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Anti-Dumping Review Panel  
C/O Legal Services Branch  
Department of Industry  
10 Binara Street  
CANBERRA CITY ACT 2601

Dear Mr Moore

**ADRP review – power transformers exported from Indonesia, Taiwan, Thailand and Vietnam**

I refer to your letter of 16 January 2015 inviting the Anti-Dumping Commission (the Commission) to comment on the applications for review of the decision by the then Parliamentary Secretary to the Minister for Industry to publish a dumping duty notice in relation to power transformers exported from the Republic of Indonesia, Taiwan, Thailand and the Socialist Republic of Vietnam.

The Commission has prepared its responses to the issues raised by the applicants in a non-confidential form (see Attachment A). The Commission considers that this letter and non-confidential Attachment A are suitable for publication.

The Commission has observed the request in your letter of 16 January 2015 and responded to the four specific matters. For each matter the Commission has separately identified information that is not *relevant information* as defined in section 269ZZK(6) of the *Customs Act 1901*.

In relation to the remaining three matters (factual claims disputed, commentary and background) the Commission has provided its responses collectively given the high degree of overlap in content.

Given the nature and extent of the claims I would also like to offer assistance in the form of a meeting and or teleconference as soon as practicable to provide further clarification and or relevant material should you so require.

Yours sincerely

Dale Seymour  
Commissioner  
Anti-Dumping Commission

13 February 2015



**Australian Government**  
**Anti-Dumping Commission**

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**Attachment A**

**Anti-Dumping Commission response**

**Applications for Review of Decision relating to Power Transformers  
exported from the Republic of Indonesia, Taiwan, Thailand and the  
Socialist Republic of Vietnam**

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## 1 Abbreviations

|                         |  |
|-------------------------|--|
| ABB Australia           | ABB Australia Pty Ltd                                |
| ABB Thailand            | ABB Limited, Thailand                                |
| ABB Vietnam             | ABB Limited, Vietnam                                 |
| ADA                     | World Trade Organization Anti-Dumping Agreement      |
| ADRP                    | Anti-Dumping Review Panel                            |
| CG Power                | PT CG Power Systems Indonesia                        |
| Commission              | Anti-Dumping Commission                              |
| Fortune                 | Fortune Electric Co. Ltd                             |
| PAD                     | Preliminary affirmative determination                |
| Parliamentary Secretary | Parliamentary Secretary to the Minister for Industry |
| REP 219                 | Anti-Dumping Commission Final Report 219             |
| SeA                     | Shihlin Electric Australia                           |
| SEEC                    | Shihlin Electric & Engineering Corp                  |
| SEF                     | statement of essential facts                         |
| WTC                     | Wilson Transformer Company Pty Ltd                   |

## 2 Key points of note in reading responses to applicant claims

Whilst the Anti-Dumping legislation (Part XVB of the *Customs Act 1901*<sup>1</sup> and the *Customs Tariff (Anti-Dumping Act) 1975* (the Dumping Duty Act)) refers to the Minister, for the purposes of this response all references to the Minister or Parliamentary Secretary should be considered interchangeably. This approach reflects the Minister for Industry's delegation of responsibility for Ministerial decision-making (under Part XVB of the *Customs Act 1901* and under the Dumping Duty Act) to the then Parliamentary Secretary for the Minister for Industry (Parliamentary Secretary).

In drafting responses to the issues raised by the applicants to the Anti-Dumping Review Panel (ADRP), the Anti-Dumping Commission (Commission) has had regard to all information submitted to it in accordance with legislative timeframes during the investigation up until the day the Final Report 219 (REP 219)<sup>2</sup> was provided to the Parliamentary Secretary. This information will include the Statement of Essential Facts (SEF 219), visit reports and submissions from interested parties. In drafting this response the Commission has also had regard to the analysis the Commission performed during its investigation. The Commission confirms that, in drafting this response, no new information has been considered or further analysis undertaken.

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<sup>1</sup> A reference to a division, section or subsection in this report is a reference to a provision of the *Customs Act 1901*, unless otherwise specified.

<sup>2</sup> REP 219 is available on the Commission's website at [www.adcommission.gov.au](http://www.adcommission.gov.au)

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## 3 Order and structure of responses

To aid the ADRP with the number of applicants and claims, the Commission has responded to each of the Applicant's claims in the order of issues identified in each application. The five applicants were:

- PT CG Power Systems Indonesia (CG Power);
- Fortune Electric Co. Ltd (Fortune);
- Shihlin Electric & Engineering Corp (SEEC);
- ABB Limited, Vietnam (ABB Vietnam); and
- ABB Limited, Thailand (ABB Thailand).

The Commission has structured its response in accordance with the letter of request by the ADRP. That is, for each matter the Commission has separately identified information that is not *relevant information* as defined in s. 269ZZK(6). In relation to the remaining three matters (factual claims disputed, commentary and background) the Commission provided its responses collectively given the high degree of overlap in content.

Due to a number of claims being identical or very similar, the Commission has responded to those identical or similar claims in detail in the first instance and then made relevant references in the second instance.

## 4 CG Power

### 4.1 Finding that CG Power was an uncooperative exporter was not warranted

- 4.1.1 CG Power submits that the Commission's treatment of CG Power as an uncooperative exporter in the investigation was not consistent with the World Trade Organization Anti-Dumping Agreement (ADA) and with Australia's anti-dumping law and practice, and is not supported by the factual circumstances of the investigation.
- 4.1.2 CG Power referred to certain provisions of the ADA and to extracts from the Commission's Dumping & Subsidy Manual.

#### ***Information that is not relevant information as defined***

- 4.1.3 Nil.

#### ***Factual claims disputed, commentary and background***

- 4.1.4 CG Power provided a response to the exporter questionnaire that the Commission considered was deficient. There was a significant amount of subsequent correspondence between the Commission and CG Power during the investigation. This correspondence is summarised at Confidential Attachment 2 to REP 219.
- 4.1.5 Following publication of the SEF, CG Power met with the Commission on 30 September 2014 to discuss the dumping margin calculations it had previously submitted to the Commission and to seek to persuade the Commission that the information provided by CG Power could and should be relied upon by the Commissioner.

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- 4.1.6 At the meeting with CG Power, the Commission explained that at this late stage of the investigation it was not appropriate to commence a verification process. The Commission indicated that it may consider relying on certain data provided by CG Power where such data could be corroborated with information provided by other parties that had been verified by the Commission during the investigation.
- 4.1.7 On 27 October 2014, the Commission advised CG Power that it had decided not to meet again with representatives of CG Power and that CG Power had ample opportunity to satisfy the Commission with respect to its information needs in this investigation, but it has not done so satisfactorily. The Commission confirmed at this time that CG Power was an uncooperative exporter. However, the Commission also undertook to review all the information submitted by CG Power and consider whether it was appropriate to use as relevant information for determining export prices and normal values.
- 4.1.8 The Commission reviewed the most recent dumping margin calculations provided by CG Power on 11 September 2014 and noted:
- the revised dumping margin calculations only included transactions where detailed costs for selected transactions were requested and there were a number of additional transactions for power transformers with mega volt ampere (MVA) ratings within the nominated range;
  - there was other information in the data provided that required explanation; and
  - CG Power had previously submitted that only two costs had changed: it acknowledged that costs had changed from those originally submitted due to other numbers in the spreadsheet being dependent on costs that had changed; however, CG Power provided no further explanation; and no explanation was provided as to how the ex-works price used to calculate the dumping margins was established.
- 4.1.9 The Commission considered that all the information submitted following its submission of 8 October 2014 was new information. Nevertheless, the Commission reviewed all of the information provided and noted:
- the values in the invoices did not reconcile to revenue information previously submitted for two of the three invoice provided;
  - bank statements to verify payment by the customer do not appear to have been provided; and
  - no explanation was provided as to what the supporting documents evidencing the purchase and cost of key components related to, and no explanation was provided as to what information currently before the Commission these documents supported.
- 4.1.10 The Commission considered that it had provided CG Power sufficient opportunities to rectify deficiencies identified in its response to the exporter questionnaire, and that it did not do so satisfactorily within a reasonable period. Accordingly, verification of the data submitted was not warranted.
- 4.1.11 The Commission was satisfied that CG Power did not give relevant information within a reasonable period in terms of the definition of an uncooperative exporter in s. 269T(1) and considers that CG Power is an uncooperative exporter.
- 4.1.12 The Commission discussed this issue in further detail at section 6.8.1 of REP 219.

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### **4.2 The Commission and the Parliamentary Secretary should have used CG Power's information**

4.2.1 CG Power submitted that following the Commissioner's finding that CG Power was an uncooperative exporter, the Commission advised that it intended to use all relevant information in the calculation of a dumping margin for CG Power.

4.2.2 CG Power submitted that the most (and perhaps only) relevant information available to the Commission was the information provided by CG Power to the Commission regarding its cost to make and sell power transformers, its domestic sales of power transformers and its export sales of power transformers to Australia.

#### ***Information that is not relevant information as defined***

4.2.3 Nil

#### ***Factual claims disputed, commentary and background***

4.2.4 The Commission had concerns about the relevance of data submitted by CG Power.

4.2.5 In Confidential Attachment 3 to REP 219, the Commission compared export price information provided by CG Power to the information provided by Wilson Transformer Company Pty Ltd (WTC) in its application. It found that WTC's estimates were very similar to the information provided by CG Power. Given the finding that CG Power had not provided relevant information within a reasonable period, and was therefore treated as an uncooperative exporter, the Commission concluded that the most reliable export price information available was the data submitted by WTC.

4.2.6 The Commission was not satisfied that the information provided by CG Power was relevant information, provided in a reasonable period, for assessing normal value. The Commission established normal values under s. 269TAC(6) having regard to all relevant information. Specifically, it used information submitted by WTC in its application, being its estimated cost for a power transformer exported to Australia by CG Power, adjusted to reflect differences in costs between Indonesia and Australia. No amount for profit was added.

4.2.7 The Commission discussed this issue in further detail at section 6.8.1 of REP 219.

### **4.3 The dumping margin calculated by the Commission is incorrect**

4.3.1 In REP 219, the Commission found that the dumping margin for CG Power was 8.7%. CG Power submitted this dumping margin is incorrect as its calculation was based on unreliable data provided by the WTC, rather than relevant information provided by CG Power.

#### ***Information that is not relevant information as defined***

4.3.2 Nil

#### ***Factual claims disputed, commentary and background***

4.3.3 As noted in the discussion of CG Power's claim that the finding that CG Power was an uncooperative exporter was not warranted, the Commission had concerns about the relevance of data submitted by CG Power. As the Commission considered that CG Power was uncooperative exporter it used all relevant information in making its dumping assessment.

4.3.4 The Commission considered that the most reliable and relevant information provided was that provided by WTC. The Commission is satisfied that the dumping margin for CG Power of 8.7% is correct.

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- 4.3.5 The Commission's calculations of the dumping margin for CG Power are summarised at Confidential Attachment 3 to REP 219.

### **5 Fortune**

#### **5.1 Inclusion of domestic sales of power transformers of a capacity greater than 100 MVA in calculation of amount of profit to be included in constructed normal value established under s. 269TAC(2)(c)**

- 5.1.1 Fortune submitted that sales of power transformers of a capacity greater than 100 MVA should not be used in determining the amount of profit to be included in the constructed normal value. It submitted that power transformers with a capacity less than or equivalent to 100 MVA form the same general category of goods.

##### ***Information that is not relevant information as defined***

- 5.1.2 Nil.

##### ***Factual claims disputed, commentary and background***

- 5.1.3 The description of the goods is "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 500 kV (kilo volts) whether assembled or unassembled, complete or incomplete."

- 5.1.4 The Commission found there is no universally accepted categorisation of power transformers by size. For example, Siemens describes medium power transformers as power transformers with a power range from 40 to 250 MVA and a voltage rating of over 72.5 kV (<http://www.energy.siemens.com/br/en/power-transmission/transformers/power-transformers/medium-power-transformers.htm>).

- 5.1.5 Regulation 181A(2) of *Customs Regulations 1926* states that "the Minister must, if reasonably possible, work out the amount [of profit] 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." In section 6.5.3 of REP 219 the Commission considered that because a "weighted average cost" of goods contemplated in s. 269TAA(3) is not meaningful for power transformers; the recovery test cannot be conducted; and the ordinary course of trade test cannot be fulfilled. As a result, the profit could not be calculated under Regulation 181A(2).

- The Commission calculated the profit for use in constructed normal values using one of the provisions in regulation 181A(3). It noted there is no hierarchy and each of these alternatives is equally available. The Commission determined a profit in accordance with Regulation 181A(3)(a) which refers to the actual amounts realised by the exporter from the sale of the same general category of goods in the domestic market of the exporting country.
- The Commission considered that because sales of like goods are such a high proportion of the same general category of goods that it was reasonable to assume that the amounts realised on sales of like goods, and sales of the same general category of goods as required by Regulation 181A(3)(a), are in close proximity.
- Like goods include all power transformers with power ratings of equal to or greater than 10 MVA and a voltage rating of less than 500 kV.

- 5.1.6 The Commission found no clear pattern in profitability according to whether Fortune's domestic sales were of power transformers above or below 100MVA.

- 5.1.7 The Commission discussed the issue of "profit for constructed normal value" in detail at section 6.5.3 of REP 219.

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5.1.8 The Commission also discussed this issue in section 12.1 of its Fortune verification visit report (<http://www.adcommission.gov.au/cases/documents/150-Verificationreport-Exporter-FortuneElectricCoLtd.pdf>)

### **5.2 Inclusion of domestic sales of power transformers to Taiwan Power Company in calculation of amount of profit to be included in constructed normal value established under s. 269TAC(2)(c)**

5.2.1 Fortune submitted that sales to Taiwan Power Company should not be used in determining the amount of profit to be included in the constructed normal value because:

- Taiwan Power Company is a government owned utility that until 2013 was not able to purchase imported power transformers and;
- Taiwan Power Company primarily purchases larger power transformers, but also has quality assurance criteria unlike many producers of medium power transformers.

5.2.2 Fortune requested that an adjustment be made to the constructed normal value to account for the higher profit achieved on domestic sales to Taiwan Power Company compared to other customers.

#### ***Information that is not relevant information as defined***

5.2.3 Nil

#### ***Factual claims disputed, commentary and background***

5.2.4 The description of the goods is “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 500 kV (kilo volts) whether assembled or unassembled, complete or incomplete.”

5.2.5 Regulation 181A(2) states that “the Minister must, if reasonably possible, work out the amount [of profit] 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.” In section 6.5.3 of REP 219 the Commission considered that a “weighted average cost” of goods contemplated in s. 269TAAD(3) is not meaningful for power transformers, the recovery test cannot be conducted and the ordinary course of trade test cannot be fulfilled. As a result, the profit could not be calculated under Regulation 181A(2).

- The Commission calculated the profit for use in constructed normal values using one of the provisions in regulation 181A(3). It noted there is no hierarchy and each of these alternatives is equally available. The Commission determined a profit in accordance with Regulation 181A(3)(a) which refers to the actual amounts realised by the exporter from the sale of the same general category of goods in the domestic market of the exporting country.
- The Commission considered that because sales of like goods are such a high proportion of the same general category of goods that it was reasonable to assume that the amounts realised on sales of like goods, and sales of the same general category of goods as required by Regulation 181A(3)(a), are in close proximity.
- Like goods include all power transformers with power ratings of equal to or greater than 10 MVA and a voltage rating of less than 500 kV.

5.2.6 Fortune states that Taiwan Power Company primarily purchases larger power transformers. This is consistent with advice provided to the Commission at the Fortune verification visit. As stated above, the Commission found no clear pattern in profitability according to whether Fortune’s domestic sales were of power transformers above or below 100MVA.

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- 5.2.7 The Commission notes that the other Taiwanese exporter, SEEC, submitted that the domestic profit used in the construction of normal values should be based on sales to Taiwan Power Company, being a utility customer rather than a non-utility customer (see Section 6 below).
- 5.2.8 The Commission discussed the issue of “profit for constructed normal value” in detail at section 6.5.3 of REP 219.
- 5.2.9 The Commission also discussed this issue in section 12.1 of its Fortune verification visit report (<http://www.adcommission.gov.au/cases/documents/150-Verificationreport-Exporter-FortuneElectricCoLtd.pdf>)

### **5.3 Section 269TAF(1) was not applied correctly in identification [of] the date of transaction or agreement that best establishes the material terms of the sale of the exported goods for the purpose of currency conversion**

- 5.3.1 Fortune submitted that Australian sales values should be converted to local currency at the date of invoice rather than the date the contract was signed because the invoice date best establishes the material terms of sale for the purposes of currency conversion.

#### ***Information that is not relevant information as defined***

- 5.3.2 Nil.

#### ***Factual claims disputed, commentary and background***

- 5.3.3 In the case of power transformers, the contract date determines the amount the customer will have to pay in the currency specified in the contract (Australian dollars in this case). This date also typically defines the physical characteristics of the power transformer and the delivery terms. The contract may define a broad delivery date (such as by October 2015) but typically does not define exact delivery dates because of the long time between contract and delivery.
- 5.3.4 The Commission considers that the material terms of sale are established when the contract is signed or the purchase order accepted and it used the exchange rate at the contract date or purchase order date, unless satisfied that an alternative exchange rate should be used (such as the rate established in a foreign exchange contract).
- 5.3.5 The date of revenue recognition is, in the Commission’s view, a different issue to determining the date that best establishes the material terms of sale.
- 5.3.6 It was open to Fortune to enter into a foreign exchange contract at the time of the contract to supply a power transformer to ensure the agreed price in the foreign currency will be reflected in Fortune’s accounts when the revenue is eventually recognised.
- 5.3.7 The Commission discussed this issue in further detail at section 6.5.5 of REP 219.

## **6 SEEC**

### **6.1 The Commission should only have used the profit rate of domestic sales to utility customers instead of that for all domestic sales in the constructed normal value for SEEC**

- 6.1.1 SEEC submitted that only sales to Taiwan Power Company should be used in determining the amount of profit to be included in the constructed normal value. Domestic sales are to utility (Taiwan Power Company) and non-utility customers and there are differences in transactions between these types of customer that affect prices and profits.
- 6.1.2 SEEC submitted that an alternative would be to make a downward adjustment to the constructed normal value to ensure a fair comparison with export prices.

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### ***Information that is not relevant information as defined***

6.1.3 Nil.

### ***Factual claims disputed, commentary and background***

6.1.4 Regulation 181A(2) states that “the Minister must, if reasonably possible, work out the amount [of profit] 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.” In section 6.5.3 of REP 219 the Commission considered that a “weighted average cost” of goods contemplated in s. 269TAAD(3) is not meaningful for power transformers, the recovery test cannot be conducted and the ordinary course of trade test cannot be fulfilled. As a result, the profit could not be calculated under Regulation 181A(2).

- The Commission calculated the profit for use in constructed normal values using one of the provisions in regulation 181A(3). It noted there is no hierarchy and each of these alternatives is equally available. The Commission determined a profit in accordance with Regulation 181A(3)(a) which refers to the actual amounts realised by the exporter from the sale of the same general category of goods in the domestic market of the exporting country.
- The Commission considered that because sales of like goods are such a high proportion of the same general category of goods that it was reasonable to assume that the amounts realised on sales of like goods, and sales of the same general category of goods as required by Regulation 181A(3)(a), are in close proximity.
- Like goods include all power transformers with power ratings of equal to or greater than 10 MVA and a voltage rating of less than 500 kV.

6.1.5 The Commission found no clear and consistent indication that the SEEC profit levels varied according to whether its domestic customers were utility or non-utility customers.

6.1.6 The Commission notes that the other Taiwanese exporter, Fortune, submitted that the domestic profit used in the construction of normal values should exclude sales to Taiwan Power Company.

6.1.7 The Commission discussed the issue of “profit for constructed normal value” in detail at section 6.5.3 of REP 219.

6.1.8 The Commission also discussed this issue in section 8.5 of its SEEC verification visit report (<http://www.adcommission.gov.au/cases/documents/121-140519SEECvisitreportpublic-final.pdf>)

## **6.2 Export price – deduction of profit margin for Shihlin Electric Australia (SeA)**

6.2.1 SEEC submitted that the Commission should not have deducted a notional profit margin for SeA when constructing export price. SEEC considers that the Commission should only have deducted the actual profit made by SeA.

### ***Information that is not relevant information as defined***

6.2.2 Nil.

### ***Factual claims disputed, commentary and background***

6.2.3 The Commission was not satisfied that export sales from SEEC to SeA were arms length transactions. It established free-on-board (FOB) export prices under s. 269TAB(1)(b) using the selling price of SeA to a person who is not an associate of SeA less prescribed deductions. One of the prescribed deductions was for importer profit.

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- 6.2.4 The Commission found that SeA did not make a profit, but determined a profit to be deducted using the profits achieved by other importers that are subsidiaries of, or related to, the exporters.
- 6.2.5 The Commission considers that this approach is supported by s. 269TAB(2)(c) which provides for the deduction for profit in calculating deductive export prices, as follows:
- the profit, if any, on the sale by the importer or, where the Minister so directs, an amount calculated in accordance with such rate as the Minister specifies in the direction as the rate that, for the purposes of paragraph (1)(b), is to be regarded as the rate of profit on the sale by the importer.
- 6.2.6 The Commission's Dumping and Subsidy Manual also addresses the deduction for profit in calculating deductive export prices. The Manual states the Commission may have regard to a number of factors, including
- the profit achieved by other importers at the same level of trade for the goods during the investigation period.
- 6.2.7 The Commission considers its approach was reasonable and justified.
- 6.2.8 The Commission discussed this issue in further detail at section 6.10.2 of REP 219.

### **6.3 Interim dumping duties should not apply to imports that have been exported pursuant to existing contracts for the supply of power transformers**

- 6.3.1 SEEC submitted that interim dumping duties should not apply to imports of power transformers that have been or will be exported to Australia pursuant to contracts for the supply of power transformers entered into prior to 27 November 2013, the date the Commission made a Preliminary Affirmative Determination (PAD), and, in respect of which, if securities were taken, those securities have not been cancelled.
- 6.3.2 SEEC questions what material injury to an Australian industry would or could be prevented by the taking of securities in circumstances where the supply of the power transformer being supplied is pursuant to a contract entered into on or before the date of publication of the PAD.

#### ***Information that is not relevant information as defined***

- 6.3.3 Nil.

#### ***Factual claims disputed, commentary and background***

- 6.3.4 Securities lapse four months after they are taken. In this case:
- public notification of initiation of the investigation occurred on 29 July 2013;
  - publication of the dumping duty notice occurred on 10 December 2014; and
  - any securities taken before 10 August 2014 would have lapsed.
- 6.3.5 The Commission considers that construction of power transformers imported on or after 10 August 2014 are not likely to have commenced before the investigation was initiated. It considers that manufacturers therefore had reasonable opportunity to renegotiate contracts or to decline to supply power transformers if they knew, or ought to have known, they had been exporting at dumped prices.
- 6.3.6 The Commission further considers that if prices had been renegotiated to ensure that power transformers were not exported at dumped prices, the Australian industry may have had an opportunity to bid for the renegotiated contract.

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### **7 ABB Vietnam**

#### **7.1 Different purchasers were not the purchasers from ABB Vietnam.**

- 7.1.1 The Commission found that certain ABB Vietnam export prices differed significantly among purchasers, regions or periods. The Commission considered that the differences in export prices made the methods for comparing export price and normal value under s. 269TACB(2) inappropriate for use in respect of the whole investigation period. The Commission therefore calculated the dumping margin under s. 269TACB(3). The Commission detailed its approach at section 6.12.1 of REP 219.
- 7.1.2 ABB Vietnam contests four aspects of these conclusions by the Commission. The first is dealt with in this section (7.1), and the other three at sections 7.2, 7.3 and 7.4.
- 7.1.3 ABB Vietnam submits that, as a matter of legal interpretation, the different purchasers amongst whom the export price was said to have differed significantly must be the purchasers from ABB Vietnam.
- 7.1.4 ABB Vietnam submits that s. 269TACB(3) has as its focus on the exporter's export prices, which in the case of ABB Vietnam were determined under:
- s. 269TAB(1)(a) for transactions with ABB Australia Pty Ltd (ABB Australia); and
  - s. 269TAB(3) for transactions through ABB Hong Kong.
- 7.1.5 ABB Vietnam submits that the purchaser and importer in the case of ABB Vietnam was ABB Australia, not as REP 219 suggests, the final customers of ABB Australia.
- 7.1.6 ABB Vietnam claimed that the application of s. 269TACB(3) in REP 219 was unlawful, because the basis for that application, that export prices differed significantly among different purchasers, incorrectly identified ABB Australia's final customers as the purchasers relevant to the determination of the export price.

#### ***Information that is not relevant information as defined***

- 7.1.7 Nil.

#### ***Factual claims disputed, commentary and background***

- 7.1.8 The Commission explained at Confidential Attachment 10 of REP 219 how it examined the export price differences at the point of export (FOB) and after having regard to the particular Australian purchaser that were the customers named in the contracts. The Commission considers that the word 'purchasers' in s. 269TACB(3) is capable of being read more broadly, to include those Australian customers, and it need not be confined to direct importers only. The Commission's view is that it would be too narrow, and in this case inappropriate, to read down s. 269TACB(3) as being confined to only those entities involved in the purchase of the goods directly from the exporter, especially when that entity is related to the exporter. Such narrow interpretation could also allow for 'masking' of a targeted dumping situation – all that would need occur is for an intermediary to be placed in the sales transactions so it becomes the direct purchaser but everything else may remain unchanged, including the price differentiation between purchasers, regions or periods.
- 7.1.9 The involvement of a related party as an intermediary in the transaction between manufacturer and purchaser should not, in the Commission's view, preclude the Commission from testing whether export prices differ significantly among different purchasers, regions or periods for the purpose of s. 269TACB(3).
- 7.1.10 In this case:

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- 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 and each power transformer is unique; and
- ABB Australia is related to ABB Vietnam.

7.1.11 Transactions involving the export sale of power transformers to Australia involve manufacturers, Australian purchasers, and sometimes intermediaries. In all cases the parties are aware of the technical specifications of the unit and the identity of the parties involved in the manufacture and export sale of the unit. In the case of ABB Australia's sales the negotiations involve the Australian purchaser and ABB Australia, and ABB Australia and ABB Vietnam. However, it is reasonable to expect the negotiations between ABB Australia and ABB Vietnam must consider the requirements of the Australian purchaser and the conditions of competition particular to that purchaser's requirements and tender process.

7.1.12 The Commission therefore considers it is reasonable to compare the export prices from ABB Vietnam in groupings according to the Australian purchasers of those goods, even though those entities purchased the goods from ABB Australia.

7.1.13 The Commission discussed this issue in further detail at sections 6.6.6 and 6.12.1 of REP 219, and in Confidential Attachment 10 to REP 219.

### **7.2 Export prices among different purchasers did not differ significantly.**

7.2.1 ABB Vietnam submitted that, as a factual matter, ABB Vietnam's export prices did not differ significantly among different purchasers.

7.2.2 ABB Vietnam submitted that the prices (or ratios) identified by the Commission as significantly different were not the lowest prices and are not particularly unique. ABB Vietnam submitted that there were a number of export prices similar to the ones identified and that export prices to other customers were sometimes higher and sometimes lower than the ones identified.

7.2.3 ABB Thailand submitted that the Commission's test (ratio-based comparison) failed to consider the export prices themselves.

#### ***Information that is not relevant information as defined***

7.2.4 Nil.

#### ***Factual claims disputed, commentary and background***

7.2.5 To assess whether export prices differed significantly among different purchasers regions or period, the Commission conducted detailed export price comparisons using the ratio of export price to the full cost to make and sell (actuals figures, not estimates), calculated for all power transformers exported in the investigation period. The reasons for this approach, including an explanation as to why it could not reasonably compare the export prices of each power transformer, are set out in detail at section 6.6.6 of REP 219.

7.2.6 The Commission maintains that its comparison of export prices for ABB Vietnam in the investigation period (using the comparison of ratios of export price to cost to make and sell) is relevant and it shows that certain export prices differed significantly among purchasers, regions or periods.

7.2.7 The Commission's detailed analysis of the ABB Vietnam export prices is at Confidential Attachment 10 to REP 219.

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### 7.3 Incorrect finding that inappropriateness extended over whole period.

7.3.1 ABB Vietnam submits that s. 269TACB(3) only operates where there are different export prices between purchasers, regions or periods, and those differences make the use of the normal dumping margin calculation methodologies inappropriate for a period. ABB Vietnam considers that where this is found to have occurred the Commission may use the transaction to weighted-average method “for that period” in which the inappropriateness arises.

7.3.2 ABB Vietnam submits that the conclusion that the “different” export prices affected the entire three year period of investigation when they only took place in a discrete period is unfair and unreasonable.

#### ***Information that is not relevant information as defined***

7.3.3 Nil.

#### ***Factual claims disputed, commentary and background***

7.3.4 In comparing export prices among different purchasers, regions or periods the Commission considered all export prices for goods exported in the investigation period. This is consistent with the period (investigation period) used for comparing export price and normal value to determine whether dumping had occurred.

7.3.5 When initiating the investigation, the Commission chose a three-year investigation period because of the following factors:

- the long lead time between when a tender is called and when the power transformer is installed and operating (up to three years);
- ensuring that there are exports where the date of sale (possibly the purchase order date) and the export of the power transformer occur within the investigation period; and
- the ability to properly assess causal link between dumping and claimed injury through lost tenders over the past three years.

7.3.6 The Commission considers that ABB Vietnam has provided no compelling reason for why its export price comparisons ought to be restricted to a period shorter than the full investigation period.

7.3.7 The Commission’s detailed analysis of the ABB Vietnam export prices is at Confidential Attachment 10 to REP 219.

### 7.4 Failure to apply the method that was claimed to have been applied.

7.4.1 ABB Vietnam submits that there can be only one weighted average of export prices and one weighted average of normal values in any given period. ABB Vietnam submits that in purporting to apply a transaction to weighted average method (for dumping margin calculation) to ABB Vietnam’s exports, the Commission did not work out one weighted average of corresponding normal values.

7.4.2 ABB Vietnam considers the approach used by the Commission can only be described as a transaction to transaction comparison as envisaged by s. 269TACB(2)(b).

#### ***Information that is not relevant information as defined***

7.4.3 Nil.

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## ***Factual claims disputed, commentary and background***

- 7.4.4 The Commission's detailed description of how it applied the *weighted average* (normal value) *to transaction* (export price) method to determine dumping margins is set out within section 6.6.6 of REP 219 (refer to the part called "*Dumping margin calculations using the weighted average to transaction method*"). The Commission's reasons for that approach are also provided in that section.
- 7.4.5 The Commission's detailed calculation of dumping margins for ABB Vietnam using the weighted average to transaction method are contained in Confidential Attachment 11 to REP 219.

## **7.5 Incorrect determination of normal value and export price.**

- 7.5.1 ABB Vietnam submits that nothing in the legislation entitled the Commission to recommend to the Parliamentary Secretary that he should publish notices against ABB Vietnam's exports under s. 269TG(1) and (2). ABB Vietnam explains that those sections rely on the proposition that the export price was less than the normal value, which are amounts determined under s. 269TAB and s. 269TAC respectively. ABB Vietnam submits that the normal value determined under s. 269TAC was not the normal value considered by the Parliamentary Secretary and is not the normal value in the notice he signed.
- 7.5.2 ABB Vietnam submits that Australian law and WTO law provide no written authority for zeroing and no judicial authority for zeroing.
- 7.5.3 ABB Vietnam notes that the Commission, in calculating the dumping margin for ABB Vietnam, used all its export prices, but because only the dumping margin on the dumped exports was used as the numerator in the calculation, not all ABB Vietnam's normal values were used in the comparison.
- 7.5.4 ABB Vietnam notes that to impose dumping duties under s. 269TG(1) the Minister must be satisfied that the export price of the goods is less than the normal value of those goods. It also notes that to impose dumping duties under s. 269TG(2) the Minister must be satisfied that the export price of like goods that have already been exported to Australia is less than the normal value of those goods [underlining by ABB Vietnam].
- 7.5.5 ABB Vietnam submits that a notice can only be published under s. 269TG(1) or (2), and dumping duties can only be imposed on an exporter, pursuant to the terms of the sections. ABB Vietnam notes s. 269TG(1) and (2) refer to "export price" (defined under s. 269TAB) and "normal value" (defined under s. 269TAC), and does not use the words "dumped" or "dumping margin".
- 7.5.6 ABB Vietnam submits that the Minister has in this case not received a proper recommendation from the Commissioner as to the export price and the normal value for ABB Vietnam's exports to Australia.
- 7.5.7 ABB Vietnam notes that the amount of the ascertained normal value (per unit) in the notice signed by the Parliamentary Secretary does not agree with the normal value ascertained under 269TAC.
- 7.5.8 ABB Vietnam submits that the basis put forward to the Parliamentary Secretary for the publication of the s. 269TG notice, and the notice itself, are invalid.

## ***Information that is not relevant information as defined***

- 7.5.9 Nil.

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### ***Factual claims disputed, commentary and background***

- 7.5.10 The Commission considers that the variable factors contained in the notice pursuant to s. 269TG(1) and (2) are correct, and that the notice is valid.
- 7.5.11 The Commission considers that in the long history of WTO jurisprudence concerning zeroing there have been no findings made by a WTO body that zeroing is not permitted in the circumstances covered by s.269TACB(3). The Commission considers this provision, based on WTO Anti Dumping Agreement, has as its purpose a remedy against so called 'targeted' dumping which is explained in some more detail below.
- 7.5.12 The Commission considers that s. 269TACB(6) prescribes the manner of determining a dumping margin in relation to circumstances where a comparison is made under s. 269TACB(3), and only in relation to the particular transactions with export prices that are less than the weighted average of corresponding normal values. Subsection 269TACB(6)(a) provides that the goods exported to Australia in each such transaction are taken to have been dumped. It also provides at s. 269TACB(6)(b) that the dumping margin for the exporter concerned in respect of those goods is the difference between each relevant export price and the weighted average of corresponding normal values.
- 7.5.13 The Commission notes that the focus of s. 269TACB(6) is on the particular transactions where the individual export price is less than the weighted average of corresponding normal values. Subsection 269TACB(6) is silent on how to treat the goods exported to Australia in other transactions. In these circumstances, the Commission considers when it is using the method under s.269TACB(3) and (6) it must not take into account offsets for negative dumping margins arising from transactions where the export price was higher than the weighted average of corresponding normal values. As noted, the Commission's view is that the purpose of this section is to allow particular dumping margins to be taken into account only. As a simple example, consider a case where dumping is occurring in relation to goods exported to one Australian state, but not other parts of Australia (i.e. export prices differ significantly among different regions). The dumping of those goods exported to that one state may be found to have caused material injury to the Australian industry. If all of the export transactions were taken into account it may be that there is no dumping margin overall. This section provides the remedy. Likewise, the Commission considers that where there are export prices that differed significantly among different purchasers or periods, a remedy is intended under this provision.
- 7.5.14 The Commission considers this interpretation is consistent with the intention of these provisions which is to unmask and take into account export prices that differ significantly among different purchasers, regions or periods. In doing so, the Commission has identified and addressed 'targeted' or 'masked' dumping that can cause material injury. The Commission considers that this approach is available under Australian law and that it is consistent with WTO jurisprudence, as noted above.
- 7.5.15 Having calculated the difference between each relevant export price and the weighted average of corresponding normal values, the Commission then expressed that amount as a percentage of the total export value of all goods exported in the investigation period. The Commission calculated that the goods exported by ABB Vietnam in the investigation period were dumped at a margin of 3.8%.
- 7.5.16 ABB Vietnam correctly noted that dividing the total export value by the number of units exported to Australia in the investigation period gives rise to the ascertained export price in the notice pursuant to s. 269TG(1) and (2).
- 7.5.17 The Commission then sought to ensure the ascertained variable factors in the notice pursuant to s. 269TG(1) and (2) were consistent with the findings that export price of the goods was less than normal value of those goods (being the normal value of all goods exported in the investigation period) by an amount of 3.8%. Accordingly, the Commission calculated that the normal value of all goods exported to Australia in the investigation period was an amount that was 3.8% higher than the ascertained export price. To do otherwise would mean there is no

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remedy against the dumping the Commission had identified as causing an injury and it would require a recommendation for dumping duty notices using variable factors, and a resulting dumping duty, where no duty could be collected. The Commission considers that having made a determination of a dumping margin under s. 269TACB(3) in this case, the Minister's notices under s. 269TG which notify the results of the investigation must give effect to that determination.

7.5.18 The Commission therefore recommended, and the Parliamentary Secretary accepted, dumping duty notices that contain ascertained variable factors that are consistent with dumping margin calculations.

### **8 ABB Thailand**

#### **8.1 Different purchasers were not the purchasers from ABB Thailand.**

8.1.1 The matters raised in the ABB Thailand application were similar to those raised by ABB Vietnam, which were summarised in section 7.1.3 to 7.1.6 of this document.

##### ***Information that is not relevant information as defined***

8.1.2 Nil.

##### ***Factual claims disputed, commentary and background***

8.1.3 The Commission's responses at sections 7.1.13 to 7.1.17 are also applicable here.

8.1.4 The Commission discussed this issue in further detail at sections 6.6.6 and 6.11.1 of REP 219, and in Confidential Attachment 7 to REP 219.

#### **8.2 Export prices among different purchasers did not differ significantly.**

8.2.1 ABB Thailand submitted that, as a factual matter, ABB Thailand's export prices did not differ significantly among different purchasers.

8.2.2 ABB Thailand submitted that the prices (or ratios) identified by the Commission as significantly different did not differ significantly from certain other specified (but confidential) prices. ABB Thailand submitted the prices identified by the Commission were sometimes higher and sometimes lower.

8.2.3 ABB Thailand submitted that the Commission's test (ratio-based comparison) failed to consider the export prices themselves.

##### ***Information that is not relevant information as defined***

8.2.4 Nil.

##### ***Factual claims disputed, commentary and background***

8.2.5 To assess whether export prices differed significantly among different purchasers regions or period, the Commission conducted detailed export price comparisons using the ratio of export price with full cost to make and sell (actuals figures, not estimates), calculated for all power transformers exported in the investigation period. The reasons for this approach, including an explanation as to why it could not reasonably compare the export prices of each power transformer, are detailed at section 6.6.6 of REP 219.

8.2.6 The Commission maintains that its comparison of export prices for ABB Thailand in the investigation period (using the comparison of ratios of export price to cost to make and sell) revealed certain export prices differed significantly among purchasers, regions or periods.

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8.2.7 The Commission's detailed analysis of the ABB Thailand export prices is at Confidential Attachment 7 to REP 219.

### **8.3 Incorrect finding that inappropriateness extended over whole period.**

8.3.1 The matters raised in the ABB Thailand application were similar to those raised by ABB Vietnam, which were summarised in section 7.3.1 to 7.3.2 of this document.

#### ***Information that is not relevant information as defined***

8.3.2 Nil.

#### ***Factual claims disputed, commentary and background***

8.3.3 The Commission's responses at sections 7.3.4 to 7.3.6 are also applicable here.

8.3.4 The Commission's detailed analysis of the ABB Thailand export prices is at Confidential Attachment 7 to REP 219.

### **8.4 Failure to apply the method that was claimed to have been applied.**

8.4.1 The matters raised in the ABB Thailand application were similar to those raised by ABB Vietnam, which were summarised in section 7.4.1 to 7.4.2 of this document.

#### ***Information that is not relevant information as defined***

8.4.2 Nil.

#### ***Factual claims disputed, commentary and background***

8.4.3 The Commission's response at section 7.4.4 is also applicable here.

8.4.4 The Commission's detailed calculation of dumping margins for ABB Thailand using the weighted average to transaction method are contained in Confidential Attachment 8 to REP 219.

### **8.5 Incorrect determination of normal value and export price.**

8.5.1 The matters raised in the ABB Thailand application were similar to those raised by ABB Vietnam, which were summarised in section 7.5.1 to 7.5.7 of this document.

#### ***Information that is not relevant information as defined***

8.5.2 Nil.

#### ***Factual claims disputed, commentary and background***

8.5.3 The Commission's responses at sections 7.5.9 to 7.5.16 are also applicable here.