



**Australian Government**

**Anti-Dumping Review Panel**

# **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

## Table of Contents

ADRP REPORT No. 24.....	0
PART 1 – INTRODUCTION AND DECISION .....	2
PART 2 – REVIEW OF THE DECISION TO PUBLISH A DUMPING DUTY NOTICE .....	5
PART 3 – CONCLUSION .....	27

# PART 1 – INTRODUCTION AND DECISION

## Background

1. Power Transformers are presently manufactured in Australia by Wilson Transformer Company Pty Ltd (WTC), Ampcontrol Pty Ltd (Ampcontrol) and Tyree Transformer Co Ltd (Tyree). On 8 July 2013 WTC applied for the publication of a dumping duty notice under s 269TB of the *Customs Act 1901* (the Act) in relation to Power Transformers exported to Australia from the People's Republic of China, the Republic of Indonesia (Indonesia), the Republic of Korea (Korea), Taiwan, Thailand and the Socialist Republic of Vietnam (Vietnam). The application argued that low-priced and dumped Power Transformers caused material injury to the Australian industry.
2. An investigation was initiated by the Anti-Dumping Commissioner (the Commissioner) of the Anti-Dumping Commission (the ADC). The investigation period was from July 2010 to June 2013 for the purposes of assessing dumping. On 2 December 2014 the Commissioner published the Anti-Dumping Commission Report No. 219 (ADC Report 219) recommending to the Parliamentary Secretary to the Minister for Industry (the Parliamentary Secretary) that a dumping duty notice be published in respect of Power Transformers exported to Australia from Indonesia, Taiwan, Thailand and Vietnam. The ADC Report 219 itself refers, at various points, both to the views or assessments of the Commissioner (as contemplated by s.269TEA) and also those of the ADC. In this Report, it is convenient simply to refer to any views or assessments as those of the Commissioner.
3. The Parliamentary Secretary accepted the recommendations in the ADC Report 219 and decided to impose dumping duties on Power Transformers exported to Australia from Indonesia, Taiwan, Thailand and Vietnam (the Reviewable Decision). On 10 December 2014 a dumping duty notice was published under s.269TG(1) and (2) of the Act.
4. On 5 January 2015, an application for review of the Reviewable Decision by the Anti-Dumping Review Panel (The Panel) was lodged on behalf an Indonesian company, PT CG Power Systems Indonesia (CG Power). On 8 January 2015 an application for review was lodged on behalf of a Taiwanese company, Fortune Electric Co Ltd (Fortune). On 9 January 2015 an application for review was lodged on behalf of another Taiwanese company, Shihlin Electric & Engineering Corporation (SEEC). Also on 9 January 2015 two further applications for review were lodged, one on behalf of a Thai company, ABB Ltd (of Thailand) (ABB Thailand) and the other on behalf of ABB Ltd (of Vietnam) (ABB Vietnam).
5. I determined, as the Senior Member of the Panel, that for the purposes of s.269ZYA the Panel was to be constituted by me. I also determined not to reject the applications.
6. Following public notification of my intention to review the Reviewable Decision, I received submissions from interested parties, namely ABB Vietnam, ABB Thailand, CG Power, Siemens Ltd and related entities (Siemens), Thailand and Vietnam.

Those submissions were made in accordance with s.269ZZJ. However I should note that the Panel has taken the approach that the grounds in the applications for review confine the issues which will be considered in the review: see ADC Report No 13 of 18 June 2014 concerning Rolled Plated Steel exported from the People's Republic of China at paragraph 16 - 24.

## Material taken into account and preliminary observations

7. In order to provide some context for this report, I repeat remarks recently made in an earlier report. The role of the Panel Member is, generally speaking, to review decisions of either the Commissioner or, under arrangements in place at the time of the Reviewable Decision was made, the Parliamentary Secretary. In this case, the Reviewable Decision is a decision of the Parliamentary Secretary to publish a dumping duty notice: see s.269ZZA(1)(a). In a review of this type, the Panel must determine whether the decision to publish was the correct or preferable one. If I conclude that it was, then I must report, under current arrangements, to the Assistant Minister for Science, (Assistant Minister) recommending that he or she affirm the decision, even if I consider that some of the criticisms of the process levelled by an applicant have merit but, notwithstanding, I am not satisfied the ultimate decision was not the correct or preferable decision. If I am satisfied it was not the correct or preferable decision, I must report to the Assistant Minister recommending that she or he revoke the decision and substitute a specified new decision.
8. The Panel's powers to revoke or recommend the revocation of a number of types of reviewable decisions only arise if the reviewable decision was either not the correct decision (when there has been a decision which does not involve the exercise of a discretion) or, alternatively, not the preferable decision (when there has been a decision involving the exercise of a discretion). It is tolerably clear this is the statutory test having regard to the obligation (at various points in Division 9 of Part XVB) on an applicant for review to identify in the application reasons for believing that the decision was not the correct or preferable decision and the power of the Panel to reject an application if this is not done.
9. A decision to publish a dumping duty notice may involve an element of discretion and if so, an issue may arise in a review about whether the decision was the preferable one. Notwithstanding, the correctness of the decision may arise in a review when, as one example, the decision was based on a conclusion that there had been dumping at a calculated dumping margin when, in fact, the relevant goods have not been dumped or the margin was wrong. Similarly, as another example, a decision to publish a dumping duty notice would not be the correct decision if it was based on an erroneous conclusion that material injury had been caused by Australian Industry.
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 to form a view about whether, in a case such as the

present, the report under s.269TEA on 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.

11. The Act does not set out in a comprehensive way what the task of the Panel is in conducting a review. Nicholas J comparatively recently considered the role of the Trade Measures Review Officer (TMRO) under an earlier statutory scheme for the review of Anti-Dumping and other decisions under the Act: *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs of the Commonwealth of Australia* [2012] FCA 1192. His Honour noted at [32] there are authorities (indeed many) that the word "review" is not a precise term. What a review entails is to be ascertained by reference to the statutory framework creating the review process: see, as a recent example, *The Pilbara Infrastructure Pty v Australian Competition Tribunal Ltd* [2012] HCA 36.
12. The Act does contain provisions that identify what the Panel can or should do in a review in certain respects. The first point to be noted, in relation to the review of a Ministerial decision (and I will confine the following remarks to such a review) is that the review has been preceded by what is likely to have been an extensive process of investigation and reporting by the Commissioner under Part XVB which, as to a similar earlier statutory scheme, has been described as a "*detailed prescriptive regime*": *Pilkington (Australia) v Minister of State for Justice & Customs* [2002] FCAFC 423 at [123].
13. The Panel does not undertake its own investigation in the sense of gathering fresh information and is confined, as a broad generalisation, to the information that had been before the Commissioner: s.269ZZK(4) and (6). The Panel must, in the ordinary course, report to the Minister within 60 days of the public notification of the review (unless the time is extended by the Minister or reinvestigation has been requested under s.269ZZL). The practical effect of this time limit, having regard to the right of interested parties to make submissions within 30 days of the public notification, is that the Panel may well have only 30 days to undertake the review with the benefit of submissions. While the practice of interested parties cannot inform the proper construction of these provisions, the Panel's experience to date is that mostly submissions are in fact made on the thirtieth day after the public notification or shortly before. Presumably interested parties do this in order to avoid responsive (and probably critical) submissions by other interested parties.
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.

15. In accordance with s.269ZZK(4) of the Act, I have had regard in this review only to information which was relevant information as defined in s.269ZZ(6). I have considered the grounds and information set out in the application made by the applicant subject to the constraints in s.269ZZK(4) and (6).
16. Upon accepting the applications for review of the Parliamentary Secretary's decision, the ADC was asked to provide comments on the grounds raised in the applications for review. The response from the ADC was received on 16 February 2015 (the ADC comments). The response was made publicly available, except for the confidential attachments, well before the time for submissions expired under s.269ZZJ (2 March 2015). The Panel has relied upon the ADC comments to assist it to identify information which was not relevant information as defined by s.269ZZK and to the extent that the ADC has identified information to which it had regard in making its recommendation to the Parliamentary Secretary and which it considered responsive to the claims made by the applicants.

## Decision and recommendations

17. I recommend that the Minister revoke the reviewable decision insofar as the Parliamentary Secretary decided to publish a dumping duty notice in relation to Power Transformers exported by ABB Ltd Thailand and Power Transformers exported by ABB Ltd Vietnam and all other Vietnamese exporters. I recommend that the Minister substitute a specified decision, namely a decision to publish a dumping duty notice in the terms of the notice published on 10 December 2014 but without including in the notice the companies or entities referred to in the preceding sentence. In relation to the residue of the reviewable decision, I recommend that the Minister affirm the reviewable decision.

## PART 2 – REVIEW OF THE DECISION TO PUBLISH A DUMPING DUTY NOTICE

18. It is convenient to identify the issues raised in the applications in the following way. I have followed the structure and descriptions used in the ADC comments. No interested party who made submissions after the ADC comments were published suggested the ADC comments incorrectly identified the issues. Some of these descriptions are in a shorthand form which, I hope, become clearer when discussing each issue.
  - (a) Whether CG Power had been an uncooperative exporter.
  - (b) Whether CG Power's information should have been used.
  - (c) Whether the dumping margin calculated for CG Power was correct.
  - (d) Whether, as argued by Fortune, Power Transformers of a capacity greater than 100 MVA should have been used in calculating the amount of profit to be included in a constructed normal value established under s

- 269TAC(2)(c).
- (e) Whether domestic sales by Fortune of Power Transformers to Taiwan Power Company (TPC) should have been used in calculating the amount of profit to be included in the construct of normal value established under s 269TAC(2)(c).
  - (f) Whether the Commissioner erred when identifying the date for currency conversion for the purposes of s 269TAF(1).
  - (g) Whether domestic sales by SEEC to non-utility customers should have been used in determining the amount of profit of domestic sales.
  - (h) Whether, as argued by SEEC, the Commissioner should not have deducted a notional profit margin for Shihlin Electric Australia (SeA) when constructing export price.
  - (i) Whether, as argued by SEEC, interim dumping duties should not have applied to imports that had been exported pursuant to existing contracts for the supply of Power Transformers.
  - (j) Whether, as argued by ABB Vietnam, s 269TACB(2) should have been used for the purposes of determining whether dumping had occurred.
  - (k) Whether, as argued by ABB Vietnam, its export prices differed significantly amongst different purchasers.
  - (l) Whether, as argued by ABB Vietnam, the Commissioner incorrectly found inappropriateness extended over the whole period.
  - (m) Whether, as argued by ABB Vietnam, the Commissioner failed to apply the method claimed to be applied.
  - (n) Whether, as argued by ABB Vietnam, the Commissioner incorrectly determined "*normal value*" and "*export price*".
  - (o) Whether, as argued by ABB Thailand, s 269TACB(2) should have been used for the purposes of determining whether dumping had occurred.
  - (p) Whether, as argued by ABB Thailand, its export prices differed significantly amongst different purchasers.
  - (q) Whether, as argued by ABB Thailand, the Commissioner incorrectly found inappropriateness extended over the whole period.
  - (r) Whether, as argued by ABB Thailand, the Commissioner failed to apply the method claimed to be applied.
  - (s) Whether, as argued by ABB Thailand, the Commissioner incorrectly determined "*normal value*" and "*export price*".
  - (t) Whether the Commissioner erred in failing to terminate as against Thailand on the basis of negligible volumes.

I consider each of these issues in turn.

### Whether CG Power had been an uncooperative exporter.

19. In the STET Report the Commissioner concluded that CG was an uncooperative exporter. The expression "*uncooperative exporter*" is one defined, for present purposes, by s 269T(1) of the Act. The definition depends, in substantial part, on the opinion of the Commissioner. First, the Commissioner needed to be satisfied that the exporter did not give the Commissioner information of a particular character. Secondly the character of the information is, in turn, dependent on the Commissioner's opinion about whether the information to be given was considered by the Commissioner to be relevant to the investigation. Thirdly, whether the period in

which the information could have been given was reasonable, depends on whether the Commissioner considered it to be reasonable.

20. Its reasons in support of its application, CG Power noted provisions in the Anti-Dumping Agreement concerning the approach investigating authorities should take in relation to the provision of information and the rights of interested parties to defend their interests. It also noted that there are provisions in the Anti-Dumping and Subsidy Manual (the Manual) concerning the circumstances in which an interested party would not be considered uncooperative.
21. CG Power also recounted in its reasons its version of events. It provided information in the initial exporter questionnaire and responded, in a timely way using its best efforts, to further requests by the Commissioner to provide information and, in fact, provided significant amounts of information. It actively communicated with the ADC. CG Power detailed events in 2014 in which it actively sought to provide information and make concerns of the Commissioner. This account concluded with a submission that CG believed that the Commissioner's treatment of it as an *"uncooperative exporter"* was unwarranted, and contrary the provisions of the Anti-Dumping Agreement. It also argued that the Commissioner should have given CG Power the opportunity to meet to *"provide an explanation as any data that the Commission was unable to correlate, and should then have use that data to calculate a dumping margin for CG Power"*. Had this been done, it argued, negative dumping margin would have been calculated and no dumping measures imposed on its exports.
22. Two matters should be noted at the outset. At least implicit in CG Power's submission is a complaint that was not given an opportunity to put further material to the Commissioner or clarify what was required. This, in substance, is a contention that it was denied procedural fairness. I think, having regard to the conclusion of Mortimer J in *GM Holden Limited v Commissioner of the Anti-Dumping Commission* [2014] FCA 708, discussed by the Panel in ADRP Report 16, *Quenched and Tempered Steel Plate*, 17 March 2015, denial of procedural fairness simpliciter does not arise for consideration in a review. That said, the processes leading to the characterisation of an exporter as *"uncooperative"* may inform the question of whether the opinion held by the Commissioner was one reasonably open in the circumstances.
23. The second is that the provisions in Part XVB of the Act should be construed having regard to Australia's international obligations and regard can be had to the construction the international community would attribute to the relevant instrument or concept: *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406. Consonant with those international obligations, parties should have a full opportunity to make informed submissions to protect their interests, again a matter referred to in the ADRP Report 16, *Quenched and Tempered Steel Plate*, 17 March 2015.
24. In the ADC comments, the Commissioner noted that the response to the original exporter questionnaire was deficient which led to correspondence between the Commissioner and CG Power. This assessment, the substance of which appears not to have been challenged by CG Power, laid the foundation for CG Power satisfying the definition of *"uncooperative exporter"*. Also in the ADC comments, the Commissioner described events that followed which demonstrated the failure of GC



Power to provide information that was adequate and within a time frame that the Commissioner thought was reasonable.

25. I am satisfied that it was open to the Commissioner to reach the ultimate conclusion that CG Power was an uncooperative exporter.

#### Whether CG Power's information should have been used

26. This issue follows on from the issue just discussed, namely the status of CG Power as an uncooperative exporter. In ascertaining an export price in circumstances where sufficient information has not been furnished or was not available, the export price "*shall be such amount as is determined by the Minister having regard to all relevant information*": s 269TAB(3). An analogue of this provision is found in s 296TAC(6) in relation to the calculation of normal value. Both these provisions are subject to a qualification, namely that the Minister may disregard any information that he or she considers to be unreliable: s 269TAB(4) and s 269TAC(7).

27. CG Power argued that the information it did, in fact, provide was "*relevant information*" which should have been taken into account but was not. The expression "*relevant information*" is not a defined term. As far as I am aware, the expression has not been the subject of judicial interpretation. Probably the better view is that information provided by an uncooperative exporter would be relevant information even though the exporter, in order to have been characterised as uncooperative, would have failed to give the Commissioner information he or she considered relevant. It is of course quite possible for an exporter to give relevant information and fail to give other relevant information. However such information provided by an uncooperative exporter (indeed any interested party) runs the risk of being viewed as unreliable and disregarded. These observations referable to the provisions of the Act accord with the provisions of the Anti-Dumping Agreement (Annex 11.3 and 11.5).

28. In the present case, the Commissioner might be thought to have treated two separate questions as one. The first was whether CG Power had failed to give the Commissioner information the Commissioner considered was relevant. This question arises in the consideration of whether an exporter is an uncooperative exporter. The second was whether any of the information provided by CG Power was nonetheless relevant information and, if so, whether it could be disregarded as unreliable. An answer adverse to CG Power on the first question does not necessarily lead to an adverse answer in relation to the second.

29. However on a fair reading of the Report (including confidential attachment 2) and having regard to CG Power's account of events, what appears to have occurred is this. A determination was made that CG Power was an uncooperative exporter. Subsequently there was correspondence between the Commissioner and CG Power. Further information was provided by CG Power that the Commissioner reviewed. While the Commissioner did not do so in terms, this further information was viewed as unreliable. I am not satisfied this conclusion was not open.

#### Whether the dumping margin calculated for CG Power was correct.

30. CG Power argued that the dumping margin determined by the Commissioner was not correct and did so by reference to the fact that information provided by WTC was

relied on by the Commissioner in preference to information it provided about export price, normal value and ultimately the dumping margin. This occurred in circumstances where the Commissioner said repeatedly in the Report that the information provided by CG Power was not "*relevant*" information. At various points in the Report the Commissioner explained why. In my opinion, this is an instance where the Commissioner undertook an evaluation and assessment of information provided by interested parties and ultimately made an assessment of which of the information should be used to found conclusions on relevant questions. It does not appear to me that this approach was flawed in some obvious way and consistent with observations I made earlier in this report, it is not for the Panel to second-guess this assessment and evaluation. No error is established in the way Commissioner determined the dumping margin for CG Power.

Whether, as argued by Fortune, Power Transformers of a capacity greater than 100 MVA should have been used in calculating the amount of profit to be included in a constructed normal value established under s 269TAC(2)(c).

31 The goods the subject of the application for a dumping duty notice identified in section 3.3 of the Report were:

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

32 Fortune argued that the Commissioner erred in calculating the amount of profits to be included in a constructed normal value established under s 269TAC(2)(c) by including all domestic sales of Power Transformers including transformers of a capacity of greater than 100MVA. Section 269TAC(2)(c)(ii) requires a determination, amongst other things, of the profit on sales of the goods for home consumption.

33 As s.269TAC(5B) requires, the Commissioner determined the profit on the sale of goods by having recourse to Regulation 181A of the *Customs Regulations 1926* (the 1926 Regulations). Specifically, the Commissioner did so by reference to reg 181A(3)(a) which calls for the identification of the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market.

34 Fortune appears to argue that the "*same general category of goods*" should not have included Power Transformers of a capacity greater than 100MVA. This argument was developed by reference to what it says are two categories of transformers identified in international standards (medium Power Transformers of equal to or less than 100MVA and large power transformers of greater than 100MVA), the fact that it only exported medium power transformers to Australia, there was far greater domestic competition for medium Power Transformers and import competition for large transformers on the domestic market was restricted having regard to, amongst other things, their physical characteristics. Its analysis of profit margins in the domestic market showed a significant disparity between medium and large Power Transformers. It argued that medium and large power transformers are physically different goods with different markets and competition.

35 Whether particular goods are of the same general category of goods is a matter of evaluation and assessment. The Commissioner noted that there was no universally accepted categorisation of power transformers by size. In so doing, the Commissioner noted Siemens described medium Power Transformers as Power Transformers with the power range of 40MVA to 250MVA. In my opinion there was no compelling reason to treat the expression "*same general category of goods*" as comprehending only Power Transformers of 100MVA or less. It was open to the Commissioner to treat the relevant general category in the way reflecting the Report.

Whether domestic sales by Fortune of Power Transformers to TPC should have been used in calculating the amount of profit to be included in the construct of normal value established under s. 269TAC(2)(c).

36 Fortune submitted that the amount of profit on sales of Power Transformers to TPC should be excluded from the constructed normal value. Two principal reasons are advanced. Firstly TPC was a government owned power utility with local content purchase criteria and, before 2013, could not purchase imported Power Transformers and thereafter only transformers of "*defined capacities*". The second was that TPC purchased primarily large Power Transformers and had a system of quality assurance for approved suppliers that meant that many domestic producers did not seek to sell medium Power Transformers to TPC. The gravamen of this submission appears to be that sales to TPC were not at the same level of trade as sales into the Australian domestic market. No cogent reason is advanced why this is so. Again whether sales of a particular type could be used in determining normal value involved evaluation and assessment. Fortune has not demonstrated that the Commissioner was not entitled to include sales to TPC as part of that process.

Whether the Commissioner erred when identifying the date for currency conversion for the purposes of s 269TAF(1).

37 Section 269TAF addresses circumstances where a currency conversion is appropriate for the purposes of enabling a comparison between the export prices of goods exported to Australia and corresponding normal values of like goods. With a qualification that is not presently relevant, subsection (1) provides that the conversion "*is to be made using the rate of exchange on the date of the transaction or agreement that, in the opinion of the Minister, best establishes the material terms of the sale of the exported goods.*" The difference in the approach actually adopted by the Commissioner and the approach advocated by Fortune concerns the date by reference to which the exchange rate is determined and, accordingly, the exchange rate actually used.

38 The Commissioner decided that the date that best established the material terms of sale was the contract or purchase order date. Fortune argued the appropriate date was the invoice date. Article 2.4.1 of the Anti-Dumping Agreement, footnote 8, which states that "*Normally, the date of sale [the Article contemplates conversion of currencies using the rate of exchange on the date of sale] would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of trade*".

39 Fortune's argument was, in essence, that other approaches have been adopted by the Commissioner in other investigations. But as Article VI illustrates, a range of different dates may be appropriate. The substance of the choice actually made was not challenged by Fortune in any cogent way. In my opinion, it was open to the Commissioner to select an exchange rate at the time determined.

40 I should observe that Fortune did not identify the exchange rate likely to have been used nor the exchange rate they contend should have been used an observation made of other applicants in an earlier review. Whether the ultimate decision (to publish a dumping duty notice in the terms actually published) was correct would depend on whether there was a difference between the two exchange rates and whether that difference was material. No attempt was made to establish that there was a material difference and how that material difference impacted on the ultimate decision.

Whether domestic sales by SEEC to non-utility customers should have been used in determining the amount of profit of domestic sales.

41 SEEC sells Power Transformers to two types of customers in the domestic market. One is non-utility customers of which there were 31 during the investigation period. Also, these sales accounted for a material proportion of the total domestic sales in the period of investigation. The other is the sole utility customer, TPC. SEEC argued that in determining the profit rate of domestic sales for the purposes of determining a normal value, only sales to TPC should have been considered. SEEC listed a number of factors including the differing manner in which prices were determined, the differing product quality requirements and the dominant position of TPC in the market as well as its technical capabilities in contradistinction to the more limited capabilities of non-utility Customers. SEEC argued that domestic sales to TPC were comparable to sales in the Australian market (which were to utility customers) whereas domestic sales to non-utility companies were not.

42 The Commissioner decided to have recourse to Reg 181A of the *Customs Regulations 1926* and, in so doing, considered profit on domestic sales both to non-utility and utility customers. In fact, reg 181A(3)(a) was used by the Commissioner that focuses on the actual amounts (of profit) realised by the exporter from the sale of the "*same general category of goods*" in the domestic market. SEEC did not challenge the use of the regulation but its submission, as I apprehended it, proceeded mistakenly on the basis that reg 181A(2) had been used. That sub-regulation refers to sale of "*like goods*". Accordingly SEEC's submission did not address the relevant question namely whether Power Transformers sold to TPC and non-utility customers in the Taiwanese market could reasonably be described as "*the same general category of goods*".

Whether, as argued by SEEC, the Commissioner should not have deducted a notional profit margin for SeA when constructing export price.

43 In relation to this issue, I was satisfied it was appropriate to request a reinvestigation of the finding under s.269ZZL. The issue and my reasons for requesting reinvestigation are set out in a letter to the Commissioner which, in the extract below, commences with the finding to be reviewed. Later in this report, in another context, I

set out more of the letter dated 19 March 2015 and discuss the events that followed my sending it:

The finding, made for the purposes of s.269TAB, of the export price in relation to goods exported by SEEC and any consequential findings based on this finding. In determining the export price, you noted in Report 219 (6.10.2) that SEEC was the exporter of Power Transformers from Taiwan to Australia and that an associated company incorporated in Australia was the importer, namely SeA. However you were not satisfied that relevant export sales were arms length transactions. Accordingly you had recourse to s.269TAB(1)(b). A precondition to the application of this provision is, amongst other things, that the goods are subsequently sold by the importer to a person who is not an associate of the importer. That provision says the export price is the price at which the good were sold by the importer, in this case, SeA. However the provision requires that from that price, prescribed deductions should be made. S.269TAB(2)(c) identifies one of those prescribed deductions as *"the profit, if any, on the sale by the importer or, where the Minister so directs, the 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"*.

The expression *"the profit, if any, on the sale by the importer"* directs attention to the actual profit and contemplates there may be no profit. You determined a profit for SeA to be deducted using the profits achieved by other importers that were subsidiaries of, or related to, those exporters. You noted the terms of s.269TAB(2)(c). You also noted what was said in the *"Dumping and Subsidy Manual"*, in the context of how s.269TAB(1)(b) might be used:

"In establishing a suitable rate of profit to be deducted, Customs and Border Protection may have regard to (not in any order of priority) the:

- .....
- .....
- the profit achieved by other importers at the same level of trade for the goods during the investigation period."

However, in my opinion, the expression *"the profit, if any, on the sale by the importer"* requires consideration of the actual profit. You appear to have used s.269TAB(2)(c) when determining export price but did not consider the actual profit. The calculations you did were based on profits achieved by other importers that were subsidiaries of, or related to, those exporters. It is, of course, possible for you to use s.269TAB(2)(c) in another way, namely to give effect to a Ministerial direction. It is also possible for you to use s.269TAB(3) if the preconditions for its use are met. That methodology may be apt given your finding that the export sales to SeA were not at arms length. But these are matters for you.

44 The Commissioner reinvestigated this finding. The Commissioner's Reinvestigation Report was dated 31 August 2015 and provided to me on 1 September 2015. In the Reinvestigation Report, the Commissioner drew attention to a recommendation at page 97 of the ADC Report 219 that the Parliamentary Secretary direct in accordance with s.269TAB(2)(c) that the rate of profit used to calculate the deductive export price for SEEC be based on profit achieved by other importers that are related to the exporter. This recommendation was not mentioned in the ADC comments nor in the body of the Report discussing profit at 6.10.2. However it is clear from the dumping duty notice published on 10 December 2014 that the Parliamentary Secretary had accepted all the recommendations in the Report. Thus I can proceed on the basis that the Parliamentary Secretary accepted the specific recommendation to make the direction and it can be inferred that his acceptance also involved making the direction. While this process is somewhat opaque, does not sit neatly within the four corners of s.269TAB and appears to occur ex post facto, I accept that the Commissioner determined profit pursuant to a Ministerial direction and thus did so in accord with s.269TAB(2)(c).

Whether, as argued by SEEC, interim dumping duties should not have applied to imports that had been exported pursuant to existing contracts for the supply of Power Transformers.

45 Before considering the submission advanced by SEEC, it is desirable to say something about interim dumping duties. After an application has been made for a dumping duty notice under s.269TB, a stage may be reached where the Commissioner publishes a preliminary affirmative determination under s.269TD. Provision is made for taking securities in respect of interim duty by Customs at this time (or later) and if this is to occur, the Commissioner must give public notice of the decision of Customs to do so: s 269TD(5). If securities are to be taken, they are taken under s.42 of the Act.

46 If a point is reached where the Minister is satisfied there has been dumping causing or threatening material injury, the Minister can decide under s.269TG to publish a notice declaring that s.8 of the *Customs Tariff (Anti-Dumping) Act 1975* (The Dumping Duty Act) applies. Under s.8, provision is made for the payment of interim dumping duty. S. 8(3) provides:

(3) Pending final assessment of the dumping duty payable on goods the subject of a notice under subsection 269TG(1) or (2) of the Act, an interim dumping duty is payable on those goods.

S. 8(5) requires the Minister, by signed notice, to determine that the interim dumping duty payable is an amount worked out in accordance with the method specified in the notice. The need to work out the method requires recourse to s8(5BB) which, in turn, engages reg 5 of the *Customs Tariff (Anti-Dumping) Regulation 2013*. The calculation of final dumping duty is addressed by s.8(6).

47 S.269TN prevents the Minister from publishing a notice in respect of goods that have been entered for home consumption. Relevantly, this prohibition does not, by operation of s.269TN(2), apply "*in respect of goods that have been entered for home consumption in relation to which security has been taken under s.42*".

48 In the present case, SEEC argued 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 and, in respect of which, if securities were taken, those securities have not been cancelled. SEEC submits that securities should not have been required or taken on Power Transformers exported to Australia pursuant to contracts entered into with Australian customers before 27 November 2013"*.

49 The SEEC submission concluded *"If securities could not be taken on Power Transformers imported and entered into home consumption on or after 27 November 2013 pursuant to contracts for the supply of Power Transformers entered into prior to 27 November 2013, and, accordingly, there was no right to take such securities, then the Parliamentary Secretary had no power to impose interim dumping duties on any such Power Transformers imported into Australia intended for home consumption after that date regardless of whether any securities taken have been cancelled: see s.269TN(2) of the Act 1901"*. SEEC requested that *"the dumping duty noticed published by the Parliamentary Secretary should be varied to reflect this"*.

50 I frankly find it difficult to understand this submission. What may be reviewed is, relevantly, a decision by the Minister to publish a dumping duty notice under s.269TG(1): s.269ZZA(1)(a). What SEEC seeks to impugn is the decision of Customs under s.269TD. It is not for the Minister, when deciding whether to publish a notice in respect of goods that have already entered for home consumption, to assess whether the earlier decision of Customs to require and take securities in respect of interim duty was correct or lawful. If such a decision had, in fact, been made, it enlivens the power to publish a notice with retrospective effect. I reject this ground.

Whether, as argued by ABB Vietnam (and also ABB Thailand), s.269TACB(2) should have been used for the purposes of determining whether dumping had occurred

51 ABB Vietnam raised issues 10 to 14 inclusive set out earlier, and a related company, ABB Thailand, raised issues 15 to 20 inclusive. I will, from this point on in the report, refer to both companies as *"the ABB exporters"*. I accepted the arguments of the ABB exporters critical of aspects of the way in which the Commissioner determined whether there was dumping and the levels of dumping. Accordingly I requested a reinvestigation of certain findings by the Commissioner under s.269ZZL. What I requested and my reasons for doing so is apparent from the following extract from a letter I sent the Commissioner on 19 March 2015:

As you are aware, on 2 December 2014 you published ADC Report 219 recommending to the Parliamentary Secretary to the Minister that a dumping duty notice be published in respect of Power Transformers exported to Australia from Indonesia, Taiwan, Thailand and Vietnam. The Parliamentary Secretary accepted the recommendations in your Report and decided to impose dumping duties on Power Transformers exported to Australia from Indonesia, Taiwan, Thailand and Vietnam. On 10 December 2014 a dumping duty notice was published.

On 5 January 2015, an application for review of this decision by the Panel was lodged on behalf an Indonesian company, PT CG Power Systems Indonesia (CG Power). On 8 January 2015 an application for review was lodged on behalf of a Taiwanese company, Fortune Electric Co Ltd (Fortune). On 9 January 2015 an application for review was lodged on behalf of another Taiwanese company, SEEC. Also on 9 January 2015 two further applications for review were lodged, one on behalf of a Thai company, ABB Ltd (of Thailand) (ABB Thailand) and the other on behalf of ABB Vietnam.

I determined, as the Senior Member of the Panel, that for the purposes of s.269ZYA the Panel was to be constituted by me. I also determined not to reject the applications.

I have considered the applications and the grounds advanced together with the comments you provided me on 13 February 2015 (ADC comments), for which I thank you, as well as ADC Report 219 and related documentation together with submissions made by interested parties under s.269ZZJ. I am satisfied that it is appropriate to request you to undertake a reinvestigation pursuant to s.269ZZL of the following findings and report the result within 60 days of the date of this letter or such further time as we may agree. I set out, in relation to each finding, the reasons why I have made the request.

1. ....[the finding referred to at [43] above]
2. The findings that, in relation to goods exported by ABB Vietnam and by ABB Thailand, the export prices differed significantly among purchasers and any findings consequential upon those findings. ABB Vietnam is part of a corporate group that includes ABB Australia Pty Ltd (ABB Australia). ABB Vietnam exports Power Transformers to Australia that are imported by ABB Australia. Similar arrangements exist in relation to Power Transformers exported from Thailand by ABB Thailand, also part of this corporate group. I will refer to ABB Vietnam and ABB Thailand as the ABB exporters. For the purposes of explaining my reasoning, I will not (unless it is necessary) distinguish between exports from Vietnam and exports from Thailand. In determining whether dumping had occurred in relation to Power Transformers exported from Vietnam and Thailand by ABB exporters, you used s.269TACB(3). In doing so, you did not use s.269TACB(2) because, in your opinion, the export prices differed among different purchasers.

The Act authorises the use of s.269TACB(3) and not s.269TACB(2) if certain preconditions are met. One, in s.269TACB(3)(a), is that "*the export prices differ significantly among different purchasers, regions or periods*". The ABB exporters advanced several arguments why these preconditions were not met. One was that the expression "*export prices differ significantly*" calls for a comparison between prices as a monetary amount and nothing more. The methodology used by you to evaluate



whether export prices differed significantly was to calculate the ratio between the export price and the full cost to make and sell for each Power Transformer exported to Australia and sold domestically in the investigation period. The ratios were then compared to ascertain whether there were material or significant differences between those ratios. You concluded there were which then founded your finding that *"the export prices "differed significantly"*, to use the language of s.269TACB(3)(a). Another was that the expression *"different purchasers"* is not, at least in relation to a situation such as the present, a reference to Australian customers who had purchased from ABB Australia. You took the approach that the word "purchasers" is capable of being read more broadly to include the Australian customers and need not be confined to direct importers. The following reasoning addresses these two issues together.

The central statutory focus for the determination of export prices is s.269TAB and, at least in the first instance and subject to various statutory qualifications, that price is the price paid or payable by the importer. Having regard to the prefatory words in s.269TAB, the price determined under that section is the export price for the purposes of Part XVB which includes s.269TACB. Another form of export price can be determined under s.269TAB(1)(b) when the purchase of the goods by the importer was not an arms length transaction. In those circumstances and if other preconditions are met, the export price is the price at which the goods were sold by the importer *"to a person who is not an associate of the importer"*. In relation to the Power Transformers exported by the ABB exporters you did not, in the investigation, find that the purchase of the Power Transformers by ABB Australia was not at arm's length. You used, as export prices, the prices paid by ABB Australia.

To determine whether dumping has occurred and levels of dumping the starting point is s.269TACB. There are, in subsections (1) and (2) of that section, repeated references to export prices. S.269TACB(3) proceeds on the assumption that the methodologies in s.269TACB(2) are not an appropriate methodology to determine whether dumping has occurred and the level of dumping. These provisions reflect, in Australian domestic law, methods of analysis referred to in Article 2.4 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Ant-Dumping Agreement).

It is convenient to set out Article 2.4.2:

Subject to the provisions governing fair comparison in paragraph four, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an

explanation is provided as to why such differences cannot be taken into account appropriately by the use of the weighted average-to-weighted average or transaction-to-transaction comparison

It is also convenient to set out s.269TACB(3):

If the Minister is satisfied:

- (a) that the export prices differ significantly among different purchasers, regions or periods; and
- (b) that those differences make the methods referred to in subsection (two) inappropriate for use in respect of the period constituting the whole or a part of the investigation period

The Minister may, for that period, compare the respective export prices determined in relation to the individual transactions during that period with the weighted average of corresponding normal values over that period.

I accept that the expression "*...the export prices differ significantly among different purchasers...*" is ambiguous in two respects. Firstly it does not identify with clarity the nature of the difference upon which the operation of the provision depends and secondly it does not identify with clarity the class or group which constitutes "purchasers". You have acted on the basis described earlier, namely the difference may not simply be a manifestation of price differences as a monetary amount and that the purchasers can be those corporations to whom ABB Australia sold Power Transformers in the Australian market. I do not agree with either conclusion and I now explain why. I should add that my request to you to reinvestigate is based on my conclusion about the first issue (what is the nature of the difference in export price which arises for consideration) and not the second issue of who are the "purchasers". But the issues are linked and it is probably desirable for me to explain my views about both.

It is, in my opinion, difficult to avoid the conclusion that the difference s.269TACB(3)(a) is concerned with is the monetary amount of export prices which may differ significantly. Elsewhere in s.269TACB, there are repeated references to export prices and how they should be considered. Each instance, involves consideration of the export price as a monetary amount. It would be curious if, in s.269TACB(3)(a), the identification of differences involved some other comparison such as the comparison undertaken by you comparing the ratios of export prices to the full cost to make and sell.

May I explain this in a little more detail. s.269TACB(3) contains two elements. The second element is a methodology for comparing export prices and normal values (as a weighted average of corresponding normal values). The first element sets out two conditions precedent to using this methodology. This first element creates, in effect, a pathway from the possible use of the two alternate methodologies in s.269TACB(2) to the actual use of the methodology in s.269TACB(3). In s.269TACB(2), each

of the two methodologies calls for the consideration of export prices as a monetary amount. If one or other of these two methodologies is used then s.269TACB(4) or (5) and (10) come into play. Each of these subsections also calls for the consideration of export prices as monetary amounts. If the methodology in s.269TACB(3) is used then s.269TACB(6) comes into play which, likewise, calls for the consideration of export prices as monetary amounts. Having regard to the scheme of s.269TACB it would be quite anomalous if the comparison called for by s.269TACB(3)(a) to identify differences, was a comparison of anything other than export prices as a monetary amount.

Another way of testing how differences between export prices should be ascertained for the purposes of s.269TACB(3)(a), is to transpose the language and concepts in s.269TAB into s.269TACB(3)(a) remembering that s.269TAB identifies what is an export price for the purposes of Part XVB. Doing so yields the following results concerning what the Minister must be satisfied about:

- That the prices paid or payable for the goods by the importer or importers differ significantly among different purchasers, regions or periods.
- That the prices at which the goods were sold by the importer or importers in sales subsequent to the purchase from the exporter differ significantly among different purchasers, regions or periods.
- That the prices determined by the Minister differ significantly among different purchasers, regions or periods.

While this involves some simplification of the operation of s.269TAB, it does illustrate, in my opinion, that the focus of s.269TACB(3)(a) is a comparison between prices as monetary amounts.

In addition, the second dot point illustrates, in my opinion, that the word "purchasers" was used in s.269TACB(3)(a) (as it is in Article 2.4.2 of the Anti-Dumping Agreement) to accommodate a situation where the transaction in which export price is ascertained is not the transaction between the exporter and importer but rather the transaction between the importer and the person to whom the goods are sold by the importer. The word "purchasers" is equally apt in the circumstances described in the first dot point because the purchasers would be the importers (if more than one). If there was only one importer (as is the case in relation to sales by ABB Vietnam and ABB Thailand) there remains the possibility that the precondition in s.269TACB(3)(a) could be satisfied because, in relation to that one importer, export prices as a monetary amount differed significantly among regions or periods. The word "purchasers" does not, in a case where export prices have been established under s.269TAB(1)(a) comprehend purchases from the importer. You acted on the basis it did.

The preceding analysis finds support in the language of the Anti-Dumping Agreement and its consideration by the World Trade Organisation (WTO) Appellate Body. S.269TACB(3) together with (six) reflect a method of analysis found in the second sentence of Article 2.4.2 of the Anti-Dumping

Agreement, in contradistinction to the methods of analysis in the first sentence of that provision which are reflected in s.269TACB(2). The provisions in Part XVB of the Act should be construed having regard to Australia's international obligations and regard can be had to the construction the international community would attribute to the relevant instrument or concept. This approach has been repeatedly adopted in the Federal Court of Australia. This can be illustrated by the judgments of two Full Courts: *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406 and *Pilkington (Australia) Ltd v Minister for Justice and Customs* (2002) 127 FCR 92.

In *United States - Softwood Lumber V* (WT/DS 264/AB/RW) the WTO Appellate Body said in relation to the meaning of several words in the first sentence of Article 2.4.2 at [88]:

Furthermore, the reference to "*export prices*" in the plural, without further qualification, suggests that all of the results of the transaction-specific comparisons should be included in the aggregation for purposes of calculating the margins of dumping. In addition, the "*export prices*" and "*normal value*" to which Article 2.4.2 refers are real values, unless conditions allowing an investigating authority to use other values are met.

The reference in the last sentence to the use of other values, was a reference to those circumstances where constructed normal values or constructed export values may have been used. This was not the case in relation to transactions involving exports by ABB Vietnam and ABB Thailand. There is no reason to doubt that these observations of the Appellate Body in relation to the first sentence of Article 2.4.2, would be equally applicable to the same expressions in the second sentence. Thus the reference to "*export prices*" in the second sentence is to be taken to be a reference to real values, that is monetary values or amounts. In addition, the expression "*a pattern of export prices which differ significantly*" must, in my opinion, be a reference to a discerned difference in the monetary values or amounts which form a pattern in the transactions in which the price is paid (see also *United States – Measures relating to zeroing and sunset reviews* (WT/DS322/AB/R) at [135] in which the Appellate Body spoke of "*prices of transactions which fall within this pattern*"). The preceding analysis of Article 2.4.2 and the observations of the Appellate Body, inform the construction of s.269TACB(3)(a) and fortify my conclusion that the approach you adopted involved a misconstruction of the provision.

I have not, in making this request, dealt with arguments raised by the interested parties about steps you followed after making the findings that in relation to goods exported by ABB Vietnam from Vietnam and by ABB Thailand from Thailand, the export prices differed significantly among purchasers. However, if it is necessary, I would invite you to consider those arguments when addressing any findings consequential upon the reinvestigation of the specific findings I have identified.

If this request requires explanation or amplification please feel free to contact me. I also invite you to do so if the period I have specified is inappropriate.

Yours sincerely

- 52 The power to require reinvestigation conferred by s.269ZZL(1) enables the Panel to require reinvestigation of *"a specific finding or findings"*. Once the written notice is issued under that section, the Commissioner *"must conduct a reinvestigation in accordance with the Review Panel's requirements under subsection (1) .....*". The process of reinvestigation and what is a *"finding"* was discussed by Edmonds J in *Kimberley-Clarke Australia Pty Ltd v Minister for Home Affairs* [2011] FCA 225 though by reference to the earlier legislative scheme involving review by the TMRO.
- 53 In the present case, for reasons which I explained in my letter of 19 March 2015, I had concluded that the approach adopted in the Report based on the Commissioner's views of s.269TACB(3) was wrong. What I was contemplating would occur when I requested the reinvestigation, was that the Commissioner would review the finding that *"the export prices differ [...] significantly"* and would do so by reference to the construction of the section I set out in my letter of 19 March 2015. I also contemplated that the Commissioner might possibly remain satisfied that the methods of determining whether dumping had occurred provided for in s.269TACB(2) were inappropriate having regard to a comparison of export prices as simply a monetary amount. I am aware that the Department of Commerce of the United States of America has, in the recent past, developed sophisticated methodologies using, I understand, prices as monetary amounts but subject to statistical analysis to ascertain whether there was targeted dumping. At one stage the Department used, for this purpose, the *"Nails Test"* method and, more recently, a Differential Pricing Analysis using Cohen d ratios though as I apprehend it, not for products which may differ significantly from item to item. I contemplated that the Commissioner might have access to and use another method of comparing export prices as monetary amounts to ascertain whether differences of the type referred to in s.269TACB(3) might exist. My reinvestigation request was framed in terms that meant it was not necessary, at least initially, for the Commissioner to act on my view about the meaning of the word *"purchasers"*.
- 54 I also contemplated that if the Commissioner adhered to the view that the methods in s.269TACB(2) were inappropriate, he would review consequential findings made in the Report when proceeding down the path created by the combined operation of s.269TACB(3) and s.269TACB(6). In my letter I invited the Commissioner, when doing so, to have regard to criticisms by interested parties of the approach taken further down this pathway in the Report.
- 55 In addition, I also contemplated that if the Commissioner decided the methods in s.269TACB(2) were not inappropriate, he would review the question of whether dumping had occurred and the levels of dumping using one of the methods in that subsection and this would form part of his Reinvestigation Report, a matter already addressed by the Report at pages 71 and 74. I accept that this may not have been entirely clear in my letter of 19 March 2015 but, for reasons which I explain shortly, I

was later satisfied that the Commissioner had understood the basis on which my reinvestigation request was made.

56 In my letter of 19 March 2015 I requested that the Commissioner report within 60 days of my request (that is, by 18 May 2015) or *"such further time"* as we may agree. I added this rider because when making a request, a Panel Member will not know how long it will take to meet the request and whether the Commissioner is in a position immediately to deploy staff to satisfy it. However I did think 60 days was likely to be sufficient particularly in the context of a system of review which is meant to be undertaken in a timely way and is subject to statutory time limits. As it turned out, I was later informed by the Commissioner that 60 days was insufficient. In a letter dated 15 April 2015 the Commissioner requested an extension of 60 days *"due to the current workload of the Commission and the complex nature of the re-investigation"*. In a letter of the same day, I agreed to this request and noted the report should be provided by 17 July 2015. In a letter of 1 July 2015 the Commissioner requested a further 45 days in which to report. Again this request was said to be because of the *"ongoing high workload of the Commission and the particularly complex nature of this re-investigation"*.

57 I was concerned that another 45 days in which the Commissioner was to report to me would result in my report under s.269ZZK(1) having potentially taken over nine months from the date on which the first application for review had been lodged. Accordingly, on 9 July 2015, I wrote to the Commissioner saying that *"it would assist me in considering your request [for another 45 days] if you could tell me, in a summary way, what steps have already been taken to reinvestigate as I requested and what further steps will be taken in the further 45 days period if the period is extended"*.

58 My request of 9 July 2015 resulted in a response from the Commissioner in a letter dated 17 July 2015. The response include the following:

To date, the Commission has been considering alternative methodologies that would allow a meaningful comparison between export prices when expressed as monetary amounts for the purposes of section 269TACB(3)(a). The Commission has concluded that there is no meaningful way of comparing export prices of individually unique products when expressed as monetary amounts.

Accordingly, for the purpose of the reinvestigation, the Commission is unable to determine if the export prices differ significantly among different purchases. Accordingly the Commissioner is precluded from using its preferred methodology to calculate the dumping margins, being comparison of the weighted average normal value to transactional export prices.

... [I have deleted references to staffing]

Going forward, in the next 45 days, to complete the reinvestigation as per your request the Commission will complete its recalculation of the dumping margins for ABB Ltd (of Thailand) and ABB Ltd (of Vietnam) based on the methodology specified in section 269TACB(2).

- 59 This response is important in three respects. The first is that it is clear from what is said that the Commissioner understood and accepted that the task I had requested him to perform in my letter of 19 March 2015 was as I had contemplated at the time and referred to at [53] to [55] above. The second is that it provided a sufficient basis to provide the Commissioner with a further 45 days. I did so by letter dated 17 July 2015. The third is that the letter possibly misrepresented the true position as to what would occur in the next 45 days having regard to the contents of the Reinvestigation Report. If so, I was misled into granting the further 45 days in which to provide the Reinvestigation Report.
- 60 When this letter of 17 July 2015 was sent to the Panel's Secretariat, the covering email from a staff member of the ADC indicated that some of what I have quoted from the Commissioner's letter of 17 July 2015 was confidential seemingly on the basis that (having regard to notations on redactions on a "public" version of the letter) those passages represented preliminary conclusions. I do not share the view that the communication is confidential. It is necessary, indeed important, for me to refer to the letter to explain the course I have taken both during the review and in this report. Often, the Commission expresses publicly tentative or preliminary conclusions. This fact alone does not, in my opinion, render the communication confidential. In any event, the important statement that "*the Commission will complete its recalculation of the dumping margins for ABB Ltd (of Thailand) and ABB Ltd (of Vietnam) based on the methodology specified in section 269TACB(2).*" is not a conclusion at all. It is a statement of intention.
- 61 I turn to consider the Reinvestigation Report. In relation to the finding concerning the ABB exporters, the Commissioner, in substance, repeated the conclusion in the Report of 2 December 2014, that export prices differed significantly amongst purchases and these differences made the methods referred to in s.269TACB(2) inappropriate. The Commissioner rejected the view that s.269TACB(3) authorised only the comparison of export prices as a monetary amount and adhered to the approach of analysing the ratios of actual export price to actual full cost to make and sell. Nothing was said in the Reinvestigation Report which constituted a "recalculation of the dumping margins for ABB Ltd (of Thailand) and ABB Ltd (of Vietnam) based on the methodology specified in s.269TACB(2)" as I was told would happen.
- 62 Three points can be made about this response. The first is that it reflects an approach which is completely at odds with what I was told in the letter of 17 July 2015 about what would happen in the further 45 days requested by the Commissioner. A second and related point is that it has taken 165 days for the Commissioner to repeat the substance of what was said in the Report of 2 December 2014 apart from reinvestigating the first finding identified in my letter of 19 March 2015. In these circumstances it is not easy to see, as was said in the letters of 15 April and 1 July 2015, that the reinvestigation was particularly complex. If, on receipt of my request the Commissioner believed he was entitled to reject (which I very much doubt) and proposed to reject, the construction of s.269TACB(3) I had asked him to base his reinvestigation on (only the comparison of export prices as a monetary amount), I could have been told this in very short compass. I could have been told, I would have thought, within a matter of weeks even allowing some time for the reinvestigation of the first finding (discussed at [43] above which appears to have involved little more

than referring me to a section of the ADC Report 219). Thirdly, it is highly arguable that what occurred did not constitute a reinvestigation of the type contemplated by s.269ZZL and that the report is not Reinvestigation Report to which I must have regard under s.269ZZK(4A). I required a reinvestigation of the specified finding and consequential findings on the premise that s.269TACB(3) authorised only the comparison of export prices as a monetary amount. If s.269ZZL allows the Commissioner to report as he has in this matter, then the legislative scheme for review is, in my opinion, significantly flawed in this respect.

63 What has occurred in this review may mean that a Panel Member who disagrees with the approach adopted by the Commissioner because of a difference of opinion about the proper construction of the Act (or even a difference of opinion about how to assess particular information), cannot ask the Commissioner to reinvestigate with the assurance that the reinvestigation will be based on the Panel Member's view of what the Act means (or how particular information should be assessed). If so, little or nothing would be gained by requesting reinvestigation. It would seem to follow that the Panel Member must, by reference to his or her view of the Act (or how information should be assessed), undertake an analysis of the primary material (which would probably often involve detailed financial and commercial information already considered by the Commission) himself or herself and, by reference to that material, form a view about the topic addressed by the contentious legislative provision as if investigating the matter afresh. The topic may concern a step in the investigation process followed by many other steps involving the analysis of primary material of the same character. It is unlikely that the legislature contemplated that a member of the Panel could be required or expected to do this, at least ordinarily, in the 30 days following the receipt of submissions. Also, as a practical matter, a review is undertaken by only one member of the Panel with limited access to accounting and other expertise.

64 I should, at this point, mention one side issue. In letters dated 15 June, 28 July and 3 September 2015 the lawyers acting for the ABB exporters, Moulislegal, wrote to me about the progress of the review. I read those letters. However s.269ZZK(4) appears to limit what, by way of submissions from interested parties, the Panel can consider. It is true that in an earlier review a member of the Panel has invited, and has had regard to, other submissions on a question concerning the jurisdiction or power of the Panel. The submissions were directed to the question of whether there could be a review of a particular decision. Only until that question was answered affirmatively could it be said that there was, for the purposes of s.269ZZK(4), a review on which the section would operate. In any event, the course I followed in extending the period in which the Commissioner could report was, I believed at the time, the correct approach given that I was being told by the Commissioner that the reinvestigation was a complex one. In the letter of 28 July 2015 from Moulislegal, a submission was made that the Panel did not have power to provide additional time. This submission was made after additional time was given on the second occasion and was not a matter adverted in the earlier letter from Moulislegal dated 15 June 2015. I acted on the basis that I did have power.

65 Ultimately I have to recommend to the Minister either to affirm the reviewable decision or revoke the reviewable decision and substitute a specified new decision: s.269ZZK(1). I have concluded that some of the recommendations in the Report furnished to the then Parliamentary Secretary which led to the publication of a



dumping duty notice under s.269TB on 10 December 2014, were based on an erroneous construction of the Act. Accordingly I recommend that the Minister revoke the reviewable decision insofar as the Parliamentary Secretary decided to publish a dumping duty notice in relation to Power Transformers exported by ABB Ltd Thailand and Power Transformers exported by ABB Ltd Vietnam and all other Vietnamese exporters (whose position was evaluated in the same way as ABB Vietnam using s.TACB(3)). I recommend that the Minister substitute a specified decision, namely a decision to publish a dumping duty notice in the terms of the notice published on 10 December 2014 but without including in the notice the companies or entities referred to in the preceding sentence. In relation to the residue of the reviewable decision, I recommend that the Minister affirm the reviewable decision.

66 I acknowledge that these recommendations are probably not entirely satisfactory having regard to the basis on which they are made. However I am fortified in making them by my own consideration, in the limited time that I have had available since receiving the Reinvestigation Report, of the basic information (particularly Confidential Attachments 8 and 11) by reference to which the Commissioner made the recommendations in the Report to publish the dumping notice and what I understood the information meant. That information underpins the view expressed by the Commissioner in ADC Report 219. At 6.11.1, when considering the position of ABB Thailand, the Commissioner said:

If the dumping margin was determined under s.269TACB(2)(b) using the transaction to transaction method and subsequently each separate margin for this exporter is amalgamated, the result is a dumping margin of negative 10.0 percent. The dumping margin published in the exporter visit report was negative 3.5 percent. The difference arises from a different approach to calculating the credit adjustment and to a lesser extent the profit used constructing normal values.

That is to say, there was no dumping by ABB Thailand using this methodology. Similar comments were made in relation to ABB Vietnam at 6.12.1 of the ADC Report 219:

If the dumping margin was determined under s.269TACB(2)(b) using the transaction to transaction method and subsequently each separate margin for this exporter is amalgamated, the result is a dumping margin of negative 5.1percent. The dumping margin published in the exporter visit was 5.9 percent. The difference arises from changes in the approach to calculating the profit used in constructing normal values and to a lesser extent to changes in calculating the credit adjustment.

Again, this reflects a conclusion there was no dumping by ABB Vietnam using this methodology.

67 It is tolerably clear that the Commissioner decided not to use s.269TACB(2)(b) (even though the methodology actually used when relying on s.269TACB(3) substantially replicated the transaction to transaction methodology in s.269TACB(2)(b) – a process criticised with some force by the ABB exporters) because the Commissioner believed some Power Transformers exported from Vietnam and Thailand were, when exported, sold at dumped prices. Adoption of the methodology in s.269TACB(2)(b)

would have resulted, the Commissioner believed, in those transactions being "masked". That would be, at least in part, because the methodology used to determine whether overall there had been dumping and the margin (if applying s.269TACB(2)(b)), would have been as described in the Manual at 20.2:

This method produces a series of different "margins" as there are export transactions – each of these must be amalgamated using a weighted average in order to calculate the single dumping margin over the investigation period for the product.

68 The amalgamation process would, as a mathematical exercise, result in the negative dumping margins nullifying the positive ones. The concerns about "masked" dumping were referred to both in Confidential Attachments to the Report and in the letter of 17 September 2014 to the ABB exporters' legal advisers advising a significant change in approach (by using s.269TACB(3) and not s.269TACB(2)) which had been adverted to in a Commission file note published on 15 August 2014 arising fairly late in the investigation process. Having regard to the history of the investigation culminating in the ADC Report 219, an available inference is that the Commissioner was, at the end, adopting a process of analysis for the purpose of being able to use of the methodology in s.269TACB(6).

69 Two steps were taken culminating in the publication of the dumping duty notice. The first step was the Commissioner's consideration of data under s.269TACB(6). That subsection authorises consideration of "*particular transactions*" and a conclusion, in relation to that particular transaction, whether the export price was less than the weighted average of corresponding normal values. If that question is answered in the affirmative, the subsection declares that the goods "*in each such transaction*" are taken to have been dumped. The section also declares that the dumping margin is "*the difference between each relevant export price and the weighted average of corresponding normal values*": s.269TACB(6)(b). So it is the Act itself that says that in certain circumstances goods are dumped and what is the dumping margin. The Commissioner concluded that of the overall number of Power Transformers sold by the ABB exporters, only a comparatively small percentage were sold at an export price that was less than the respective normal values.

70 In determining the overall dumping margin (a matter discussed by Nicholson J in *Panasia Aluminium (China) Ltd v Attorney-General of the Commonwealth* [2013] FCA 870 especially at [152]), the Commissioner did 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. The ABB exporters (and other interested parties) characterise this approach as "*zeroing*" (a word commonly used in discussions of international trade and used by the WTO itself) – goods with a negative dumping margin are treated as having a zero dumping margin when considering transactions involving those goods and those with a positive dumping margin for the purposes of determining an overall dumping margin.

71 The second step was the exercise of the Ministerial power to decide, in effect, to impose dumping duties by deciding to publish a dumping duty notice. The source of that power is s.269TG. The power is enlivened when, amongst other things, the Minister is satisfied that as to any goods that have been exported to Australia, the

amount of the export price of the goods is less than the amount of the normal value of those goods.

- 72 The ABB exporters pointed to the provisions of s.269TAB and s.269TAC that say, respectively, what is the export price of any goods and what is the normal value of any goods. Without, I hope, mistating the ABB exporters' argument, it was that the exercise of the power under s.269TG requires recourse to the export prices and normal values ascertained under the provisions just mentioned. Section 269TACB(6) does not authorise, for the purposes of exercising the power under s.269TG, a selective use of some export prices and some normal values.
- 73 However this argument, as I apprehend it, leaves no role for the results arising from the direct operation of s.269TACB(6) in relation to particular transactions, albeit based on a Ministerial satisfaction about the relationship between export prices in respect of particular transactions and the weighted average of corresponding normal values. It would be curious if the Act declared certain goods to have been dumped and what the dumping margin was "*in particular transactions*" but, at the end of the day, no remedy could be afforded to Australian industry materially injured by that dumping. But of course, as Nicholson J observed in *Panasia* at [148] (and I respectfully agree), the purpose of Part XVB is not to protect Australian industry. It is more complicated and while it includes that purpose, affording that protection must be balanced with a range of other objectives.
- 74 Section 269TACB(3) together with (6) reflects a method of analysis found in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in contradistinction to the methods of analysis in the first sentence of that provision of the Anti-Dumping Agreement which are reflected in s.269TACB(2)(a) and (b). The WTO Appellate Body has said in a series of decisions that, generally, zeroing involves an impermissible method of determining an overall dumping margin if using the type of methodology in s.269TACB(2)(a) or the type of methodology in s.269TACB(2)(b).
- 75 As noted earlier, the provisions in Part XVB of the Act should be construed having regard to Australia's international obligations and regard can be had to the construction the international community would attribute to the relevant instrument or concept: *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406. However in relation to the use of the method of analysis in the second sentence of Article 2.4.2 (reflected in s.269TACB(3)), the ABB exporters (and several of the interested parties who were likewise critical of zeroing) did not draw my attention to any international jurisprudence deprecating the uses of zeroing in relation to a method of analysis like that found in s.269TACB(3). In any event, I am not aware of it. Accordingly, if the Act does not, in terms, prevent the use of this methodology and zeroing, then I do not think it is appropriate that a member of the Panel should declare that it should not be adopted as, in effect, I was invited to in some of the submissions of interested parties.
- 76 The ADC is the statutory authority and the Commissioner is the statutory office holder entrusted with implementing Australia's Anti-Dumping regime embodied in the Act and associated legislation. If the Commissioner wishes to explore methods of implementing the regime which are not, as I view things, forbidden by the Act but the correctness of which may, internationally, be contestable or even highly contestable, then this is a matter for the Commissioner and, ultimately, the executive government.

It will be for them to defend these methods either in domestic legal proceedings or internationally. I apprehend at least some of the issues concerning the use of zeroing in this context will be considered possibly later this year in United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (WT/DS464) by a panel established by the Dispute Settlement Body of the WTO on 22 January 2014 and composed on 23 June 2014.

## PART 3 – CONCLUSION

77 The applicants have demonstrated that part of the decision under review was not the correct or preferable decision but have not done so in relation to other parts. Accordingly, it is appropriate I recommend that the decision be revoked in part and affirmed in part. Formally, I recommend that the Minister revoke the reviewable decision insofar as the Parliamentary Secretary decided to publish a dumping duty notice in relation to Power Transformers exported by ABB Ltd Thailand and Power Transformers exported by ABB Ltd Vietnam and all other Vietnamese exporters. I recommend that the Minister substitute a specified decision, namely a decision to publish a dumping duty notice in the terms of the notice published on 10 December 2014 but without including in the notice the companies or entities referred to in the preceding sentence. In relation to the residue of the reviewable decision, I recommend that the Minister affirm the reviewable decision.

Hon Michael Moore



Senior Panel Member