Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
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By EMAIL

Mr Dale Seymour
The Commissioner of the Anti-Dumping Commission
Anti-Dumping Commission
55 Collins Street
Melbourne VIC 3000

Dear Commissioner,

ADRP Review No 100 – Wind Towers exported from the People's Republic of China and the Republic of Korea (Case 487)

The Anti-Dumping Review Panel (Review Panel) is currently conducting a review of the decision of the Minister for Industry, Science and Technology made on 25 March 2019 under section 269ZHG(1) of the *Customs Act 1901* (the Act) in respect of Wind Towers exported from the People's Republic of China (China) and the Republic of Korea. The Review Panel accepted an application for review from Shanghai Taisheng Wind Power Equipment Co., Ltd (TSP) regarding the continuation of anti-dumping measures in respect of Wind Towers exported from China.

As you are aware, I am conducting the review.

Pursuant to section 269ZZL of the Act, I require the following findings in Report 487, relating to TSP's grounds of review, be reinvestigated:

1. The finding as to the normal value determined for TSP's exports.

2. To the extent that there is any change in the dumping margin for TSP's exports as a result of any change to the normal value determined for such exports, the finding that

the expiration of the anti-dumping measures applicable to wind towers exported to Australia from China for exports by TSP would lead, or be likely to lead, to a continuation of, or a recurrence of, the dumping and material injury that the anti-dumping measures are intended to prevent.

I provide below a summary of my reasons for making the request under s.269ZZL of the Act:

Normal Value

1. TSP contends that the Anti-Dumping Commission (ADC) did not correctly calculate the dumping margin for TSP's exports as it did not determine the amount of profit for normal value purposes as required under s.269TAC(2)(c). The submission by TSP does not take issue with the use of s.269TAC(2)(c) as it notes the ADC's finding that there was an absence of sales of like goods in the market of the country of export. TSP points out that despite this finding the ADC insisted that it should apply Regulation 45(2) of the *Customs (International Obligations) Regulation* 2015 (Regulation) for the determination of the amount of profit.

2. The use of Regulation 45(2) was, according to TSP, incorrect for two reasons. The first is because there were no sales of like goods in the market of the country of export. The second was that the ordinary course of trade (OCOT) test could not be carried out for the purpose of the Regulation in the circumstances of TSP's exports.

3. As noted above, the ADC and TSP agree that s.269TAC(2)(c) should have used to determine the normal value for TSP's exports. That paragraph relevantly provides that the normal value is:

    (i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and

    (ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export – such amounts as the Minster determines would be the administrative, selling and general costs associated with the sale and the profit on that sale.

4. Subsection 269TAC(5B) provides that the amount of profit to be determined on the sale of goods under s.269TAC(2)(c)(ii) must be worked out "in such manner, and taking account of such factors, as the regulations provide for that purpose".

Regulation 45 is the relevant provision for the working out the profit for the purpose of s.269TAC(2)(c)(ii). Regulation 45(2) provides:

> "The Minister must, if reasonably practicable, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade."

5. In support of its contention that the use of Regulation 45(2) was incorrect, TSP relies on the submission it made in response to the Statement of Essential Facts (SEF). In the submission, it is pointed out that the ADC found that TSP did not have any domestic sales of like goods to the goods under consideration (GUC) exported to Australia during the inquiry period. The SEF found as follows:

> "Therefore, the Commission is of the view that there is an absence of sales of like goods in the market of the country of export that would be relevant for the purposes of determining a price under subsection 269TAC(1)."[1]

6. Given this finding made by the ADC, it is not surprising that TSP took exception to the ADC using Regulation 45(2) which is only applicable if there are sales of like goods by the exporter in the OCOT. Of course, there can be sales of like goods which otherwise meet the requirements of s.269TAC(1) but which are nevertheless not suitable or relevant for the ascertainment of the normal value under s.269TAC(1) because they fall within one of the categories in s.269TAC(2). For example, there may be a low volume of sales. Such sales may nevertheless be used for the ascertainment of the profit in a constructed value pursuant to Regulation 45(2). There do, however, have to be sales of like goods in the ordinary course of trade for Regulation 45(2) to be used.

7. The explanation given by the ADC in the Final Report for the seeming inconsistency is as follows:

> "As noted in section 6.4.2 of this report, the Commission has found that, whilst wind towers may vary from project to project and have different technical properties, they nevertheless are like goods. However, these differences mean that there are no *relevant* sales of like goods on the domestic market to enable matching to the goods exported to Australia."[2]

[1] Statement of Essential Facts No. 487 section 6.4.2 at page 30.
[2] Final Report No 487 section 6.4.2.4 at page 36.

8. In its submission to the Review Panel, the ADC noted that wind towers "are projects with unique technical properties, hence there are no comparable sales in the domestic market to enable an exact match to the goods exported to Australia". In a reference to the methodology applied in the initial investigation[3], the Commission found that there was "an absence of sales of like goods in the market of the country of export **that would be relevant** for the purpose of determining a price under subsection 269TAC(1)" (emphasis added by the submission).

9. A further explanation for the approach of the ADC to the determination of the normal value of TSP's exports can be found in the Exporter Verification Report. That report notes that "the verification team considers that model matching between Australian and domestic sales to determine a normal value under subsection 269TAC(1)…is not possible".[4]

10. A basis for the approach taken by the ADC team to the ascertainment of the normal value of TSP's exports is to be found in the Dumping and Subsidy Manual[5]. When describing the approach which the ADC takes to the suitability of sales for determining normal value, the Manual states:

> "Subsection 269TAC(2) provides that certain domestic sales may be unsuitable for use in determining normal values because of a factor in the market.
>
> *Absence or low volume of sales*
>
> One such factor is where there is an absence, or low volume, of sales of like goods in the domestic market that would be relevant for the purposes of determining a normal value using prices (section 269TAC(1)). For example, there may be no comparable models on the domestic market and it may not be practicable to make the required specification adjustments for the purposes of comparing normal value to export price."[6]

11. The use of model matching is an acceptable method to use for the comparison of products sold domestically with those exported. It is a practical way of taking into

[3] Final Report No 221.
[4] Exporter Verification Report for Shanghai Taisheng Wind Power Equipment Co., Ltd EPR 013 section 2.3.1 at page 6.
[5] Dumping and Subsidy Manual November 2018.
[6] As above at page 34.

account differences in goods which, although like goods, are not identical. However, difficulties in taking a model matching approach is not a basis for discarding domestic sales of like goods which otherwise meet the criteria of s.269TAC(1) and do not fall within the excluding categories in s.269TAC(2).

12. The reference in the Final Report to there being no "relevant" sales is presumably based on the wording of s.269TAC(2)(a)(i) which refers to there being an absence of sales of like goods that "would be relevant for the purpose of determining a price under subsection (1)". Relevant sales for the purpose of determining a price under s.269TAC(1) are the sales described in that subsection, that is, "like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not sold by the exporter, by other sellers of like goods".

13. Subsection 269TAC(2) applies where the normal value, for one of the reasons expressed in s.269TAC(2), cannot be ascertained under s.269TAC(1)[7]. There is no reference in the legislation to sales not being suitable or relevant for the ascertainment of normal value under s.269TAC(1) because technical differences mean the models of the goods sold domestically cannot be matched with the models exported to Australia. Those technical differences may require adjustments to be made under s.269TAC(8) or even, in some cases, mean that the goods are not like goods. If, however the goods sold domestically in the country of export are like goods and those goods are sold by the exporter in the OCOT and in sales that are arms length, then they are relevant sales for the purpose of s.269TAC(1).

14. The approach taken by the ADC in the Final Report to s.269TAC(2) would mean that the Minister had a broad discretion under s.269TAC(2) to disallow sales which were not considered to be comparable or relevant for determining a price under s.269TAC(1). I am unable to find such a legislative intention in s.269TAC(2) and it would be contrary to the otherwise prescriptive nature of the circumstances in s.269TAC(2) which allow the Minister to ascertain the normal value of exports under s.269TAC(2)(c).

15. In *Anti-Dumping Authority & Anor v Degussa AG & Anor*[8] the Full Court of the Federal Court confirmed that sales which fell within s.269TAC(1) could not be

[7] *GTE (Australia) Pty Ltd v John Joseph Brown, Minister of State for Administrative Services acting for and on behalf of the Minister of State for Industry and Commerce* [1986] FCA 536 at page 50.
[8] [1994] FCA 677.

ignored on the basis of some criteria not found in the legislation. It is the words of s.269TAC(1) to which regard must be had. While the decision in *Degussa* was distinguished by the court in *Pilkington (Australia) v Minister of State for Justice & Customs*[9], on the basis of subsequent changes to the legislation, this does not affect the comments with respect to s.269TAC(1) and s.269TAC(2) on this point.

16. While I do not consider s.269TAC(1) and (2) to be ambiguous on this issue, when regard is had to the relevant provision of the Anti-Dumping Agreement[10], the proper construction is confirmed. That provision is Article 2.2 which provides:

> "2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."

17. Subsection 269TAC(2) was intended to reflect Article 2.2 of the Anti-Dumping Agreement.[11]

18. In a conference held under s.269ZZHA of the Act, representatives of the ADC explained that the technical differences of the towers meant that it was impossible to make accurate adjustments under s.269TAC(8). As noted above, in some cases the differences in the models sold domestically to those exported may be so significant that they are not like goods. In this case, it is common ground that they are like goods. An absence of sufficient information to make the necessary adjustments under s.269TAC(8) may mean that the Minister has insufficient information to enable the normal value to be ascertained under s.269TAC(1). In which case, s.269TAC(6) may be applicable and the Minister is required to ascertain the normal value having regard to all relevant information.

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[9] [2002] FCAFC 423.
[10] WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
[11] Explanatory Memorandum to the Customs Legislation (World Trade Organisation Amendments) Bill 1994 at para 34.

19. For the above reasons, I do not consider that there can be a finding consistent with the legislation that for the purpose of using a constructed value under s.269TAC(2) there is an *absence* (as opposed to a low volume) of domestic sales of like goods by the exporter in the OCOT but for the purpose of Regulation 45(2) there are such sales.

20. Another reason TSP gave for the non-application of Reg 45(2) is that it was not possible for the ADC to conduct an OCOT test on TSP's domestic sales. In the Exporter Verification Report for TSP it was stated:

> "In the absence of weighted average CTMS data to conduct a recoverability test, sales at a loss are also considered not recoverable in this case." [12]

In the Final Report the ADC noted that it had conducted a recoverability test on TSP's domestic sales by comparing the net invoice revenue to the weighted average CTMS over the inquiry period. The Final Report then stated:

> "However, due to the nature of wind towers being produced on a project by project basis, the CTMS, which in this case is calculated on a project by project basis, is equal to the weighted average CTMS over the inquiry period."[13]

21. The above comments caused me to raise the issue of the OCOT test with representatives of the ADC in a conference under s.269ZZHA of the Act. From information obtained at the conference and from a review of the spreadsheet "487-TSP-Appendix 3-Domestic Sales" it seems that what the ADC did is to include only those sales of the wind towers in projects which were profitable. If the projects were not profitable then those sales were not included for the purpose of applying Regulation 45(2).

22. As noted above, Regulation 45(2) requires the Minister to work out the profit on the sale of goods "by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade". There is no definition of the OCOT for the purpose of Regulation 45(2) (or for that matter s.269TAC(1)) but s.269TAAD provides one instance of when goods will be taken not to have been sold in the OCOT. Subsection 269TAAD(1) provides:

[12] Exporter Verification Report section 7.2 at page 13.
[13] Final Report 487, section 6.4.2.4 at page 36.

"If the Minister is satisfied, in relation to goods exported to Australia:

(a) that like goods are sold in the country of export in sales that are arms length transactions in substantial quantities during an extended period:

(i) for home consumption in the country of export; or

(ii) exportation to a third country;

at a price that is less than the cost of such goods; and

(b) that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period;

the price paid for the goods referred to in paragraph (a) is taken not to have been paid in the ordinary course of trade."

23. Subsection 269TAAD(3) provides that the cost of goods "are taken to be recoverable within a reasonable period of time if, although the selling price of those goods at the time of their sale is below cost at that time, the selling price is above the weighted average cost of such goods over the investigation period". The weighted average cost of the goods is required to be worked out in accordance with a formula set out in s.269T(5A). This formula essentially requires the sum of the cost per unit of the goods sold during the inquiry period to be divided by the sum of the number of units of the goods involved in those sales.

24. The approach taken by the ADC means that the sales included in the Regulation 45(2) calculation of profit were in the OCOT. However, it is possible that other sales of wind towers during the inquiry period may also have been sold in the OCOT but have not been included.

25. It is not clear that the legislation allows the ADC to include only those sales of wind towers in projects which were profitable in the calculation under Regulation 45(2) or for the purpose of s.269TAC(1). Subsection 269TAAD(3) would indicate to the contrary. There is also judicial comment which would indicate that sales which could come within Regulation 45(2) cannot be disregarded.

26. In *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science*[14] (an appeal from a decision of Robertson J.) Peram J., when referring to Regulation 45(3)(a), noted:

> "The primary judge accepted (at [86]) that once the general category had been identified the Commissioner could not lawfully disregard some subset of the general category in carrying out the profit calculation."[15]

His Honour also noted that it had not been suggested to the Full Court that Justice Robertson was incorrect in his Honour's construction of Regulation 45(3)(a).

27. I can see no reason why the approach would be different for Regulation 45(2). This is also consistent with the decision in *Degussa.*[16]

28. The reasons given by the ADC for not doing an OCOT test have some validity. Nevertheless, the difficulty faced by the ADC in conducting an OCOT test does not allow an approach not supported by the legislation. Again, it may mean that s.269TAC(6) has to be used.

29. For the above reasons, I agree with the submission of TSP Shanghai that the approach by the ADC with respect to the determination of profit is inconsistent with the reason for using s.269TAC(2)(c) to construct a normal value. If there are no domestic sales of like goods by TSP in the OCOT then Regulation 45(2) is not available to be used. In addition, sales which, because of s.269TAAD(3) would be in the OCOT, cannot be excluded from the calculations for the purpose of Regulation 45(2). Further it would not be possible for the Minister to be satisfied that there was an absence or low volume of sales for the purpose of s.269TAC(2) when an OCOT test cannot be undertaken.

30. Given the inconsistent findings in the ADC Report regarding whether or not there were domestic sales of like goods in the OCOT which were arms-length transactions and the difficulty in reconciling the approach taken to the ascertainment of the normal value with the relevant legislation, I am referring the finding as to normal value to you for reinvestigation.

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[14] [2018] FCAFC 20.
[15] As above at paragraph 65.
[16] *Anti-Dumping Authority & Anor v Degussa AG & Anor* [1994] FCA 677.

Material Injury

31. The Final Report found that Chinese exporters for wind tower projects had won bids during the inquiry period at dumped prices and that accordingly, the ADC considered that it was likely that future exports of wind towers from China will be at dumped prices.[17] It was also found that dumped prices for wind towers conferred a price advantage in the market on Chinese exporters.[18]

32. The reinvestigation of the finding as to TSP's normal value may lead to a different amount and accordingly, a different dumping margin for TSP's exports. If this is the case, then it will be necessary to consider whether or not this affects the above findings with respect to TSP's exports.

33. For this reason, I require that you reinvestigate the finding that the expiration of the anti-dumping measures applicable to wind towers exported to Australia from China for exports by TSP would lead, or be likely to lead, to a continuation of, or a recurrence of, the dumping and material injury that the anti-dumping measures are intended to prevent.

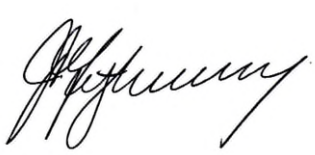
If you have any issues in relation to the reinvestigation or if you consider that a conference under s.269ZZHA of the Act would assist in obtaining the further information the subject of the reinvestigation, please contact the Secretariat.

Please could you report the result of the reinvestigation within 60 days, that is, by **Monday, 2 September 2019.**

If you require more time, including time to allow interested parties the opportunity to comment on an aspect of the reinvestigation, please contact the Secretariat.

Thank you for your assistance.

Yours Sincerely,



Joan Fitzhenry
Senior Member
Anti-Dumping Review Panel
4 July 2019

[17] Final Report 487 section 7.5 at page 48.
[18] As above.