Australian Government
Anti-Dumping Review Panel

# ADRP Decision No. 77

## Certain Wind Towers exported from the Socialist Republic of Vietnam

May 2018

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# Abbreviations

| Term | Meaning |
|---|---|
| Act | *Customs Act 1901* |
| ADC | Anti-Dumping Commission |
| ADN | Anti-Dumping Notice |
| Applicants | Keppel and Ottoway |
| CS Wind Korea | CS Wind Corporation |
| CS Wind Vietnam | CS Wind Vietnam Limited Company |
| CTM | Cost to Make |
| Commissioner | The Commissioner of the Anti-Dumping Commission |
| EPC | Engineer procure and construct |
| GE | GE Electric International, Inc |
| Goods | Certain utility scale wind towers, whether or not tapered, and sections thereof (whether exported assembled or unassembled), and whether or not including an embed being a tower foundation section |
| INV 405 | The investigation, no. 405, initiated on 8 June 2017 by the Commissioner into the alleged dumping of wind towers from Korea |
| Keppel | Keppel Prince Engineering Pty Ltd |
| Investigation period | 1 January 2015 to 31 December 2016 |
| Minister | Minister for Jobs and Innovation |
| OEM | Original equipment manufacturer of turbines |
| Ottoway | Ottoway Fabrication Pty Ltd |
| PNC | PNC Global Co., Ltd |

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| REP 405 | The report published by the ADC in relation to INV 405 and dated February 2018 |
| Review application | The application for review of the Reviewable Decision made on 6 March 2018 |
| Reviewable Decision | The decision of the Commissioner made on 5 February 2018 to terminate INV 405, being the subject of ADN 2018/20 |
| SEF 405 | The Statement of Essential Facts published by the ADC on 3 January 2018 |
| Siemens | Siemens Wind Power Pty Ltd |
| Vietnam | The Socialist Republic of Vietnam |
| *Yazaki* | *Australian Competition and Consumer Commission v Yazaki Corporation* [2015] FCA 1304; (2015) 332 ALR 396 |

## Decision

1. This is a review of the decision of the Commissioner of the Anti-Dumping Commission made under s 269TDA(13) of the *Customs Act 1901* on 5 February 2018 to terminate an investigation into the alleged dumping of wind towers exported to Australia from the Socialist Republic of Vietnam.

2. The decision of the Commissioner was the correct and preferable decision.

3. Pursuant to s 269ZZT(1)(a) of the Customs Act 1901, I affirm the Commissioner's decision.[1]

……

Scott Ellis
Panel Member
Anti-Dumping Review Panel
14 May 2018

[1] Interested parties may be eligible to seek a review of this decision by lodging an application with the Federal Court of Australia, in accordance with the requirements in the *Administrative Decision (Judicial Review) Act 1977*, within 28 days of receiving notice.

## Summary

1. On 5 February 2018, the Commissioner terminated an investigation into the alleged dumping of wind towers exported to Australia from the Socialist Republic of Vietnam under s 269TDA(13) of the *Customs Act 1901*. Although he found that wind towers from Vietnam had been dumped at a rate of 4.8%, he found the injury caused to the Australian industry by dumped goods exported to Australia from Vietnam was negligible.[2]

2. Keppel Prince Engineering Pty Ltd (Keppel) and Ottoway Fabrication Pty Ltd (Ottoway) (together, "the applicants") applied for review under s 269ZZO of the Act.

3. In general terms, the applicants contended that the Reviewable Decision was not the correct or preferable decision because:
   a. the Commissioner made several errors in determining the dumping margin, the result of which was that the dumping margin ascertained by him was too low;
   b. the Commissioner wrongly concluded that the dumping of goods from Vietnam had not materially affected the Australian industry's economic performance; and
   c. price was ultimately the determinative factor in decisions to purchase wind towers from Vietnam rather than from the Australian industry. The Commissioner was wrong to conclude that "non-price" factors were determinative.

4. I was not persuaded that the Commissioner's calculation of the dumping margin was deficient. I considered that the buying decisions affecting the Australian industry were not caused by the dumping. In the context of this application, this meant that the Australian industry did not suffer material injury as a result of the

[2] ADN 2018/20. References to sections are references to sections in the *Customs Act 1901*.

dumped goods. Consequently, I considered that the decision of the Commissioner was the correct and preferable decision.

## Background

5. This review concerns wind towers, and sections of wind towers. Wind towers are components of wind turbines, used to generate electricity on a commercial basis, frequently in large wind farms. The towers provide support to the nacelle, which contains a turbine or engine, and the rotor blades. The towers are not less than 50 metres high. It is usual for several sections to be used to form a single complete wind tower. Sections are commonly between 15 and 30 metres in height.

6. The goods are more technically described as:

> Certain utility scale wind towers, whether or not tapered, and sections thereof (whether exported assembled or unassembled), and whether or not including an embed being a tower foundation section.[3]

7. An "embed"[4] is the foundation section of a wind tower, and is shorter than a normal section. It is made of one or two steel plates rolled into a barrel shape. It is usually cast into (or embedded in) the ground and forms the foundation for the tower. Not all wind turbines require an embed.

8. "The goods" does not include the nacelle, the turbine or the rotor blades or any internal or external components which are not attached to the wind towers or the sections.

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[3] The goods are further described in ADN 2017/78.

[4] Also known as a "tower base ring" or TBR.

9. Wind towers are fitted out and supplied with platforms and hatches, ladders or an internal lift, cable trays, safety fall arrest devices, internal lighting, and power cables and the like.[5] These may be referred to as the "internals".

10. The applicants each carry on the business of manufacturing the goods in Australia. They are the Australian industry. Keppel has a manufacturing facility at Portland in Victoria. Ottoway has one at Whyalla in South Australia.[6]

11. It appears that wind tower manufacturers supply wind towers to entities described as "Original Equipment Manufacturers" (OEMs) or to Engineer, Procure and Construct ("EPC") firms. OEMs sell complete wind turbines. EPCs design and construct complete wind farms. The OEMs and the EPC may be regarded as end users, in the sense that they purchase the goods from the wind tower manufacturers. They do not, however, retain the wind towers for their own use, but on sell them as part of completed wind turbines or complete wind farms.

12. OEMs and EPCs require wind towers to be supplied to their particular specifications.

13. There were 7 OEMs operating in the Australian market. Only two OEMs purchased wind towers exported from Vietnam during the investigation period, General Electric International Inc (GE) and Siemens Wind Power Pty Ltd (Siemens).

14. The sole exporter of wind towers from Vietnam to Australia during the investigation period was CS Wind Corporation (CS Wind Korea), a Korean entity. It engages a Vietnamese subsidiary to manufacture wind towers for it in

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[5] Application at page 12.

[6] A third Australian entity, ACN 009 483 694 Pty Ltd (Haywards) formerly carried produced wind towers and retained the capacity to do so in the future but did not produce like goods during the investigation period (TER 405, at 9). Haywards supported the application (see TER 405 at p20).

Vietnam. The name of the Vietnamese subsidiary is CW Wind Vietnam Limited Company (CS Wind Vietnam). Another entity associated with CS Wind Korea, PNC Global Co., Ltd (PNC), manufacturered and supplied the internals for CS Wind Korea's wind towers.

15. By application lodged on 17 April 201, the applicants applied for the publication of dumping notices in respect of the goods.[7] The Commissioner initiated an investigation, INV405, on 8 June 2017.[8] The investigation period for the purposes of assessing dumping was 1 January 2015 to 31 December 2016. The injury analysis period was from 1 January 2013.

16. The Anti-Dumping Commission (ADC) delivered questionnaires, received responses, carried out on site investigations and published verification reports in respect of CS Wind Korea and CS Wind, Siemens and GE. The exporter questionnaire provided information in relation to both CS Wind Korea and CS Wind Vietnam. The ADC conducted a site visit at the exporter's premises in both Korea and Vietnam. The ADC also conducted on site verification for each of the applicants.

17. The Commissioner published a Statement of Essential Facts on 3 January 2018 (SEF 405)

18. On 6 February 2018, the Commissioner made the Reviewable Decision. That same day the Commissioner published a termination report (TER 405).

19. The application for review (review application) of the Reviewable Decision was made on 6 March 2018 under s 269ZZO. It was in the approved form. The Senior Member directed that Panel in respect of this matter should be

[7] EPR001 in the the Electronic Public Record (EPR) maintained by the Anti-Dumping Commission in respect of Investigation 405.

[8] By ADN 2017/78.

constituted by me. I accepted the grounds of review set out in the review application. The review was initiated on 15 March 2018.

20. On 13 April 2018 Clayton Utz, the solicitors for Siemens, wrote to the Panel Secretariat concerning the review. The Act does not contemplate that submissions will be provided in reviews of termination decisions. I did not have regard to the letter from Clayton Utz.

## The issues

21. I am required by s 269ZZT(1) to affirm the Reviewable Decision or revoke it. I must affirm the Reviewable Decision if it is the correct and preferable decision and revoke it if it is not.

22. The grounds advanced by the applicants were as follows:

    10.1 The decision of the … Commissioner … to treat the related companies in the CS Wind Group as separate entities is not the correct or preferable decision.

    10.2 The decision of the Commissioner to treat CS Wind Vietnam as a other seller and producer of like goods in the Vietnamese domestic market is not the correct or preferable decision.

    10.3. The Commissioners (sic) decision to treat related party transactions between companies in the CS Wind Group as arms length transactions is not the correct or preferable decision.

    10.4 The Commissioner's decision to use the by using (sic) the weighted average profit of CS Wind Vietnam and CS Wind Korea to determine a profit for the normal value is not the correct or preferable decision.

    10.5 The Commissioner's decision to calculate an export price without properly considering whether additional items to the export represented a consideration other than the price is not the correct or preferable decision.

10.6 The Commissioner's decision to calculate a normal value that excludes relevant SG&A costs is not the correct or preferable decision.

10.7 The Commissioner's decision to calculate a normal value that excludes an adjustment for non-market costs for electricity is not the correct or preferable decision.

10.8 The Commissioner's decision that the size of the dumping margin had not materially impacted the Australian industry's economic performance is not the correct or preferable decision.

10.9 The Commissioner's decision that non-price factors were determinative in the decisions to award projects to CS Wind Korea during the investigation period is not the correct decision or preferable decision.

23. It is necessary to bear in mind the role of the Panel and the nature of the review conducted by it. These matters were discussed by Senior Member Moore in ADRP Report No. 24:[9]

> [10] As a preliminary observation it is necessary to emphasise (as I have in earlier review reports) that the power to review, is to review the operative decision. It is not a power to "review" all or some of the calculations, assessments or subsidiary decisions made by or on behalf of the Commissioner that underpinned the operative decision if made by the Commissioner or as in this case informed, through a report, the decision-making of then Parliamentary Secretary. Of course in many instances it will be necessary for the Panel Member to look at criticisms or comments of an applicant about the way the Commissioner went about making the calculations or reaching subsidiary conclusions in order the form a view about whether, in a case such as present, the report under s.269TEA on

[9] ADRP Report No. 24 Power Transformers exported from the Republic of Indonesia, Taiwan, the Kingdom of Thailand and the Socialist Republic of Vietnam, 30 September 2015.

which the operative decision (to decide to publish a dumping duty notice) was wholly or substantially based, infected the ultimate decision such as to justify a recommendation that it be revoked, however the Reviewable Decision is the operative decision and it is the correctness of that decision only which is to be assessed by the Panel.

…

[14] It seems to me that having regard to the fact that the Panel will ordinarily have to undertake a review in a comparatively short time frame against a background where the Commissioner will have ordinarily undertaken an extensive process of investigation and reporting, and also having regard to the fact that the Panel can require the Commissioner to reinvestigate, the Panel's role in a review does not entail full reinvestigation of matters considered by the Commissioner and raised by interested parties in the application for review. The investigation by the Commissioner will often entail the evaluation by the Commissioner of material gathered in the investigation both from overseas and domestically. That evaluation may involve subsidiary conclusions or decisions involving assessment and judgement. I do not see the Panel's role as involving this type of evaluation afresh. Rather the Panel's role includes, by way of illustration, assessing whether there has been inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Act or relevant regulations.

24. The ultimate issue is, therefore, whether the decision of the Commissioner to terminate the investigation was the correct and preferable decision. None of the decisions identified in the applicants' grounds are what Senior Member Moore described as the "operative decision". The operative decision is the decision to terminate the investigation. That decision, not the steps leading up to that decision, is the subject of this review. The grounds should be read as identifying reasons why the Reviewable Decision was wrong.

25. Paragraph 11 of the application of the approved form of application is intended to identify what the applicants contend to be the correct and preferable decision. Instead, paragraph 11 identifies how the Commissioner ought to have dealt with the matters referred to in the grounds in paragraph 10, rather than dealing with the Reviewable Decision. I have read paragraph 11 of the review application as contending that the correct and preferable decision was for the Commissioner to not terminate the investigation but to proceed with the investigation to completion. I have found paragraph 11 of the review application helpful in understanding the applicants' position on the various grounds identified in paragraph 10.

26. Accordingly, the applicants may be taken to be contending that Reviewable Decision was not the correct or preferable decision and that the Commissioner should have continued the investigation, rather than terminating it, because:
    a. the Commissioner made several errors in determining the dumping margin, the result of which was that the dumping margin ascertained by him was too low (grounds 10.1 to 10.7);
    b. the Commissioner wrongly concluded that the dumping of goods by the Korean exporters had not materially affected the Australian Industry's economic performance (ground 10.8); and
    c. price was ultimately the determinative factor in the decision by OEMs to purchase wind towers from Korea rather than the Australian Industry. The Commissioner was wrong to conclude that "non-price" factors were determinative (ground 10.9).

27. I will deal with these matters in turn.

## Grounds 10.1 to 10.7: Dumping margin

### Introduction

28. The first broad contention advanced by the applicants is that the Commissioner got the dumping margin calculation wrong. The applicants say he made several errors.

29. The dumping margin depends on the difference between the normal value of the goods and the export price. It is convenient to deal with the specific grounds in the following order: 10.2 and 10.4 together, then 10.3, 10.1, 10.6, 10.7 (all of which deal with the normal value) and finally 10.5 (which deals with the export price).

### Grounds 10.2 and 10.4: Profit

30. Grounds 10.2 and 10.4 are set out at paragraph 22 above.

31. Paragraph 11.2 says, in respect of ground 10.2, that domestic sales by CS Wind Vietnam should have been treated as part of the domestic sales of CS Wind Korea's sales in the domestic market, examined to see whether the costs reflected a fully absorbed cost to make and sell and tested for ordinary course of trade.

32. Paragraph 11.4 contends, in respect of paragraph 10.4, that the Commissioner should have had regard to information about global sales in the Annual Reports of CS Wind Corporation, which would have lead the Commissioner to determine a profit of 13.5%.[10]

[10] Review application at 14, EPR032 at pp 21 – 24.

*Background*

33. It will be recalled that each of CS Wind Korea, CS Wind Vietnam and PNC was involved in the overall process of the supply of wind towers from Korea. CS Wind Vietnam and PNC are both subsidiaries of CS Wind Korea.[11] The Commissioner described the roles of the various entities in TER 405: [12]

    1. CS Wind Korea, the marketer and beneficial owner of the goods (from raw materials to finished goods), until such time as ownership is transferred to the buyer of the wind towers.
    2. CS Wind Vietnam, which assembles/manufactures the wind towers on an arm's length toll processing basis on behalf of CS Wind Korea.
    3. PNC Global Korea, a related company which sources, coordinates and supplies certain wind tower internals on an arm's length transaction basis to CS Wind Korea.

34. There was no dispute about the roles of the entities, although the applicants disputed that the transactions between the entities were on an arms' length basis.

35. The normal value of the goods exported to Australia is usually the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export, in this case Vietnam.[13] Wind towers were sold for home consumption in Vietnam. The Commissioner took the approach that it was not feasible to determine a normal value for the goods[14] because wind towers had to be constructed in accordance with requirements specific to projects. He

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[11] EPR006, CS Wind Korea, Exporter Response, at p3 and 7.

[12] At p28.

[13] Section 269TAC(1).

[14] TER 405 at p 32.

considered that there were so many variables and differences between specifications that it would not be feasible to adjust domestic prices to make them comparable with export prices.[15]

36. Accordingly, the Commissioner constructed the normal value under s 269TAC(2)(c). Section 269TAC(2)(c) provides that the normal value is the sum of such amounts as the Minister determines to be:
    a. the cost of production or manufacture of the goods in the country of export;
    b. the administrative, selling and general costs that would be incurred selling the goods on the domestic market; and
    c. an amount for profit on the assumption that the exported goods were sold on the domestic market.[16][17]

    The amounts referred to paragraphs (b) and (c) must be determined on the counterfactual basis that the exported goods had been sold for consumption on the domestic market of the country of export.[18]

37. As the normal value was to be constructed under s 269TAC(2)(c), rather than determined under s 269TAC(1), the Commissioner was obliged to work out the profit component under Reg 45 of the *Customs (International Obligations) Regulations 2015*.[19]

38. Regulations 45(2) and (3) provide:

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[15] TER 405 at p 32.

[16] Section 269TAC(2)(c).

[17] The Act and Regulations frequently refer to the "Minister". For purposes of the exercise of the Commissioner's power to terminate an investigation under s 269TDA(13), those provisions apply mutatis mutandis to the Commissioner and he must determine normal value and export price in accordance with them.

[18] Section 269TAC(2)(c)(ii).

[19] References to Regulations in this Report are references to provisions in the *Customs (International Obligations) Regulations 2015*.

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

(3) If the Minister is unable to work out the amount by using the data mentioned in subsection (2), the Minister must work out the amount by:

(a) identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export; or

(b) identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or

(c) using any other reasonable method and having regard to all relevant information.

39. In this case, the Commissioner found that, although CV Korea made sales in Vietnam, those sales were not in the ordinary course of trade.[20] Consequently, Reg 45(2) was not available.

40. Of the three alternative methods for working out profits under Reg 45(3), the Commissioner rejected both Reg 45(3)(a) and 45(3)(b). The Commissioner found that "there was no information available relating to the actual amounts realised by CS Wind Korea from the same general category of goods in the domestic market in Vietnam"[21] so Reg 45(3)(a) was not available The Commissioner rejected Reg 45(3)(b) as well. The Commissioner considered that it was only possible to apply Reg 43(3)(b) where there were two other producers or manufacturers of like goods in the domestic market. This requirement follows from the reference to "weighted average" in Reg 45(3)(b): it

[20] TER 405 at p 39.

[21] TER 405 at p 39.

takes more than one other producer or manufacturer (excluding the exporter of the goods) to arrive at a weighted average.[22]

41. Since neither Reg 45(3)(a) nor (b) was available, the Commissioner worked out the profit under Reg 45(3)(c). Reg 45(3)(c) requires the Minister to work out the profit "using any other reasonable method and having regard to all relevant information".

42. The information to which the Commissioner had regard was information about the profit on sales in Vietnam of goods by both CS Wind Vietnam and CS Wind Korea in the same general category of goods. The method adopted by the Commissioner was to ascertain the weighted average of profit earned on those sales. The Commissioner arrived at a profit of [redacted]. The profit of CS Wind Korea on sales of like goods in Vietnam was [redacted].

43. Reg 45(4) limits the amount of profit which can be determined by the Minister under Reg 45(3)(c). The profit determined under Reg 45(3)(c) cannot be more than the profit earned by other exporters or producers on sales of goods of the same general category. The amount worked out under Reg 45(3)(c) (i.e. the weighted average of the profits of sales by both CS Wind Vietnam and CS Wind Korea) was less than the amount realised by CS Wind Vietnam. Accordingly, the Reg 45(4) cap had no impact. This left the weighted average profit of the sales by both CS Wind Korea and CS Wind Vietnam as the profit under Reg 45(3)(c).

[22] This interpretation is consistent with the interpretation of the WTO Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (WT/DS141/AB/R (1 March 2011) at [75].

*Discussion*

44. The applicants contended that the Commissioner was wrong to treat CS Wind Vietnam as an "other producer".

45. The context in which this error was made was not clearly identified in the review application. There are two contexts in which identifying CS Wind Vietnam as an "other producer" might have an impact. The first is in Reg 45(3)(b), but the applicants cannot be referring to Reg 45(3)(b) because the Commissioner held that it was not applicable. The other context in which CS Wind Vietnam's role as a "other producer" is relevant is Reg 45(4). In Reg 45(4), the profits made by "other producers" caps the amount of profits which can be worked out under Reg 45(3)(c). I think that this is where the applicants see the problem. The applicants' argument appears to be that:
    a. sales of wind towers in Vietnam by CS Wind Vietnam should have been treated as sales by CS Wind Korea;
    b. the profit should have been worked out having regard to information derived by the applicants from the annual reports of the CS Group provided by the applicants. The applicants contended in the review application that an analysis of those reports indicated that the appropriate profit was 13.5%; and
    c. the domestic profit of CS Wind Vietnam should not have been used to cap the profit worked out under Reg 45.

46. This argument should be rejected.

47. The Commissioner was entitled to have regard to information about sales by CS Wind Vietnam and to treat CS Wind Vietnam as an "other producer" of goods in the same general category as the goods. The Commissioner was provided with evidence that CS Wind Vietnam had sold such goods in the domestic

Vietnamese market to an independent third party.[23] The fact that there were dealings between CS Wind Korea and CS Wind Vietnam does not mean that sales by CS Wind Vietnam to an independent third party were in fact sales by CS Wind Korea.

48. The information contained in the annual reports of the CS Wind Group is profit on all transactions of the CS Wind group, including profits on export sales and transactions which do not directly involve the sale of wind towers. Reg 45 is concerned to identify profit on domestic sales, in this case, domestic sales in Vietnam. The information in the annual reports is, therefore, at best, only indirectly relevant to determining the profit under Reg 45. The Commissioner had information about specific relevant domestic sales. He was entitled, and required, to have regard to that information in calculating profit under Reg 45. He was not obliged to prefer inferences drawn from the group accounts to the more direct information about profits available to him.

49. As indicated above, reliance upon the domestic sales of CS Wind Vietnam did not, by virtue of Reg 45(4), have the effect of reducing the profit component below what it would have been had the Commissioner considered only the domestic sales of CS Wind Korea. In SEF 405, the Commissioner worked out that the profit on domestic sales was zero. After consideration of the sales of CS Wind Vietnam, profit under Reg 45 moved into positive territory.

50. Paragraph 11.2 asserts that the Commissioner "should have been examined … to see whether the costs reflected a fully absorbed cost to make and sell and tested for ordinary course of trade". I understand this to be a reference to the following passage in TER405:

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[23] Attachment D1 to the Exporter Questionnaire Response (EPR006), and EPR023 (Verification Report) at p12.

> For the purposes of calculating the dumping margin, the verification visit team treated prices paid by CS Wind Korea under the tolling arrangements as arms length transactions. These tolling arrangements have, embedded within them, amounts of profit applied by CS Wind Vietnam or PNC Global Korea. As such, CS Wind Vietnam, CS Wind Korea and PNC Global have been consistently treated as separate entities. Furthermore, and as noted in SEF 405, the Commission verified that during the investigation period, CS Wind Vietnam both provided a tolling manufacturing service, for the goods under consideration exported by CS Wind Korea, and produced and sold wind towers in its own right for the Vietnamese market.[24]

51. The Commissioner's examination of the costs of manufacture is really a matter going to the "costs to make" component of the constructed normal value. However, the reference to "embedded profit" is relevant to the calculation of the profit. It might be thought that profits earned by CS Wind Vietnam and PNC should form a component of the profit calculated under Reg 45. However, I understand the Commissioner to be saying that the members of the CS Wind Group have been treated consistently: the arrangements between CS Wind Korea and CS Wind Vietnam and PNC have been treated as an arms length transaction for the purposes of working out the costs to make component of the normal value and the profit component of the normal value. This has the consequence that the profit component of the toll arrangement and the supply of goods by PNC formed part of the cost component of the normal value, rather than the "profit" component of the normal value. Consequently, "internal" or "embedded" profit had been factored into the normal value. This is an appropriate approach.

52. I also note that the Commission did examine in some detail the costs to CS Wind Vietnam associated with the services performed by CS Wind Vietnam and

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[24] TER405 at p 41. Sales by CS Vietnam in the Vietnamese market were not manufactured under the tolling arrangement with CS Korea.

the goods provided by PNC. The verification process involved comparing the amount internally invoiced for the intra-group transactions with the costs incurred by CS Wind Vietnam. The Commissioner also considered in some detail how CS Wind Vietnam's costs were allocated between particular projects. Adjustments to costs considered necessary were made by the Commissioner.[25]

## Ground 10.3: arms' length transactions

53. Ground 10.3 asserts that the Commissioner ought not to have treated transactions between members of the CS Group as arms length transactions. The applicants contend at paragraph 11.3 of the review application that the Commissioner:
    a. should have properly tested the prices of intra-group transactions; and
    b. where there were no sales to external parties, the consolidated results of the group should be examined in reference to the profit achieved at a consolidated level.

54. The applicants referred to the definition of "arms length transactions" in s 269TAA(b) which provides:

> (1) For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:
>
> …
>
> (b) the price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller;

55. The applicants also referred to section 269TAA(4), which sets out the circumstances in which 2 persons are deemed to be associates. It is clear that members of the CS Wind Group were associates within this definition.

56. Section 269TAA affects the determination of the normal value under s 269TAC(1). Section 269TAC(1) which provides that the normal value will be

[25] TER 405 at p 37.

determined by reference to sales in the ordinary course of trade in the domestic market. Under s 269TAAD sales that are not arms length transactions are not in the "ordinary course of trade". Hence, they are excluded from the determination of the normal value.

57. However, in the present case, the normal value was not determined under s 269TAC(1), but under s 269TAC(2)(c). Regulation 43 is applicable in these circumstances. It requires the Commissioner to proceed on the basis of the records of the exporter provided that the exporter's records are in accordance with generally accepted accounting principles and "reasonably reflect competitive market costs".

58. Regulation 43 does not use the expression "arms length transactions" and does not require that the transactions recorded in the exporter or producer's records to be arms length transactions. The applicants' focus on the whether the transactions between members of the CS Group were arms length transactions is understandable, given the Commissioner's description of the relationship between the parties, quoted at paragraphs [ 33] and [50]. However, that it not the issue which arises in the present context.

59. It should also be noted that the scope of Reg 43 is broader than s 269TAA. It applies to all costs. Section 269TAA deals only with the purchase and sale of goods. Regulation 43(2) applies to all costs, including the provision of services. CS Wind Vietnam provides a toll manufacturing service to CS Wind Korea, which does not fall within s 269TAA.

60. In the present case, it appears that the accounts of CS Wind Vietnam and CS Wind Korea were prepared in accordance with generally accepted accounting principles of Vietnam and Korea respectively.[26] The Commissioner examined records relating to each of CS Wind Vietnam, CS Wind Vietnam and PNC (including records as to their costs). It used those records to ascertain the costs

[26] EPR006, at 8.

of the materials purchased by CS Wind Korea, the services provided by CS Wind Vietnam to CS Wind Korea and the internals provided by PNC. That examination revealed that there was internal invoicing between CS Wind Vietnam, CS Wind Korea and PBC. On one occasion the internal pricing was less than the cost of manufacture. However, in calculating the CTM, the Commissioner did not rely on the internal invoicing in the instance were invoicing was less than the actual costs shown by the records of CS Wind Korea and CS Wind Vietnam.[27] The transactions involving CS Wind Korea, CS Wind Vietnam and PNC showed that generally CS Wind Vietnam and PNC earned profit from the internal transactions. If CS Wind Korea had engaged third parties to perform the services and supply the internals provided by CS Wind Vietnam and PNC, one would expect to find a profit component, so it is not-inappropriate for CS Wind Korea's costs to include profit on these internal transactions. The "internal" profit was not nominal, so it does not appear that the structure was used to minimize costs and hence artificially reduce the normal value and does not appear excessive or unreasonable. If the internal profit was above market rates, then the profit component would have artificially increased the costs, and hence the normal value. This is not an outcome which operates, in the present circumstances, to the disadvantage of the applicants.

61. Part of ascertaining the costs to make under Reg 43 involved attributing general overheads to particular projects. The Commissioner considered the appropriateness of the allocation of CS Wind Vietnam's costs in some depth. These matters are discussed at section 5.5.3 of TER405. I am not persuaded that there was any error by the Commissioner.

## Ground 10.1: Lifting the corporate veil

62. The applicants said that the Commissioner ought to have "pierced the corporate veil" and treated CS Wind Korea, CS Wind Vietnam and PNC Global as a single entity. The applicants did not articulate in paragraphs 10.1 or 11.1 what effect

[27] EPR023, at 4.1.1.

treating the members of the CS Wind Group as a single entity would have. It appears that the objective of this ground was to support the proposition that the group profits should have been to calculate the normal value.

63. The review application referred to findings by the United States Department of Commerce in anti-dumping investigations conducted by it involving wind towers exported to the United States by the CW Wind group of companies. It appears that the United States Department of Commerce applied s 771(33) of the US anti-dumping legislation and determined that the CS Wind Group of companies should be treated as a single entity.[28]

64. In the review application, the applicants said:

> Pertinent points from the USA findings are:
>
> …
>
> - significant potential for manipulation of production and sales decisions exists between CS Wind Corporation and CS Wind Vietnam because CS Wind Corporation effectively controls and indirectly manages CS Wind's operations with subject merchandise.

65. I infer that the applicants were also concerned about the potential for members of the CS Group to manipulate the cost to make and the profit.

66. I do not consider that this is an occasion where it is appropriate to disregard the separate legal identify of the various members of the CS Group of companies.

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[28] TER 405 noted, at p 41, footnote 61, that the final determination in respect of CS Wind and CS Wind Vietnam was revised downwards from 17.07% to 0% because of a court decision. The applicants did not indicate whether the passages relied upon by them and the approach of the Department to the separate identity of the group members were affected by that decision.

67. The question of the separate legal identify of the companies within a group was discussed by the Panel in ADRP Report 34.[29] Acting Senior Member Fitzhenry said:

> [62] It is well established in Australian law that the separate legal personality of companies in a corporate group has to be recognised.19 There exists legislation which in certain circumstances allows for the grouping of companies and some of these instances are listed by Nervacero in its submission. However, absent such legislative provision it is only in very rare circumstances that the "corporate veil" can be lifted and the corporate structure ignored.
>
> [63] Of course, related companies in a corporate group can be found to be acting as agents for each other or for the parent company. This may mean that in effect the parent or another company in the group is acting as the exporter for the corporate group. There would however need to be something more than the indirect legal and commercial capacity of the parent company to control and direct the subsidiaries to support a finding that the parent, rather than the subsidiary, is the exporter and the subsidiary was engaging in all of its commercial activities on behalf of, and therefore as agent for, the parent.

68. It is not apparent that the circumstances of this case go so far beyond the control exercised by parent companies within a group of subsidiaries that it is appropriate that CS Wind Vietnam, CS Wind Korea and PNC be treated as a single entity.

69. The applicants referred to *Australian Competition and Consumer Commission v Yazaki Corporation*.[30] They emphasized the role that CS Wind Korea played in

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[29] ADRP Report no. 34 – Steel reinforcing bar exported from Korea, Singapore, Spain and Taiwan.

[30] [2015] FCA 1304; (2015) 332 ALR 396.

setting global prices and compared it to the role of the Japanese parent company in in *Yazaki*. The question which arose for determination in *Yazaki*, was whether the Japanese parent of an Australian trading company had itself entered into an anti-competitive agreement in Australia. Yazaki suggested that it did not trade in Australia and had not entered into the anticompetitive arrangement because it was the Australian subsidiary which carried on business in Australia. In that case, the control exercised by Yazaki over the Australian business was relevant to whether it did trade in Australia and whether it did enter into the anti-competitive arrangement. The Court found that Yazaki had entered into the agreement, notwithstanding the existence and operations of the Australian subsidiary. In the present case, one would expect that CS Wind Korea would set global prices and arrange sales, as the parent and entity in the group responsible for sales and marketing. These activities are not activities assigned to CS Vietnam within the CS Wind Group. The marketing and sales activities of CS Wind Korea do not suggest that its control over the operations of CS Wind Vietnam and PNC went beyond the permissible "indirect legal and commercial capacity of the parent company to control and direct the subsidiaries".

70. Further, the legislature has not gone down the path of "lifting the corporate veil" in dealing with issues arising out of operations of group companies in this context. Instead the Act excludes certain transactions which are not arms length transactions, when normal value is determined under s 269TAC(1). When normal value is determined under s 269TAC(2)(c), Regs 43, 44 and 45 provide a statutory regime for constructing the normal value and identifying the information to which regard may be had. The Minister may disregard information which is not reliable under Regs 43(8), 44(9) and 45(5).[31] This would include information which was not reliable because of the exporter's corporate structure.

[31] The Minister has a general power to disregard unreliable information in the calculation of the normal value under s 269TAC(7) and, where information provided has not been furnished or is not available, to determine the normal value having regard to all relevant information.

71. In the present case, it can be seen from the discussion above of the process by which the Commissioner arrived at the normal value that the application of Regs 43 and 45 effectively by passed the separate identity of the entities of the CS Group. The records of CS Wind Korea, CS Wind Vietnam and PNC and the costs and profits of those entities were considered during the investigation and formed the basis of the determination of the normal value.

## Ground 10.6: SGA

72. The applicants contended that the decision of the Commissioner to exclude relevant administrative selling and general costs (SG&A) from the determination of the normal value was wrong. The SGA costs which the applicants contended were relevant were expenses incurred by CS Wind Korea/CS Wind Vietnam during the 2015 calendar year.

73. The process of determining the SGA expenses under Reg 45(2) and (3) follows the same process as determining the CTM under Reg 43(2) and (3). In the present case, the matters which prevented the Commissioner identifying costs under Reg 45(3)(a) or (b) were applicable to the working out of the administrative, selling and general expenses. The Commissioner was identifying SGA costs under Reg 45(3)(c) and could have regard to all relevant information available to him.

74. The relevant domestic sales took place during 2016. The Commissioner was satisfied that the work which was associated with the domestic sales and which formed the basis of the SGA component, occurred during 2016.[32] There were difficulties with allocating costs from 2015 to 2016.[33] There is no reason to think

[32] TER 405 at pp 36 and 37.

[33] EPR23, Visit Report – Exporter at p9.

that the SGA expenses were different in the two years. It was appropriate for the Commissioner to use the 2016 costs.[34]

## Ground 10.7: Electricity costs

75. The Australian industry noted that in an investigation into the Alleged Dumping of Steel Rod in Coils exported to Australia from the Republic of Indonesia, the Republic of Korea and the Socialist Republic of Vietnam, the Commissioner published a Statement of Expected Facts,[35] in which the Commission stated that the price of electricity in Vietnam was subject to such a degree of government control that it does not reflect a competitive market cost. The Australian industry indicated that the component of the CTM associated with electricity costs should be uplifted so that it did reflect competitive market costs.

76. The Commission declined to do so on the basis that:
    a. determining a competitive market rate for the supply of electricity in Vietnam would require substantial resources; and
    b. electricity was only a small component of the CTM, so that an adjustment to market rates would have marginal impact on the dumping margin.

77. In the review application, the applicants effectively repeated the contentions they made during the course of the investigation. They contended that the Commissioner did not have a discretion to decline to apply competitive market costs.

78. I consider that the approach of the Commission is a reasonable one. The cost of electricity compared to the overall cost of the goods was trivial – less [redacted]

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[34] The situation is relevantly different from that considered by the Federal Court in *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20. In that case, the Court held that costs incurred in 2015 in respect of sales in 2016 should have been in determining the profit under Reg 45(3)(a), rather than the 2016 costs. In this case, the Commissioner was not determining administrative, selling and general costs under Reg 44(3)(a).

[35] SEF 416. The investigation was subsequently terminated.

[redacted]. The Commission is not required to embark an extensive and time-consuming inquiry into a minor expense. Further, under Reg 43, the Commissioner is required to consider whether the records "reasonably reflect market costs". The Commissioner is entitled to conclude that costs reasonably reflect market costs where the actual amounts incurred do not differ by a substantial amount from "market costs".

79. In any event, the task of this Review is to ascertain whether the Reviewable Decision is the correct and preferable decision. Even if the approach of the Commissioner on this particular issue was wrong, the amount involved was so small that it would not have lead me to conclude that the Reviewable Decision was wrong.

## Ground 10.5: Flange bolts

80. The final matter raised by the applicants was that the Commissioner's determination of the export price was flawed because he did not properly take into account sales of items that were associated with the goods but did not fall within the definition of the goods under inquiry. The applicants referred in particular to flange bolts but also referred to [redacted]. The applicants argue that:
    a. these items were, or may have been, provided by KS Korea at less than cost, so that the suppliers effectively conferred a benefit on the purchaser of the towers; and
    b. this should be investigated and taken into account in determining the export price.

81. TER405[36] shows that the Commissioner did consider the costing of the flange bolts and found that the transaction involving the flange bolts did not have the effect of providing indirect consideration. Even if the approach of the

[36] At p32.

Commissioner on this matter was wrong, the amount involved would not have had a material effect or lead to the conclusion that the Reviewable Decision was wrong.

82. There no evidence to suggest that there was a problem the [redacted] or any other ancilliary goods or services.

83. I reject this ground.

### Summary: dumping margin

84. For the reasons I have given, I do not accept any of the grounds advanced by the applicants in respect of the Commissioner's calculation of the dumping margin. I am satisfied that it was correct.

## Ground 10.8: Material injury

85. Ground 10.8 said:

> 10.8 The Commissioner's decision that the size of the dumping margin had not materially impacted the Australian industry's economic performance is not the correct or preferable decision.

86. The review application focused on the Commission's treatment on 4 tenders which were let during the investigation period. Although there were other projects let during the investigation period the successful tenderers did not source towers from Vietnam.

87. The table below shows details of the tenders let by the identified OEMs during the investigation period that involved towers from Vietnam:

| Project | Year | OEM | Total Towers | Australian Industry | CS Wind |
|---|---|---|---|---|---|
| Ararat | 2015 | GE | 75 | 35 | 40 |
| Hornsdale Stage 1 | 2015 | Siemens | 32 | 0 | 32 |
| Hornsdale Stage 2 | 2016 | Siemens | 32 | 0 | 32 |

88. There was, in addition, a tender for 75 embeds as part of the Ararat project in 2015. The Australian industry's tendered price was below that of CS Korea. However, the Australian industry was not successful on that tender. The Commission concluded that this result was not influenced by any dumping by CS Wind Korea. This aspect of the Commissioner's reasoning was not challenged in the review application.

89. The 40 towers on the Ararat project and the 64 towers on the Hornsdale project were the sales during the investigation period which were central to the question whether the Australian industry suffered material injury.

90. The applicants made two arguments in relation to this ground.[37]

91. The first argument was that, when properly calculated, the dumping margin was much greater than calculated by the Commissioner, and so would have reduced the level of undercutting to the point that the Australian goods were competitive

[37] In the section of the review application dealing with the ground (pp 19 22), the applicants also raised issues about the Australian industry's capacity to meet the OEMs' supply requirements. This really relates to ground 10.9, and has been dealt with in that context.

with the Vietnamese goods. I have concluded that the dumping was correct, so I do not accept this argument.

92. The second aspect of this ground related to the preparedness of OEMs to use Australian manufacturers of wind towers. The Australian industry contended that:

[redacted]

[redacted]The use of local manufacturers was a factor considered by OEMs in making their buying decisions. GE indicated that it had involved Australian industry on the Ararat project to provide community benefits, increase support for wind farm development and [redacted].[38] There is no reason to think that Siemens took the view that local manufacturing offered no such advantages. [redacted]

[38] EPR 005, GE Submissions dated 24 July 2017, page 6

94. In any event, the force of the applicants' argument is substantially undermined by my conclusion that the Commissioner's calculation of the dumping margin was not flawed. I accept that the dumping margin was 4.8% rather than the 15 – 16% plus dumping margin advanced by the applicants. In TER 405, the Commissioner carried out an undercutting analysis of the tenders of the Australian industry compared to the tenders of CS Wind Korea. It concluded that the level of undercutting was as follows:

| **Project** | **"Raw" level of undercutting** | **Level of undercutting after adjustment for dumping** |
|---|---|---|
| Ararat | [redacted] | [redacted] |
| Hornsdale I | [redacted] | [redacted] |
| Hornsdale II | [redacted] | [redacted] |

[redacted]

## Ground 10.9: Non-price factors

95. Ground 10.9 of the review application is:

> 10.9 The Commissioner's decision that non-price factors were determinative in the decisions to award projects to CS Wind Korea during the investigation period is not the correct decision or preferable decision.

96. The applicants contended strongly that price was the determinative factor in the decision of OEMs about the number of wind towers awarded to producers. It disagreed strongly with the proposition that non-price factors were determinative in the decisions made by Siemens and GE. The applicants argued:

a. the non-price factors identified by GE and Siemens and relied on by the Commission did not play a significant part in the award of tenders; and
b. there was no substance to the non-price factors identified as reasons for the decision to award tenders and the number of towers awarded.

97. The first point to be made is that, assuming that price was the determinative factor, there is no reason to think that the Australian industry would have been successful in obtaining more sales. This conclusion follows from the discussion about the undercutting margin in the previous section.

[redacted]Further, it is clear that decisions to award tenders and about how many towers would be awarded were not made solely by choosing the lowest bid. Price was not the determinative factor in this sense, even on the applicants' version of events. [redacted]

99. GE and Siemens identified non-price factors which they contended were determinative in their buying decisions. The Australian industry contended that these matters were not determinative. The Australian industry contended that:

a. price was the predominant factor in their negotiations with the OEM. [redacted];
b. issues about quality and delay had been resolved;
c. they were experienced manufacturers and there were no difficulties about becoming qualified tenderers;
d. they had the capacity to meet the delivery requirements of the projects; and
e. reservations about the financial stability of Ottoway were unfounded.

[39] See EPR010.

100. In the review application, the applicants provided a copy of their confidential attachment to their response to SEF405[40] which contains a substantial amount of material relating to these matters. I have had regard to it.

101. The applicants referred to the remarks of Jacobson J in *Schaefer Waster Technology Sdn Bhd v Chief Executive Officer, Australian Customs Service and Others*[41] to the effect that the CEO was not obliged to accept the statements made by end users with an interest in keeping prices as low as possible. While I accept that it may be appropriate to analyse critically positions taken by the OEMs, the Commissioner is not precluded from accepting them. I note that, although the OEMs are the purchasers of the wind towers for the purposes of the Act, and no doubt had an interest in the price to them of wind towers, the Australian industry also had a commercial interest in the outcome of the investigation.

102. There was documentary material which supported the proposition that non-price factors relating to the Australian industry, including performance, reliability and capacity, were relevant to the buying decisions made by the OEMs.[42] [redacted]

103. I consider it likely that "non-price" factors worked against the Australian industry. The applicants were smaller and had less experience and capacity that CS Wind Korea, which sells wind towers globally. KS Wind Korea had established global relationships with GE and Siemens. CS Wind Korea was regarded by the them as a highly competent, experienced and reliable supplier. Further, it is likely that

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[40] EPR032.

[41] [2006] FCA 1644; (2006) 156 FCR 94 at [228].

[42] TER 405, Confidential appendices 10 and 12.

the performance issues experienced by GE/Siemens involving the Australian Industry played some part in the decision-making process. I think those matters would have been seen as risk factors, even if the issues had ostensibly been resolved. The non-price factors would have added to the price disadvantage of the Australian industry.

104. However, it is not necessary that these "non-price" factors be "determinative" in the sense of being the sole reason that the Australian industry was not more successful. It is necessary for the dumped goods to have been the cause of material injury. Taking into account the combination of the Australian industry's pricing, and other "non-price" factors, it appears that the extent of dumping did not play a causal role in the buying decisions of GE and Siemens. It was open to the Commissioner to conclude that the dumped goods did not cause material injury to the Australian industry and to terminate the investigation on that basis.

## Conclusion

105. For the reasons given above:
    a. I consider that the Commissioner was correct to conclude that the dumped goods did not cause material injury;
    b. I consider that the Reviewable Decision was the correct and preferable decision; and
    c. I affirm the Reviewable Decision.

……..

Scott Ellis
Panel Member
Anti-Dumping Review Panel
14 May 2018