



Australian Government
Anti-Dumping Review Panel

ADRP Report No. 119

Power Transformers from the Republic of Indonesia
and Taiwan

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Abbreviations

Term	Meaning
Act	<i>Customs Act 1901</i>
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
CG Power	PT CG Power Systems Indonesia
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Fortune	Fortune Electric Co., Ltd
Goods	Power transformers
IDD	Interim dumping duty
Indonesia	Republic of Indonesia
Inquiry period	1 January 2016 to 31 December 2018
Manual	Dumping and Subsidy Manual November 2018
Minister	Minister for Industry, Science and Technology
The Regulation	<i>Customs (International Obligations) Regulation 2015</i>
REP 504	The report published by the Commission in relation to power transformers exported from the Republic of Indonesia, Taiwan and the Kingdom of Thailand and dated 4 October 2019
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Minister made on 1 November 2019 under s.269ZH(1) of the Act applying to power transformers exported from the Republic of Indonesia and Taiwan
SEF	Statement of Essential Facts
SG&A	Selling, general and administrative

Wilson	Wilson Transformer Company Pty Ltd
WTO	The World Trade Organization

Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology (Minister) in relation to the continuation of anti-dumping measures in respect of power transformers exported from the Republic of Indonesia (Indonesia) and Taiwan (the Reviewable Decision). The two applicants for the review were Fortune Electric Co., Ltd (Fortune) and PT CG Power Systems Indonesia (CG Power).
2. For the reasons set out in this report, I recommend that the Reviewable Decision with respect to Fortune and CG Power be revoked and that the Minister:
 - With respect to Fortune declare that the Minister has decided to secure the continuation of the measures but that the dumping duty notice continue in force with different specified variable factors, in that the normal value be changed.
 - With respect to CG Power that the Minister declare that the Minister has decided not to secure the continuation of the measures.

Introduction

3. The applicants applied under s.269ZZC of the *Customs Act 1901* (the Act) for a review of the decision of the Minister relating to the continuation of anti-dumping measures pursuant to s.269ZH(1) of the Act in respect of power transformers exported from Indonesia and Taiwan.
4. The applications were accepted and notice of the proposed review, as required by s.269ZZI, was published on 16 December 2019.
5. As Senior Member of the Anti-Dumping Review Panel (Review Panel), I directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

Background

6. Anti-dumping measures were originally imposed on power transformers exported to Australia from Indonesia and Taiwan on 10 December 2014 following an investigation by

the Anti-Dumping Commission (ADC).¹ The investigation was initiated following an application by Wilson Transformer Company Pty Ltd (Wilson).

7. A review of the measures applying to exports to Australia by CG Power was initiated on 7 November 2016. Following the review, the variable factors in the dumping duty notice as applicable to CG Power were amended.² A further amendment to the normal value and dumping margin for CG Power's exports occurred following a review by the Review Panel.³
8. On 11 February 2019 the ADC initiated an inquiry into whether the Minister should continue the anti-dumping measures then applying to exports to Australia of power transformers from Indonesia, Taiwan and Thailand.⁴ The measures were due to expire on 10 December 2019. The inquiry was initiated following consideration by the ADC of an application by Wilson. The inquiry period was from 1 January 2016 to 31 December 2018.
9. A Statement of Essential Facts (SEF) was published by the ADC on 22 August 2019. The ADC subsequently made a report to the Minister (REP 504) and on 1 November 2019 the Minister accepted the recommendations of the Commissioner of the ADC and declared that she had decided to secure the continuation of the anti-dumping measures currently applying to power transformers exported to Australia from Indonesia and Taiwan. The Minister decided not to secure the continuation of the measures applying to power transformers exported to Australia from Thailand.⁵ Notice of the Minister's decision was published on 6 November 2019.
10. At the same time as the Minister decided to secure the continuation of the measures applying to exports from Indonesia and Taiwan, she also determined pursuant to s.269ZH(4)(a)(iii) of the Act that the dumping duty notice applying to those exports continued in force after 10 December 2019 as if different specified variable factors had been fixed in relation to those exports.⁶

¹ ADC Report No. 219 (REP 219).

² ADC Report No. 383.

³ Review Panel Review No. 60.

⁴ ADN No. 2019/20.

⁵ ADN No. 2019/127.

⁶ As above.

Conduct of the Review

11. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision, if he or she is satisfied that the decision is the correct or preferable one, or revoke it and substitute a new specified decision. In undertaking the review s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it were the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.
12. Subject to certain exceptions,⁷ the Review Panel is not to have regard to any information other than relevant information pursuant to s.269ZZK, i.e. information to which the ADC had regard or ought to have had regard when making its findings and recommendations to the Minister.
13. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference, to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information. Conferences were held with representatives of the ADC on 23 January 2020 and 15 July 2020 pursuant to s.269ZZHA of the Act. Non-confidential summaries of the information obtained at the conferences were made publicly available in accordance with s.269ZZX(1) of the Act.
14. On 31 January 2020, pursuant to s.269ZZL of the Act, I required the Commissioner to conduct a reinvestigation of the finding that it is likely that future exports of power transformers by CG Power from Indonesia will be at dumped prices. Initially, the Commissioner was required to report on the result of the reinvestigation by 31 March 2020. However, two extensions of time were requested and granted. The Commissioner provided a report on the reinvestigation on 9 July 2020.
15. In conducting this review, I have had regard to the applications and documents submitted with the applications and to submissions received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information. I have also had regard to REP 504 and to information referenced in that report and to relevant

⁷ See s.269ZZK(4).

information obtained at the conferences with the ADC. As required by s.269ZZK(4A), I also had regard to the report by the Commissioner on the result of the reinvestigation.

Grounds of Review

16. The grounds of review relied upon by the applicants, which the Review Panel accepted, are as follows:

Fortune Electric Co., Ltd

The ADC erred in calculating profit pursuant to section 45 of the *Customs (International Obligations) Regulation 2015*, which resulted in an overstated normal value.

PT CG Power Systems Indonesia

- (a) The evidence does not establish that dumping is likely to recur; and
- (b) It is not likely that material injury will recur.

17. The above grounds are considered below.

Consideration of Grounds

Fortune Electric Co., Ltd

18. Fortune contends that the ADC erred in calculating the profit to be included in the constructed normal value for Fortune's exports. This, Fortune submits, resulted in an overstated normal value.
19. The ADC considered it appropriate to determine the normal value for Fortune's exports pursuant to s.269TAC(2)(c) of the Act which provides for a constructed normal value to be calculated as the sum of:
- such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and
 - on the assumption that the goods, instead of being exported, had been sold in the ordinary course of trade (OCOT) in the country of export, the selling, general

and administrative (SG&A) costs associated with the sale, and an amount of profit.

20. The profit included in the constructed normal value for Fortune's exports was determined by the ADC using s.45(2) of the *Customs (International Obligations) Regulation 2015* (the Regulation). Section 45(2) of the regulation provides:

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

21. While there is no definition in the Act of the OCOT, s.269TAAD of the Act provides that the price paid for goods exported to Australia is to be taken not to have been paid in the OCOT in certain circumstances. Relevantly, these circumstances are where the goods:
- are sold in the country of export in sales that are arms length transactions in substantial quantities during an extended period for home consumption in the country of export;
 - at a price that is less than the cost of such goods; and
 - that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period.
22. Subsection 269TAAD(2) provides that the sales of goods at a price that is less than the cost of such goods occurs in substantial quantities over an extended period if the volume of such goods is not less than 20% of the total volume of sales over that period.
23. Pursuant to s.269TAAD(3) the costs of the goods are taken to be recoverable within a reasonable period of time if, although the selling price of those goods at the time of their sale is below their cost at that time, the selling price is above the weighted average cost of such goods over the investigation period. This test is known as the recoverability test when assessing whether goods have been sold in the OCOT for the purpose of s.269TAAD.

24. Section 269TAAD is intended to reflect Article 2.2.1 of the Anti-Dumping Agreement.⁸ When considering Article 2.2.1, the WTO Panel in *EC- Salmon AD Measure*,⁹ noted that below cost sales had to display three characteristics, namely they had to be made:

- within an extended period of time;
- in substantial quantities; and
- at prices which do not provide for the recovery of all costs within a reasonable period.

It was only below-cost sales that are found to exhibit all three of these characteristics that, according to the WTO Panel, may be treated as not being made in the OCOT by reason of price.

25. Fortune contends that the ADC's approach to determining the profit was inconsistent with the Act and the Regulation as it did not comply with the requirement to calculate profit on sales in the OCOT using a weighted average cost of goods. Instead of using s.45(2) of the Regulation to determine the profit, Fortune contends that the ADC should have used s.45(3)(a) of the Regulation.

26. In support of its contention that s.45(2) should not have been used, Fortune first points to the different approach taken by the ADC in the original investigation (REP 219) and secondly it relies on the definition of weighted average cost in s.269T(5A) for the purpose of an OCOT test.

27. In REP 219, the ADC considered that a weighted average cost as contemplated by s.269TAAD(3) of the Act could not be meaningfully calculated for power transformers. REP 219 states:

The Commission is satisfied that 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. Therefore, as each power transformer is unique the weighted average cost of goods contemplated in s. 269TAAD(3) cannot be

⁸ Explanatory Memorandum to the Customs Legislation (World Trade Organisation Amendments) Bill 1994 clause 29.

⁹ European Communities - Anti-Dumping Measure on farmed salmon from Norway WT/DS337/R.

*meaningfully calculated. Consequently, because the recovery test cannot be conducted meaningfully the ordinary course of trade test cannot be fulfilled.*¹⁰

28. The ADC explained the reason for the change in its approach in REP 504 as follows:

*The Commission acknowledges that the methodology applied in this continuation inquiry differs to that employed for the purposes of REP 219. The methodology applied in this continuation inquiry is however consistent with the Commission's current policy and practice in relation to this issue, which has evolved in the intervening period of time, and which is detailed in Anti-Dumping Commission Report No. 487 (REP 487). In REP 487 the Commission found that "having established that like goods are sold in the [Chinese] domestic market, there is no basis for derogating from section 45(2) of the Regulation."*¹¹

29. The first point that is made by Fortune regarding the above is that the findings of REP 487 were the subject of a review by the Review Panel and that the Review Panel had requested the Commissioner to conduct a reinvestigation into its approach to calculating the amount of the profit. This is correct, although the issues raised in that review were not exactly the same as those raised by Fortune's application for review. Fortune also notes the difference between a wind tower and a power transformer as a basis for disagreeing with the ADC's reliance on REP 487 as the basis for altering its policy interpretation and methodology for calculating profit in the case of power transformers.
30. It is not necessary to consider the points made by Fortune given the view I have taken below with respect to the methodology used by the ADC to determine the profit under s.45(2) of the Regulation. However, I should note that what is relevant to this review is whether or not the approach taken by the ADC with respect to the ascertainment of the normal value of Fortune's exports makes the reviewable decision not the correct or preferable decision. It is not to the point whether it is consistent with a previous approach taken by the ADC in another investigation, inquiry or review.
31. The principal argument relied upon by Fortune is that the ADC's approach is inconsistent with the OCOT provisions which require comparing the selling price of the goods with the weighted average cost of the goods. Fortune contends that the formula in s.269T(5A) of

¹⁰ REP 219 section 6.5.3 at page 42.

¹¹ REP 504 section 6.5.1.6 at page 40.

the Act for the calculation of a weighted average requires there to be more than one unit. As each power transformer is a discrete unit, it must follow, according to Fortune, that there cannot be a multiple of units and the OCOT recovery test cannot be meaningfully performed.

32. In further support of its argument, Fortune points to the calculation by the ADC of the weighted average domestic cost to make and sell in Appendix 2 of Fortune dumping calculations. That table, according to Fortune, clearly identifies in the quantity column that only single units were used and that the unit cost to make and sell (CTMS) is the same as the weighted average unit CTMS. There was therefore no weighting of costs undertaken as required by s.269TAAD(3) of the Act.
33. In its submission to the Review Panel, the ADC referred to its approach in REP 504 and contended that this approach was correct and preferable as it satisfied the requirements of s.269TAAD and that it was reasonably practicable to calculate the amount of profit under s.45(2) of the Regulation. The ADC submission also pointed out that s.45(2) ensures that the amount of profit is calculated on the basis of the production and sale of like goods.
34. The ADC submission noted that Fortune had relied on the same domestic sales of like goods for its calculation of the profit under s.45(3)(a) as that to which the ADC had regard for the purposes of s.45(2) of the Regulation. The point being made by the ADC is that Fortune is not actually contending for the profit to be calculated using the amounts realised on sales of the same general category of goods (as specified by s.45(3)(a)) but rather that the ADC should have used all of the sales of the like goods and not just those that passed the OCOT test conducted by the ADC.
35. In the conference I held with the ADC, the above point was confirmed. The ADC representatives at that conference also confirmed how the OCOT test and, in particular, the recoverability test, was conducted for Fortune's domestic sales of like goods. With the recoverability test, the ADC grouped sales of power transformers with similar specifications and the net invoice revenue of a sale was compared with the weighted average CTMS of the grouped sales.
36. For those sales where there were no comparable sales, the ADC representatives confirmed at the conference that the unit CTMS was the same as the weighted average

CTMS used in the recoverability test. As a result, if a sale was unprofitable then it did not pass the recoverability test and was treated as not in the OCOT.

37. In REP 504 the ADC justified its approach to the recoverability test for the purpose of s.269TAAD(3) by noting that for the purpose of calculating a weighted average cost of goods, s.45(2) of the Regulation does not state whether costs have to be at an aggregate or unit level.¹² This however is not to the point. It is not s.45(2) which provides the circumstances in which certain sales can be considered not in the OCOT because of price. Those circumstances are specified in s.269TAAD.
38. The ADC also justified the approach on the basis that the values in the formula in s.269T(5A) for the weighted average could refer to each model so that the revenue from each model could be compared to the cost of the same model. If each unit was considered its own model then the test in s.269T(5A) would allow for the value n in the formula to be 1. This position as outlined by the ADC in REP 504 effectively makes the unit CTMS the same as the weighted average CTMS for the purpose of the recoverability test.
39. In its submission to the Review Panel, Wilson also supported the approach by the ADC on s.269T(5A). The submission makes the point that s.23(b) of the *Acts Interpretation Act 1901* provides that, absent a contrary intention, words in the singular number include the plural and words in the plural number include the singular. Wilson contends that as there is no contrary intention evident in s.269T(5A), the ADC was correct when it stated in REP 504 that the definition of weighted average in s.269T(5A) does not preclude the possibility that n can equal 1.
40. The points made by the ADC and Wilson regarding s.269T(5A) miss the point. The formula for determining the weighted average of prices, values, costs or amounts in s.269T(5A) is not limited to s.269TAAD. It applies whenever in Part XVB the weighted average of prices, values, costs or amounts have to be calculated. It is difficult to envisage a situation when it would be appropriate to apply the formula in s.269T(5A) with n equalling 1. However, it is not necessary for me to decide this in the abstract.
41. The applicable legislative provision for determining if sales of goods are not in the OCOT because of price is s.269TAAD and, in particular, s.269TAAD(1). This is the section that

¹² REP 504, section 6.5.1.6 at page 41.

has to be construed. When applying the formula in s.269T(5A) in the context of conducting a recoverability test, regard must be had to the wording of s.269TAAD(3) and to its purpose. Subsection 269TAAD(3) sets out the test for whether or not the cost of certain goods sold unprofitably can be recovered over a reasonable period. This test is done for the purpose of s.269TAAD(1)(b), namely the requirement that the costs of the goods sold unprofitably not be recoverable within a reasonable period.

42. When construing s.269TAAD(3), the first point to be made is that there is no reference in s.269TAAD(3), or in any of the subsections in s.269TAAD, to models of goods. Subsection 269TAAD(1) refers to sales of like goods. Subsection 269TAAD(3) has to be read in the context of s.269TAAD(1). In this context, it is clear that the test for recoverability requires the selling price of the like goods in the unprofitable sales to be compared with a weighted average of the cost of the like goods sold domestically during the investigation period (or in this case, the inquiry period). This is the group of sales for which the average CTMS has to be calculated for the recoverability test to be conducted.
43. Consistent with the above approach to the recoverability test, is that required for determining whether there were substantial quantities of like goods sold unprofitably during an extended period as required by s.269TAAD(1). Subsection 269TAAD(2) defines “substantial quantities” for the purpose of s.269TAAD(1). It provides that the unprofitable sales “are taken to have occurred in substantial quantities during an extended period if the volume of sales of such goods at a price below the cost of such goods over that period is not less than 20% of the total volume of sales over that period”. Again, when regard is had to s.269TAAD(1), the reference to the “total volume of sales” has to be a reference to the volume of sales of like goods during the relevant period.
44. In REP 504 the ADC found that Fortune sold like goods on the domestic market in Taiwan during the inquiry period. Fortune does not dispute that it sold like goods domestically. Accordingly, if there are sales of like goods in the OCOT by the exporter then these sales should form the basis for the calculation of profit, unless it is not reasonably practicable to do so. Subsection 45(3) of the Regulation is only to be used if the Minister is unable to work out the amount using the data described in s.45(2).
45. In order for domestic sales to be excluded from a calculation of profit under s.45(2) on the basis that their price meant they were not in the OCOT, the sales have to meet all three of the tests set out in s.269TAAD(1), namely unprofitability, substantial quantities

and non-recoverability of the costs within a reasonable time. Where there were sales of like goods that are unprofitable, those sales still have to meet the other requirements of s.269TAAD for the price paid to be taken as not paid in the OCOT.

46. A review of Tab(c) of Fortune Confidential Appendix 3 (Domestic Sales) to REP 504 shows that the percentage of the unprofitable sales by Fortune is not 20% or greater of the total volume of sales as required by s.269TAAD(2). Therefore, it is not necessary to do the recoverability test under s.269TAAD(3). On the information regarding Fortune's domestic sales that was used by the ADC to prepare REP 504, there is no basis for treating the unprofitable sales by Fortune as not in the OCOT on the basis of price. As REP 504 does not assert any other basis for treating them as not in the OCOT, they should be included in the calculation of profit for the purpose of ascertaining the normal value of Fortune's exports under s.45(2).
47. Given that the unprofitable sales of like goods by Fortune were not in substantial quantities as defined by s.269TAAD(2), I do not need to consider further the arguments put by Fortune that it was impracticable to work out the profit under s.45(2) because the weighted average cost of the goods could not be meaningfully calculated for power transformers. No other basis is put in the application for review or submissions as to why it is not reasonably practical to calculate the profit under s.45(2). Indeed, I note that the submission made on behalf of Wilson would support the conclusion that s.45(2) has to be used if it is reasonably practical to do so and that there is no discretion then to use s.45(3).
48. I note that the submission made on behalf of Wilson contends that even if s.269TAAD does not apply, it would be open to the ADC to assess Fortune's loss-making sales as not being in the OCOT. The reason given is that loss-making sales of capital-intensive goods such as power transformers could be considered as not made in the OCOT as the bespoke nature of power transformers means that losses cannot be recovered through repeat sales of the same unit.
49. Wilson submits that if those loss-making sales reflected the OCOT then Fortune would have gone broke. The submission does not however explain why, even if the power transformers sold by Fortune were not identical, losses on some sales could not be recovered by sales of other power transformers. Again, I note that the ADC found that

the power transformers sold domestically by Fortune were like goods to those exported to Australia.

50. To take the approach advocated by Wilson would require the ADC to consider sales not to be in the OCOT because of the price even when such sales do not meet the requirements of s.269TAAD(1). This approach would be inconsistent both with the Act and with the Anti-Dumping Agreement. I have not been referred to any relevant information which would establish another basis for treating the sales as not in the OCOT.
51. In the conference I had with them, the ADC representatives noted that if the profit was calculated on the basis of Fortune's domestic sales of like goods, including those that had been found in REP 504 not to be in the OCOT, then the profit would vary slightly from the amount asserted by Fortune in its application for review. This was because the ADC had excluded two sales which Fortune included.
52. According to the ADC, if the profit is calculated on all of the domestic sales (with the exclusion of the two sales) then the amount of the profit used for the calculation of the normal value should be [REDACTED]. Given this, I accept that the Reviewable Decision in so far as it concerned the determination of the normal value of Fortune's exports was not the correct or preferable decision. The reason for this is that the ADC erred in calculating the profit which resulted in an overstated normal value for Fortune's exports.
53. At my request, the ADC calculated the change to the normal value of Fortune's exports once the revised profit is used. This calculation was provided to me at a conference held under s.269ZZHA. At that conference I was also advised that a change to the normal value and hence the dumping margin also affects the export price. This is because the export price was determined under s.269TAB(1)(c) and anti-dumping duties were one of the deductions made to arrive at the export price.
54. The determination of Fortune's export price was not part of the review. If, as a result of the Minister's decision on the recommendation made in this review, there is a change to the anti-dumping duties paid on Fortune's exports any consequential change to the ascertained export price is appropriately dealt with as part of a duty assessment or review of measures.

55. Finally, I should note that the application for review by Fortune did not dispute the application of s.269TAC(2)(c) for the construction of the normal value and this issue did not arise as part of the review. Accordingly, I did not consider, in this review, the issue of whether or not s.269TAC(2)(c) was applicable given that for the purpose of s.45(2) the ADC found there were sales of like goods in the normal course of trade.

PT CG Power Systems

56. Before addressing the specific grounds of its application, CG Power made some observations on the standard required by s.269ZHF(2) of the Act. That subsection relevantly provides that the Commissioner cannot recommend to the Minister that the Minister take steps to secure the continuation of the measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead to a continuation of, or a recurrence of, the dumping and the material injury that the anti-dumping measure is intended to prevent.

57. CG Power submitted that “likely” in s.269ZHF(2) had been defined to mean “more probable than not”. Wilson, in its submission to the Review Panel, contended that it would be open to the ADRP to interpret the term “likely” in s.269ZHF(2) to mean a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent.

58. In *Siam Polyethylene Co. Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838, Justice Rares stated “I am satisfied that the word “likely” in s.269ZHF(2) should be interpreted as meaning more probably than not”.¹³ As both CG Power and Wilson note in their submissions, this aspect of his Honour’s decision was not affected by the appeal to the Full Court as the “parties were content to address submissions on the basis that the primary Judge had accurately described the test to be applied when interpreting the word “likely” as he did.”¹⁴

59. Accordingly, to the extent it is relevant to the review of CG Power’s grounds, I have accepted the test in s.269ZHF(2) as described by Justice Rares.

¹³ [2009] FCA 838 at [48].

¹⁴ *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86 at [92].

Ground 1

60. The first ground relied upon by CG Power is that the evidence before the Minister did not establish that dumping is likely to recur. CG Power contends that the ADC's analysis of the factors relied upon by it for its conclusion that dumping was likely to recur was based on either a misunderstanding of the facts and evidence and, that in respect of some of the factors, there had been a dearth of evidence.
61. The factors which CG Power asserts were relied upon by the ADC for its conclusion that dumping was likely to recur are:
- Prior findings of dumping;
 - "likely" future dumping;
 - Periods of consistent profitability;
 - Maintenance of an Australian sales office;
 - Ongoing tendering for business; and
 - CG Power's ability to forward plan capacity.

Prior findings of dumping

62. CG Power takes issue with the ADC's view that findings that dumping occurred previously are relevant to the continuation inquiry. Its submission points out that every exporter involved in a continuation inquiry will have been found to have dumped in the past.
63. CG Power's submission on this point also relies on there being nothing in Division 6A of the Act which requires the ADC to undertake a dumping margin analysis. Division 6A is the Division of the Act in which the provisions governing a continuation of measures are found. The submission also relies on comment by the Appellate Body that "no obligation is imposed on investigation authorities to calculate or rely on dumping margins in a sunset review".¹⁵

¹⁵ Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review para 123.

64. While CG Power concedes that prior findings of dumping can be relevant to a continuation inquiry, it contends that the relevance of such findings needs to be assessed in the particular circumstances in each case. CG Power claims that the ADC formed the view that information arising from Review 383 was the most reliable and relevant information and has used that to inform its consideration of the likelihood of future dumping. It also claims that the ADC has failed to explain why the prior findings were relevant to the outcome of the inquiry.
65. The reference given by CG Power to that part of REP 504 to support this last assertion does not however support CG Power's claim. At page 35 of REP 504 it is clear that the ADC was referring to the determination of the variable factors in the anti-dumping notice. The ADC found that "the most reliable and relevant information it possesses in relation to the export price and normal value for power transformers exported by CG Power are those currently on the notice".¹⁶
66. CG Power relies on the fact that every power transformer that was found to have been dumped was exported to Australia before the original imposition of the measures. Such exports were, it is claimed, also subject to pricing mechanisms in contracts that are now six to seven years out of date.
67. CG Power submits that REP 504 does not explain in any detailed or reasoned manner what the ADC considered to be the relevance of the historical sales to the continuation inquiry or how they have any bearing on ascertaining whether or not it is more probable than not that dumping would recur. CG Power submits that given the sales all occurred prior to the imposition of measures, they are simply irrelevant to that question.
68. In its submission to the Review Panel, Wilson contends that past conduct is frequently a predictor of future conduct and to preclude this evidence would unduly narrow the matters that inform the Commissioner's recommendation to the Minister. Further, it asserts that CG Power's historic dumping is a very good indicator of CG Power's likely conduct if no measures were in place in the future.
69. Past dumping is a factor to which regard can and, in certain circumstances, should be had by the ADC in trying to determine whether future exports are going to be dumped. However, it cannot be considered in isolation. Where, as in this case, there has been no

¹⁶ REP 502 section 6.4.1.5 at page 35.

exports since the imposition of measures, it needs to be considered why this is the case. The answer to this can be informative of the exporter's likely future behaviour.

70. I found the explanation in REP 504 regarding the relevance of the past dumping to be inadequate. There was no explanation of its relevance and how the ADC relied upon it to establish the likelihood of future dumping. The only explanation was that, with the absence of exports during the inquiry period, regard had to be had to past dumping.
71. In any event, CG Power is correct when it submits that the dumping which gave rise to the imposition of measures cannot alone support a finding under s.269ZHF(2) that dumping was likely to continue or recur if the measures expired. However, the ADC did not only have regard to the past dumping.

“Likely” Future Dumping

72. Under this heading, CG Power takes issue with the finding in REP 504 that the export of a power transformer made by CG Power after the measures were imposed was “likely dumped”. The finding was part of the conclusion in REP 504 on the issue of the likelihood of a recurrence of dumping. When considering this issue with respect to CG Power, the report states:

Data supplied by CG Power during this inquiry indicates that the power transformer delivered in 2019 is likely dumped.¹⁷

73. The first issue taken by CG Power is with the description of certain information as “estimated costs and targeted profitability”. This information was provided by CG Power to the ADC in relation to the power transformer which CG Power was contracted to deliver in Australia in 2019. REP 504 states that the information showed a targeted profit margin similar to domestic sales from 2018-2019. However, the report goes on to state that “the targeted profit is a gross profit (not a net profit)” and that:

If the indicative SG&A of domestic sales and the Australian operations is included in CG Power's Attachment G-5 calculations (as reported at Attachment G-4 of the REQ and Attachment 1 to CG Powers' submission of 18 September 2019), the sale to

¹⁷ As above, section 7.5.7 at page 54.

*Australia would be significantly less profitable than the domestic sales from 2018-2019. This is an indicator that the power transformer would likely be dumped.*¹⁸

74. CG Power claims that the profit margin was not a targeted margin but rather just a margin based on the costs estimates for the purpose of the review, rather than the margin CG Power anticipated it would receive when it submitted its best and final offer (BAFO) in [REDACTED]¹⁹ or the margin actually received on the sale. There is no explanation why it submitted a margin which it did not expect to receive.
75. A second point made by CG Power is that the ADC interpretation of the margin is incorrect. Contrary to the ADC's finding, CG Power asserts that it did include the SG&A costs in cell C40 as "other costs". CG Power's explanation for not splitting the costs into individual selling, administrative or general costs was that as the estimate related to an export outside the inquiry period for which the ADC had not requested information, it did not consider it necessary to do so.
76. The importance of the misinterpretation of the information relating to the profit margin, according to CG Power, is that the ADC based its view regarding the likely dumping on that misinterpretation. CG Power also asserts that the ADC failed to reflect that the price referred to at Cell C49 excluded the dumping duties payable on import. The gross price to CG Power's Australian customer included an additional 28.3% IDD. The point being made by CG Power was that irrespective of dumping, CG Power had passed-on the significant margin to its customer.
77. In its submission to the Review Panel, the ADC refuted CG Power's claim that the profitability calculation included SG&A costs. The ADC could not accept that the "other costs" amount contained all SG&A costs. The ADC also noted that the "other costs" amount for the particular power transformer, as a proportion of the total cost to make of the power transformer, was significantly lower and inconsistent with the SG&A costs for domestic sales of like goods. Lastly, the ADC noted that the "other costs" section of the exporter questionnaire included an explanatory note clarifying that the "other costs" related to the manufacture of power transformers.

¹⁸ REP 504 section 7.5.1 at page 48.

¹⁹ Confidential information of CG Power.

78. The ADC in its submission to the Review Panel also rejected the claim by CG Power that the analysis in relation to the particular power transformer was of central relevance. Rather, the ADC asserted that it considered various factors, none alone of which were of central relevance. However, I note that in the analysis regarding whether future exports would likely be dumped, the finding that the power transformer delivered in 2019 was likely dumped, is an important factor.
79. The final point made by CG Power on this issue is that the finding by the ADC that the export in 2019 was likely dumped was not based on an analysis done in accordance with the Act or with WTO jurisprudence. There was no application of s.269TACB of the Act to ascertain whether the export was made at a dumped price.
80. CG Power submits that the suggestion its export was likely dumped is wrong and meaningless as it is based on cost estimates and the ADC's failure to understand or clarify information and was not based on any legally recognisable dumping analysis. Consequentially, there is not a sufficient factual basis for the ADC's opinion.
81. A finding of dumping does, of course, require a comparison of the export price of the goods exported to Australia with the normal value of those goods in accordance with s.269TACB. The ADC's finding is not based on such a comparison. It is not necessary though to make a formal finding of dumping for the purpose of s.269ZHF(2). Indeed, as CG Power notes in its submission, nothing in Division 6A of the Act requires the Commissioner to undertake a dumping margin analysis.²⁰
82. However, if the ADC intends to rely on a finding that a recent export was likely dumped, there should be some analysis to support this other than just a reference to a different level of profitability. There needs to be an explanation as to how this results in the conclusion that the export was likely dumped. It could be that, if all else were equal, a lower profitability equates to a lower export price than the domestic price and the likely normal value. This though has not been explained.
83. The lack of a satisfactory explanation for the finding that the power transformer was likely dumped was one of the reasons I asked the Commissioner to reinvestigate the finding

²⁰ Attachment 2 to CG Power's application dated 6 December 2019 at page 5.

that it was likely that future exports by CG Power from Indonesia would be at dumped prices.

84. CG Power also makes the point that the pricing mechanism under which the sale was made was from a contract made in 2015, which contract had now run its course. This, it is argued, makes the sale of little relevance as to whether dumping is likely to recur if the measures were revoked. I do not agree with this last point. Sales relating to exports after the measures were imposed can be relevant to the likelihood of the recurrence of dumping.

Periods of Consistent Profitability

85. CG Power submits that there is high domestic demand for power transformers in Indonesia, that it makes a good profit on its domestic sales and that it is functionally at full capacity. Accordingly, were the measures to be revoked it would have no incentive to sell to Australia at dumped prices.
86. The ADC appear to have accepted the claims regarding CG Power's profitability on its domestic sales. However, it noted that the dumped exports made by CG Power between 2011 and 2014 occurred during a period of consistent profitability at a total company level.
87. The point made by CG Power in response is that the ADC's reference to a consistently profitable business overlooks the data that establishes the substantial increase in CG Power's revenue from 2014, [REDACTED] [REDACTED]²¹ This increase in revenue was, CG Power asserts, as a result of the increases in demand in CG Power's domestic market and resulted in capacity utilisation increasing to [REDACTED]²² in 2018.
88. In support of its claim that it would only pursue sales in the Australian market that were profitable, CG Power provided the data to the ADC which compared the profit sought initially on all sales of power transformers made domestically in 2018-19 with the originally envisioned margin in the costing. The ADC seemed to accept this. REP 504

²¹ Information confidential to CG Power.

²² As above.

states that CG Power’s “profit figures reported in relation to the domestic sales for 2018-2019 show an overall level of net profit consistent with CG Power’s claimed target”.²³

89. However, CG Power claims that the ADC discredited its claims by:

- rejecting CG Power’s claim in relation to its New Zealand sales;
- the position the ADC took on the 2019 export to Australia; and
- the finding the ADC had made in the context of previous exports by CG Power to Australia that CG Power incurred higher costs than it budgeted for.

CG Power takes issue with each of the points made by the ADC.

90. With respect to the sales to New Zealand, CG Power claims that it provided the data on those sales to the ADC with the purpose of illustrating what kind of profits CG Power could receive in a market similar to Australia. In REP 504 the ADC notes that the data provided by CG Power in relation to its New Zealand sales was limited to 2018 only, which is a subset of the goods reported in CG Power’s REQ at Attachment F-2. The data was also limited to a comparison between the cost to make the goods and the revenue generated and that the data provided by CG Power showed a gross (not net) profit, which did not take into account SG&A expenses.

91. According to CG Power, the ADC misinterpreted this information by taking the view that it did not include SG&A costs. CG Power asserts that it did include these costs in the overheads as was its usual practice. It claims the only reason it had stripped out those costs in responding to the REQ was that the ADC had specifically requested it to do so with regard to domestic sales.

92. In REP 504, the ADC had also noted that the underlying data behind the New Zealand profitability had not been provided with CG Power’s submissions and could not be cross referenced to other areas of CG Power’s REQ. Therefore, the validity of the New Zealand profitability data was unable to be further tested. In response to this, CG Power accepts that the information could not be validated but argues that if the ADC considered it relevant it could have asked for clarification or further information. CG Power also

²³ REP 504 section 7.5.1 at page 47.

notes that the SEF did not refer to it and the relevance only became apparent after the Minister's decision.

93. As part of its consideration of the profitability submission made by CG Power, the ADC analysed the information provided by CG Power on the estimated costs and targeted profitability in relation to the power transformer delivered in 2019 for comparison with the domestic sales in 2018-2019. As noted above, the ADC considered that the SG&A costs had not been factored in and the targeted profit was a gross and not net profit. If those costs were included then the sale to Australia would be significantly less profitable than the domestic sales.
94. CG Power relies on the arguments made above that the ADC misinterpreted this data and that the SG&A costs were included. It also makes the point that the ADC refers to the information as cost estimates.
95. The last point made by the ADC was that in the context of previous export sales to Australia, CG Power was found to have incurred higher costs than it budgeted for. The ADC also noted that CG Power had acknowledged that costs are not known until power transformers are installed. From this the ADC concluded that the actual profitability of export sales to Australia can, as has occurred in the past, be lower than targeted.
96. The response to this point by CG Power is to note that these findings related to exports that occurred prior to the imposition of measures. I do not however consider that this detracts materially from the point made by the ADC. CG Power does not explain why its actual costs would be closer to those estimated if it was to start exporting again. I am not sure such a conclusion can be drawn from the fact that this occurs with domestic sales.

Maintenance of an Australian Office

97. As part of its reasoning on the issue of the recurrence of dumping, the ADC referred in REP 504 to CG Power's maintenance of an Australian sales office.²⁴ The reference to a sales office may be a mistake as earlier in the report, it refers to CG Power's decision to close a sales office.

²⁴ REP 504 section 7.5.7 at page 54.

98. CG Power claims that it did have a sales office with multiple staff but the last was shut down in 2016. It does however have a representative engineer in Australia. This is consistent with the information provided to the ADC in its REQ.
99. The argument CG Power makes is that it should not be a “black mark” against it to have a continued presence in Australia. The question for the Commissioner is not whether exports are likely to recur if the measures are revoked, it is whether dumping is likely to recur. CG Power also makes the point that the one export made by it since the measures were imposed passed on the dumping duties to the customer.
100. In summary, CG Power contends that its presence in Australia is smaller than it was when the measures were imposed, limiting its ability to supply power transformers to Australia now and in the future.
101. In its submission to the Review Panel, Wilson contends that CG Power’s continued presence and activity in the Australian market is highly relevant to the question of whether it is likely to dump power transformers in Australia should measures expire because it has an existing and continuing power transformer supply business here. It would face none of the difficulties usually faced by a supplier entering the market afresh and so it would be better able to quickly ramp up its Australian capacity.
102. I agree with Wilson’s submission to the extent it contends that CG Power’s continued presence and activity in the Australian market is relevant. However, it is not asserted by CG Power that it has left the Australian market entirely and that it has no intention of returning. In its application to the Review Panel, it makes the point that it had never stated that it will not supply to the Australian market in the future but rather that it will only pursue sales that are profitable.²⁵ CG Power has also never denied it would like the opportunity to supply power transformers to the Australia market.²⁶
103. I agree with CG Power that the question for the Commissioner is whether there will be a recurrence of dumping if the measures are removed. That question can be answered in the negative if the evidence is that the exporter has left the Australian market entirely and has no intention of returning. If there are no exports, there can be no dumping.

²⁵ Submission by Moulis Legal dated 6 December 2019 at page 9.

²⁶ As above at page 12.

104. To the extent that the ADC's conclusion as to the likely recurrence of dumping was based on the view that CG Power had not left the Australian market and maintained an interest in supplying that market, there was sufficient evidence for that view. Of itself, it only takes the matter so far. There has to be some evidence which indicates that any exports to Australia once the measures were removed are likely to be dumped.

Production Capacity

105. CG Power asserts that it is at full capacity and that this is accepted by the ADC. It appears that CG Power is actually claiming functional capacity as this is what it put to the ADC in its submission dated 18 September 2019 and at a subsequent meeting.²⁷ This appears to have been accepted by the ADC. However, the ADC considered that CG Power had the ability to forward plan to account for upcoming production of exports. It therefore seems to have discounted the production capacity of CG Power as evidence it would not continue to supply the Australian market.²⁸

106. This, according to CG Power misses the point of the production capacity. CG Power contends that it shows that CG Power is not reliant on making sales to the Australian market and there is no reason for CG Power to sell product to Australia at a lower margin than it can achieve domestically.

107. In its submission to the Review Panel the ADC noted that despite operating at almost full capacity, CG Power still tendered for business in the Australian market, indicating both a desire to supply the Australian market and the production capacity to do so. The ADC accepted that these factors alone should not be the sole basis for the continuation of the measures, although they are relevant considerations.

108. In response to CG Power's claim that the fact that it was operating at full capacity meant it was illogical for it to sell to Australia at a lower margin than it can achieve domestically, the ADC notes that this assertion is speculative. The ADC submission then speculates that it was not improbable that a profitable company selling a profitable product in its own market could also be in demand in an export market and capable of exporting its product there at a price that may be injurious to the overseas domestic industry.

²⁷ REP 504 section 7.5.4 at page 52.

²⁸ As above at page 53.

109. I do not consider that there is much relevance in the point being made by either CG Power or the ADC. CG Power still seeks to export power transformers to Australia despite its production capacity constraints. This, of itself, is of limited assistance with an assessment of how likely it is that any such future exports would be dumped.

Participation in Tenders

110. The ADC in REP 504 referred to CG Power's participation in recent tenders in the Australian market as a basis for its finding that CG Power intended to continue to supply the Australia market²⁹ and that exports by CG Power to Australia are likely to continue if the measures were to expire.³⁰

111. In its submission, CG Power refers to the tender documents it provided to the ADC relating to two RTFs in which it was involved. It argues that the costings for each tender show that it targeted EBIT margins of ■% and ■%.³¹ CG Power also claims that each tender bid passed on the dumping duty payable directly to the customer.

112. Finally, on this point, CG Power argues that the participation in the tenders does not evidence that dumping will recur in the absence of measures, but rather that CG Power's interest with regard to the Australian market is to make profitable sales of power transformers.

113. I agree with CG Power's submission to the extent that its participation in tenders only demonstrates that it is still interested in exporting to Australia. It does not of itself establish that such exports would be at dumped prices. An analysis of the pricing and level of profitability of the tenders could possibly assist with the assessment of the likelihood of future dumping.

Failure to inquire regarding adverse interpretations of Confidential Attachment 7

114. CG Power contends that the ADC relied upon Confidential Attachment 7 for much of its adverse inferences. This caused problems for CG Power as the ADC's reliance on the attachment did not become apparent until after the Minister's decision was made. CG Power asserts that neither Confidential Attachment 7 nor the adverse inferences from it

²⁹ REP 504 section 7.5.4 at page 53.

³⁰ As above section 7.5.7 at page 54.

³¹ Information confidential to CG Power.

were referred to in the SEF. At no time, CG Power claims, did the ADC seek to ascertain whether its interpretation of the data was correct or even arguable.

115. The result is that CG Power now cannot tender information that supports its clarifications of the data and rebuts the ADC's adverse interpretation. This, it claims, is a denial of procedural fairness and not one that can be directly corrected through the Review Panel process.

116. In response to the procedural fairness complaint by CG Power with regard to the use of Confidential Attachment 7, the ADC notes that the information contained in that attachment was compiled and analysed in response to CG Power's submission of 18 September 2019 and the meeting with the ADC on 19 September 2019. CG Power responded to the SEF by way of submission and the provision of additional information, which the ADC considered in preparing REP 504.

117. The points the ADC made in its submission regarding the SG&A costs seem reasonable. However, I was concerned that CG Power did not have the opportunity to comment on the inferences drawn from the material it provided, and in particular the view taken by the ADC that the profit margin did not include SG&A costs. While the information came from CG Power, the inferences and conclusion were made by the ADC, without CG Power being made aware that this was being done.

118. This was also a reason I required the Commissioner to reinvestigate the finding that it was likely that future exports of power transformers by CG Power from Indonesia would be at dumped prices.

Relevant information the ADC overlooked

119. The last point made by CG Power in support of this ground is that the ADC had before it evidence relevant to a number of factors which the ADC failed to consider in detail.

These are factors listed in the Dumping and Subsidy Manual.

120. The evidence relied upon by CG Power is:

- CG Power sought to pass on dumping duty to its customers.

- Over the inquiry period CG Power exported ■³² power transformers to four additional countries and its market focus related to Vietnam, Philippines, Myanmar, Sri Lanka and New Zealand.
- After the measures were imposed, CG Power's export ceased, except for one based on a legacy contract.
- CG Power closed down its Australian sales office, now only employs one person, an engineer and does not have the ability to attend to the Australian market to the same capacity it had before the measures.
- Domestic demand is very high and will continue to be into the mid 2020s.
- There is no evidence of sales below costs and the evidence was that CG Power's sales were profitable.
- CG Power is not dependant on export sales and the majority of its capacity is directed towards the domestic market.
- CG Power's strategy has been to seek access to Vietnam, Philippines, Myanmar, Sri Lanka and New Zealand and Australia is not part of this strategy.
- There are a number of sources from which power transformers could be supplied, including from Vietnam, Korea, Thailand, China, the EU and the US.

121. From my review of REP 504, it seems to me that the ADC did consider most of the above factors and the ADC's consideration of such factors is the subject of other submissions by CG Power which are dealt with above. While REP 504 does not address in detail the factors related to CG Power's market strategy, it does refer to CG Power's claim as to its highly profitable domestic sales and third country sales.³³ In any event, CG Power concedes that it would like to maintain the option to export to Australia if it were profitable to do so.

³² Information confidential to CG Power.

³³ REP 504 section 7.5.1 at page 47.

Ground 2

122. The second ground relied upon by CG Power is that it was not likely that material injury will recur. CG Power claims that the basis for the finding by the ADC that injury was likely to recur was that dumping would confer a price advantage on CG Power.

123. CG Power disputes that dumping provides a pricing advantage. The reason is that power transformers are bespoke, individually designed units and manufacturers submit their own designs in a tender process to meet the customers' requirements. Further, different designs have different costs and price is not determinative.

124. In support of its argument, CG Power refers to a quote from the ADC's consideration of the application for a continuation inquiry:

*Purchasers evaluate and rank tenders received and the evaluation process varies from purchaser to purchaser. Considerations relevant to the tender evaluation process include the ability to meet specifications, commercial requirements, price, and other qualitative and quantitative criteria.*³⁴

125. From this quote, CG Power extrapolates that tenderers are not competing on price. I do not consider that such a conclusion can be drawn from the quoted comments. Price is one of the criteria on which tenders are evaluated, although not the only one.

126. CG Power further argues that price is driven by design and each tenderer's design will be unique and have a unique price. Further, a dumped product may still be more expensive than a non-dumped product, by virtue of the features of its design.

127. While the points made by CG Power may be valid, I do not consider that it follows that price cannot be determinative or that dumping may not still confer an advantage. Dumping can mean that the price of the dumped product is cheaper than if it would have been if not dumped and that the lower price can give an advantage to the exporter of the dumped product. Such a price advantage can assist the exporter to win tenders it may not otherwise have done, to the detriment of the Australian industry.

128. Another argument made by CG Power is that the finding by the ADC in this inquiry is inconsistent with the finding in the investigation into exports of power transformers from

³⁴ ADN 2019/20.

China. CG Power quotes from the SEF in that investigation in which it was found that the ADC was “not satisfied that the size of the dumping margin was determinative in decisions to award tenders for goods from China during the investigation period” and that “the size of the dumping margins have not materially impacted the Australian industry’s overall economic performance”.³⁵

129. CG Power contends that while the SEF was not published until after REP 504 was provided to the Minister, the information on which the conclusion was based was before the ADC. This is presumably to support it being relevant information to which the Review Panel can have regard.
130. Even if regard can be had to the conclusions in the investigation into exports from China, I do not consider that such information carries much weight. First, the conclusions are made in a SEF and this is not the final view of the ADC and can be subject to change before a final decision is made. Second, the tenders considered by the ADC showed that while non-price factors were often considered as important as price, price was still a factor and the Australian industry would not have won the tenders, even in the absence of dumping, based on submitted prices.
131. The principal conclusion in the China investigation seems to have been that the injury being suffered by the Australian industry is due to non-dumped product. I do not consider that this assists in establishing that dumped product from Indonesia would not have a price advantage in future tenders.
132. CG Power contends that there is no evidence to support the conclusion that dumping confers a price advantage. In REP 504, the ADC found that “whilst the tender evaluation decision is impacted by a range of factors, price remains a consideration for power transformer purchasers”.³⁶ Given this, it is reasonable to draw the conclusion that dumped exports by CG Power in the future are likely to give it a price advantage in future tenders.

³⁵ SEF No. 507 section 8.3 at page 75.

³⁶ REP 504 section 7.6.8 at page 59.

Reinvestigation

133. Given my concerns regarding some of the analysis in REP 504 and the issue of procedural fairness with regard to the Confidential Attachment 7, I required the Commissioner to reinvestigate the finding that it was likely that future exports of power transformers by CG Power from Indonesia would be at dumped prices.³⁷
134. As part of the reinvestigation the ADC re-examined the 2019 export of a power transformer by CG Power. It found that the sale was profitable and that the inferences formed in REP 504 regarding the sale were not supported by the relevant data. The ADC also found that CG Power's domestic sales were profitable and that the rate of profit achieved was comparable to the profit achieved on the 2019 export to Australia.
135. The ADC found that it was unable to establish conclusively whether the single consignment in 2019 was dumped, but that there was nothing in the evidence to support a finding that it was. The profitability of the sale supported CG Power's claim that it seeks to export profitably. The evidence also indicated that CG Power's sales were focused on its domestic market during the inquiry period and will likely remain a focus in response to anticipated ongoing domestic demand.
136. Finally, the ADC found that while CG Power's domestic market remained profitable and its production capacity utilisation remained at a high level, it appeared unlikely that there were any commercial incentives for CG Power to commence exporting power transformers at dumped prices.
137. Consequently, the ADC concluded that the evidence did not support a conclusion that the expiration of measures, as they apply to CG Power, would lead or be likely to lead to a recurrence of the dumping that the anti-dumping measures were intended to prevent.
138. The ADC invited submissions from interested parties in the course of the reinvestigation and issued a preliminary reinvestigation report. The ADC also provided interested parties an opportunity to make submissions in response to the preliminary reinvestigation report. I note that both CG Power and Wilson made submissions to the ADC.
139. I have considered the reasons for the conclusion reached by the ADC as a result of the reinvestigation and accept that conclusion and the findings and reasons for it. Given the

³⁷ Letter from the Review Panel to the Commissioner dated 31 January 2020.

findings made as a result of the reinvestigation, particularly those regarding the export of the power transformer in 2019, I agree with the ADC that there is not the factual basis for forming the conclusion required by s.269ZHF(2) of the Act.

140. Given the above, I am satisfied that the Reviewable Decision with respect to CG Power was not the correct or preferable decision.


Recommendations

141. Pursuant to s.269ZZK(1) of the Act and for the reasons given above, I consider that the Reviewable Decision with respect to both Fortune and CG Power was not the correct or preferable decision.

142. I recommend that:

- With respect to Fortune, the Reviewable Decision be revoked and be substituted by a new decision under s.269ZHG(1)(b), namely that the Minister has decided to secure the continuation of the anti-dumping measures relating to the goods exported to Australia from Taiwan with effect from 11 December 2019 but that under s.269ZHG(4)(iii) the dumping duty notice continues in force in relation to Fortune as if the Minister had fixed different specified variable factors, relevant to the determination of duty, being those variable factors set out in the confidential attachment; and
- With respect to CG Power, that the Reviewable Decision be revoked and substituted with another decision namely that the Minister decide under s.269ZHG(1)(a) not to secure the continuation of the anti-dumping measures applying to the goods exported to Australia from Indonesia by CG Power.

143. For the purpose of s.269ZZK(1A), the new decision recommended above is materially different from the Reviewable Decision.



Joan Fitzhenry
Senior Panel Member
Anti-Dumping Review Panel
7 August 2020