation of the normal value are set out in a confidential spreadsheet.