



Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved¹ form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 20 May 2019 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party² may lodge an application for review to the ADRP of a review of a Ministerial decision.

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

Time

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

Conferences

The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

Further application information

You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 9, 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by completing the withdrawal form on the ADRP website.

¹ By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

² As defined in section 269ZX *Customs Act 1901*.

PUBLIC VERSION

Contact

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

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: Fortune Electric Co., Ltd. ("Fortune")
Address: No.10, Jilin Rd., Zhongli Dist., Taoyuan City 32063, Taiwan (R.O.C.)
Type of entity (trade union, corporation, government etc.): Corporation

2. Contact person for applicant

Full name: Mr Rafe Ho
Position: Manager – International Department
Email address: rafe@fortune.com.tw
Telephone number: +886-2-2704-7001 ext:238

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

Fortune is the manufacturer and exporter of the power transformers that were the subject of the expiry review.
--

4. Is the applicant represented?

Yes No

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

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

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 8504.22.00 (statistical code 40)
- 8504.23.00 (statistical codes 26, 41)
- 8504.21.00 (statistical code 39)
- 8504.33.00 (statistical code 30)
- 8504.34.00 (statistical code 91)

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number: ADN 2019/127 (Attachment A)
Date ADN was published: 6 November 2019

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

PART C: GROUNDS FOR THE APPLICATION

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

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

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant’s representative.

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

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

See Attachment B .

10. Identify what, in the applicant’s opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:

See Attachment B .

11. Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

See Attachment B .

PUBLIC VERSION

12. Set out the reasons why the proposed decision provided in response to question 10 is materially different from the reviewable decision:

See Attachment B.

13. Please list all attachments provided in support of this application:

Attachment A – ADN 2019/27

Attachment B – Submission containing grounds of appeal.

Attachment C - 504 - Fortune - Appendix 2 - CTMS (Final Report).xlsx

Attachment D - 504 - Fortune - Appendix 3 - Domestic sales (Final Report)

PART D: DECLARATION

The applicant declares that:

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

Signature: 

Name: Mr Rafe Ho

Position: Manager – International Department

Organisation: Fortune Electric Co., Ltd.

Date: 05 / 12 / 2019

PART E: AUTHORISED REPRESENTATIVE

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

Provide details of the applicant's authorised representative:

Full name of representative: [REDACTED]
Organisation: [REDACTED]
Address: [REDACTED]
Email address: [REDACTED]
Telephone number: [REDACTED]

Representative's authority to act

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

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

Signature: 

Name: Mr Rafe Ho

Position: Manager – International Department

Organisation: Fortune Electric Co., Ltd.

Date: 05 / 12 / 2019



華城電機股份有限公司
FORTUNE ELECTRIC CO., LTD.

6 December 2019

Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601

Fortune Electric Co., Ltd (“Fortune”) seeks a review of the Minister’s decision under section 269ZHG(1)(b) of the Act, to continue the anti-dumping measures currently applying to goods exported from Taiwan by Fortune, and secure the continuation of the measures pursuant to subsection 269ZHG(4)(a)(iii) of the Act, on the basis of different specified variable factors for Fortune as per the table in the minister’s published notice (ADN 2019/127).

The grounds of review are:

Ground 1: The Commission erred in calculating profit pursuant to section 45 of the Customs (International Obligations) Regulation 2015, which resulted in an overstated normal value.

GROUND 1: The Commission erred in calculating profit pursuant to section 45 of the Customs (International Obligations) Regulation 2015, which resulted in an overstated normal value.

1. Grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

The Commission correctly concluded that each power transformer unit is a unique capital item with particular specifications and pricing to meet each purchasers’ technical requirements. In these circumstances, the Commission considered it appropriate to establish normal values pursuant to subsection 269TAC(2)(c) of the Act, which provides that a constructed normal value is 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 the goods, instead of being exported, had been sold for home consumption 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 for profit.

At section 6.5.1.5 of the Final Report, the Commission outlines its approach to determining the amount of profit to be included in the constructed normal values:

As required by section 269TAC(5B), in ascertaining the normal value of the goods under section 269TAC(2)(c), the amount of profit included in the normal value is to be determined having regard to section 45 of the Regulation. Section

PUBLIC VERSION

45(2) of the Regulation requires that, where reasonably practicable, the amount of profit must be worked out using data relating to the production and sale of like goods by the exporter or producer of the goods in the OCOT.

The Commission found that Fortune sold like goods in the OCOT on the domestic market of Taiwan.

The Commission has calculated an amount of profit on the domestic sales of like goods in the OCOT that were produced by Fortune, in accordance with section 45(2) of the Regulation.

For the reasons outlined below, Fortune contends that the Commission's approach is inconsistent with the requirements of the Act and the Regulation, as it does not comply with the requirement to calculate profit on sales in the ordinary course of trade using a weighted average cost of goods. This is a fundamental flaw that is inconsistent with the Commission's interpretation in the original investigation, inconsistent with the findings of the WTO Appellate Body and inconsistent with the interpretation of the Federal Court.

Method of calculating profit for constructed normal values

It is important to firstly distinguish the Commission's approach and interpretation of the Act and Regulation in this review compared to its stated interpretation in the original investigation into power transformers. This comparison clearly highlights a major change in the Commission's reading of the relevant provisions, as the current methodology conflicts directly with its previously stated interpretation of the OCOT requirements contained in ss.269TAAD of the Act.

During the original investigation, the ADC published its interpretation of the OCOT provisions in an issues paper released on 27 May 2014³. In that paper, the ADC stated its clear understanding of the OCOT requirements in the context of the unique circumstances of power transformer sales that prevent the recovery test set out in ss.269TAAD(3) to be meaningfully undertaken.

The ordinary course of trade provisions are at s. 269TAAD and an important element of those provisions is determining whether the cost of goods sold at a loss are recoverable within a reasonable period. The recovery test is at s. 269TAAD(3). In the case of power transformers, each unit is uniquely constructed and the costs and prices can differ significantly from one model to another. Indeed, it is the inability to make reasonable adjustments to prices of models sold domestically, to ensure fair comparison with export prices, that explains why the ADC will not establish normal values on the basis of domestic selling prices (s. 269TAC(1)). Furthermore, the ADC considers that a "weighted average cost" of goods contemplated in s. 269TAAD(3) cannot be meaningfully calculated for power transformers. Consequently, the recovery test cannot be conducted meaningfully and the ordinary course of trade test cannot be fulfilled. Accordingly the ADC considers it is not reasonably possible to work out the profit on the sale of the goods made in the ordinary course of trade in accordance with Regulation 181A(2).

The Commission maintained and adopted this position in its final report (Report 219) to the Minister, which was the basis of the imposition of the measures which are the subject of the current expiry review.

In its response to Fortune's submissions on the issue, 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

³ Issues Paper, 2014/1.

PUBLIC VERSION

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.

This statement by the Commission is unconvincing for the following reasons.

First, the findings from Report 487 into exports of wind towers are itself the subject of an ADRP review and the ADRP has since requested the Commission to conduct a reinvestigation into its approach to calculating the amount of profit pursuant to Regulation 45.

Second, a single wind tower is made up and comprises multiple sections of steel plate. As each section of a wind tower falls within the subject goods, it is possible then to calculate a weighted average cost of a tower using the steel weight of each section as the unit of measure for weighting purposes. Further, the wind towers are typically sold on a project basis requiring multiple complete towers. Again in these circumstances, it is possible to calculate the weighted average cost of a project using the total weight of each complete tower as the unit of measure for weighting purposes.

These characteristics of wind towers therefore differ to power transformers, which are single units comprising thousands of different parts and components. For these reasons, Fortune disagrees with the Commission’s reliance on the circumstances in Report 487 as the foundation for altering its policy interpretation and methodology for calculating profit in the case of power transformers. As the Commission has verified and established, Fortune’s domestic sales comprise single power transformer units with each involving different technical specifications. There is no reasonable manner in which to calculate a weighted average cost for each transformer unit, as noted and confirmed by the Commission during its original investigation.

Meaning of weighted average

Fortune contends that the Commission’s calculation of profit is flawed and inconsistent with the OCOT provisions which requires comparing the selling price of the goods with the weighted average cost of such goods. Fortune agrees with the Commission’s original interpretation that *‘it is not reasonably possible to work out the profit on the sale of the goods made in the ordinary course of trade in accordance with Regulation 181A(2)’* as the *“weighted average cost” of goods contemplated in s. 269TAAD(3) cannot be meaningfully calculated for power transformers.’*

Weighted average is a type of average where each observation in the data set is multiplied by a predetermined weight before calculation. Therefore, a weighted average calculation can only be achieved with multiple observations. It stands to reason then that a weighted average cannot be calculated with a single observation.

This is confirmed by the definitions at s.269T(5A) of the Act which states:

(5A) For the purposes of this Part, the weighted average of prices, values, costs or amounts in relation to goods over a particular period is to be worked out in accordance with the following formula:

$$\frac{P_1 Q_1 + P_2 Q_2 + \dots + P_n Q_n}{Q_1 + Q_2 + \dots + Q_n}$$

where:

P₁ , P₂ ... P_n means the price, value, cost or amount, per unit, in respect of the goods in the respective transactions during the period.

Q₁ , Q₂ ... Q_n means the number of units of the goods involved in each of the respective transactions.

PUBLIC VERSION

The formula confirms that to calculate a weighted average cost of power transformers, there must be more than one unit. However, as the Commission has noted and confirmed that each power transformer is a discrete unique unit, it must follow that there cannot be a multiple number of units. This is the basis of its original view that the OCOT recovery test cannot be meaningfully performed.

Finally, there is support for the Commission's original interpretation and Fortune's contended view that a weighted average cost of goods requires more than one transformer unit, from the WTO Appellate Body.

In *EC — Bed Linen*⁴, the Appellate Body overturned the Panel's finding under Article 2.2.2(ii) that the existence of data for more than one other exporter or producer is not a necessary prerequisite for application of the approach using "weighted average" in calculating the amount for administrative, selling and general costs ("SG&A") to determine the constructed normal value of subject products. The Appellate Body stated:

To us, the use of the phrase 'weighted average' in Article 2.2.2(ii) makes it impossible to read 'other exporters or producers' as 'one exporter or producer'. First of all, and obviously, an 'average' of amounts for SG&A and profits cannot be calculated on the basis of data on SG&A and profits relating to only one exporter or producer. Moreover, the textual directive to 'weight' the average further supports this view because the 'average' which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. In short, it is simply not possible to calculate the 'weighted average' relating to only one exporter or producer. Indeed, we note that, at the oral hearing in this appeal, the European Communities conceded that the phrase 'weighted average' envisages a situation where there is more than one exporter or producer.

...

In our view, then, the use of the phrase 'weighted average', combined with the use of the words 'amounts' and 'exporters or producers' in the plural in the text of Article 2.2.2(ii), clearly anticipates the use of data from more than one exporter or producer. We conclude that the method for calculating amounts for SG&A and profits set out in this provision can only be used if data relating to more than one other exporter or producer is available.

[original emphasis]

It is clear then that the Commission's changed interpretation and approach to calculating profit for the purposes of constructing normal values for Fortune's exported power transformers is not correct or preferable as it inaccurately calculates a weighted average cost of the power transformer units sold domestically.

Fortune's domestic sales of power transformers

Confirmation that the Commission did not accurately calculate the weighted average cost of the power transformer units sold domestically by Fortune, is evidenced in the tables contained in the worksheet titled "(a) WA Domestic CTMS" in Appendix 2 of Fortune's dumping calculations (refer to **Attachment C**), and shown below.

CONFIDENTIAL TABLE REDACTED

The table above identifies the weighted average cost for each model to be used for performing the recoverability test. That table clearly identifies in the "quantity" column that only single units were used for the purposes of calculating these weighted average costs. This is further confirmed as the actual unit cost to make and sell of certain transformers is

⁴ WT/DS141/AB/R, EC – Bed Linen, para 74-76, pages 23-24.

PUBLIC VERSION

identical to the weighted average unit cost to make and sell. As the actual unit costs and weighted average unit costs for the transformer units are identical, this confirms that no weighting of costs was undertaken as required and in accordance with subsection 269TAAD(3) of the Act.

For the reasons, Fortune contends that the Commission's calculation of profit is flawed and calculated inconsistently with the Act and the Regulation, as the recovery test and profits were not calculated using a weighted average costs of the domestic power transformer units. As such, the Commission has not undertaken the OCOT tests required by subsection 269TAAD(3) of the Act, and as such was not able to recommend that the Minister determine profit using OCOT sales pursuant to subsection 45(2) of the Regulation.

2. The applicant's opinion of the correct or preferable decision.

Fortune submits that the correct and preferable decision was for the Commission to apply its original interpretation and conclude that it is not reasonably possible to work out the profit on the sale of the goods made in the ordinary course of trade as the weighted average cost of goods contemplated in subsection 269TAAD(3) of the Act cannot be meaningfully calculated for power transformers. Accordingly, it is not reasonably possible to work out the profit on the sale of the goods made in the ordinary course of trade in accordance with subsection 45(3) of the Regulation.

The correct decision in these circumstances was to calculate profit pursuant to subsection 45(3)(a) of the Regulation, using the actual amounts realised by Fortune from the sale of the same general category of goods in the domestic market of the country of export. This is the same approach adopted by the Commission in the original investigation which resulted in the measures being imposed. This method is preferred as the alternative method provided for in subsection 45(3)(b) of the Regulation is not possible as Fortune was the only cooperating exporter from Taiwan. Therefore, the Commission is unable to calculate the weighted average amounts realised by other exporters from Taiwan.

In calculating profit pursuant to subsection 45(3) of the Regulation, it is important to note that the Commission is required to include all amounts realised on its domestic sales, irrespective of whether they are profitable or loss-making. This is consistent with the Commission's interpretation and supported findings by the ADRP.

3. How the grounds support the making of the proposed correct or preferable decision.

The proposed correct or preferable decision is supported by the following:

- a) the Commission's original interpretation of the OCOT provisions and profit regulations;
- b) the clear and unambiguous reading of the definition of 'weighted averages' as outlined in subsection 269T(5A) of the Act;
- c) the interpretation by the WTO Appellate Body that a weighted average calculation requires 'more than' one unit; and
- d) the Commission's calculation of the weighted average costs of Fortune's domestic power transformers were clearly based on individual units which did not provide for the weighted average calculation required by the OCOT provisions.

Fortune's submitted proposed decision complies with Act and the Regulation by ensuring that profit is calculated using the actual amounts realised, which does not require a weighted averaging procedure.

4. Why the proposed decision is materially different from the reviewable decision.

PUBLIC VERSION

The Commission's flawed profit calculation which is not based on the required weighted cost of the goods, amounts to a profit rate of [REDACTED]% over the review period. This compares to a profit rate of [REDACTED]% calculated on the basis of Fortune's proposed methodology, which is calculated in the **Attachment D – Domestic Sales.xlsx**.

This difference of [REDACTED]% is material in the context of Fortune's calculated dumping margin of 7.6%, which would have been substantially reduced to [REDACTED]%.



ANTI-DUMPING NOTICE NO. 2019/127

Customs Act 1901 – Part XVB

**Power Transformers
Exported to Australia from the Republic of Indonesia, Taiwan
and the Kingdom of Thailand
Findings of the Continuation Inquiry No. 504
into Anti-Dumping Measures**

Notice under section 269ZHG(1) of the Customs Act 1901¹

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed an inquiry, which commenced on 11 February 2019, concerning whether the continuation of the anti-dumping measures in the form of a dumping duty notice applying to power transformers (the goods) exported to Australia from the Republic of Indonesia (Indonesia), Taiwan and the Kingdom of Thailand (Thailand) by all exporters other than PT. Unelec Indonesia (UNINDO) from Indonesia and ABB Limited from Thailand, is justified.

Recommendations resulting from the inquiry completed by the Commissioner, reasons for the recommendations, and material findings of fact and law in relation to the inquiry are contained in *Anti-Dumping Commission Report No. 504 (REP 504)*.

I, KAREN ANDREWS, the Minister for Industry, Science and Technology, have considered REP 504 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts and law therein.

Under section 269ZHG(1)(b) of the Act, I declare that I have decided to secure the continuation of the anti-dumping measures currently applying to the goods exported to Australia from Indonesia and Taiwan. Under section 269ZHG(1)(a) of the Act, I declare that I have decided not to secure the continuation of the anti-dumping measures applying to the goods exported to Australia from Thailand.

Having decided to secure the continuation of the anti-dumping measures currently applying to the goods exported to Australia from Indonesia and Taiwan, I determine, pursuant to section 269ZHG(4)(a)(iii) of the Act, that the notice continues in force after 10 December 2019 but that, after this day, has effect in relation to goods exported to Australia by all exporters from Taiwan and by “all other exporters” from Indonesia², as if different specified variable factors had been fixed in relation to those exporters.

¹ All legislative references are to the *Customs Act 1901* (the Act), unless otherwise specified.

² For clarity, this covers all exporters other than PT CG Power Systems Indonesia (REP 504 did not recommend a change to the variable factors for this exporter) and UNINDO (who are not subject to the anti-dumping measures).

Particulars of the effective rates of interim dumping duty are set out in the following table.

Country	Exporter	Effective rate of interim dumping duty	Duty method
Indonesia	PT CG Power Systems Indonesia	28.3%	Ad valorem duty method
	All other exporters (except UNINDO)	28.3%	
Taiwan	Fortune Electric Co., Ltd	7.6%	
	All other exporters	8.8%	

REP 504 has been placed on the public record which may be examined on the Anti-Dumping Commission website.³ Enquiries about this notice may be directed to Client Support at clientsupport@adcommission.gov.au.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel,⁴ in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Dated this 18th day of November 2019



KAREN ANDREWS
Minister for Industry, Science and Technology

³ The public record is available via www.adcommission.gov.au.

⁴ The Anti-Dumping Review Panel website may be accessed via <https://www.industry.gov.au/about-us/our-structure/anti-dumping-review-panel>.