



Australian Government
Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal Services Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601
P +61 2 6276 1781 | F +61 2 6213 6821
Email: adrp@industry.gov.au
Web: www.adreviewpanel.gov.au

Mr D Seymour
Anti-Dumping Commissioner
Anti-Dumping Commission
1010 La Trobe Street
Docklands VIC 3008

By EMAIL

Dear Mr Seymour,

As you are aware, on 2 December 2014 you published Report No. 219 recommending to the Parliamentary Secretary to the Minister for Industry 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 Anti-Dumping Review 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).

I determined, as the Senior Member of the Panel, that for the purposes of s269ZYA the Review 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 Report 219 and related documentation together with submissions made by interested parties under s269ZZJ. I am satisfied that it is appropriate to request you to undertake a reinvestigation pursuant to s269ZZL 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, made for the purposes of s269TAB, 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 Shihlin Electric Australia Pty Ltd (SeA). However you were not satisfied that relevant export sales were arms length transactions. Accordingly you had recourse to s269TAB(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 goods were sold by the importer, in this case, SeA. However the provision requires that from that price, prescribed deductions should be made. Section 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 s269TAB(2)(c). You also noted what was said in the "Dumping and Subsidy Manual", in the context of how s269TAB(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 s269TAB(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 s269TAB(2)(c) in another way, namely to give effect to a Ministerial direction. It is also possible for you to use s269TAB(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.

2. 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 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 s269TACB(3). In doing so, you did not use s269TACB(2) because, in your opinion, the export prices differed among different purchasers.

The Customs Act authorises the use of s269TACB(3) and not s269TACB(2) if certain preconditions are met. One, in s269TACB(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 s269TACB(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 s269TAB 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 s269TAB, the price determined under that section is the export price for the purposes of Part XVB which includes s269TACB. Another form of export of export price can be determined under s269TAB(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 s269TACB. There are, in subsections (1) and (2) of that section, repeated references to export prices. Section 269TACB(3) proceeds on the assumption that the methodologies in s269TACB(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 (ADA).

It is convenient to set out Article 2.4.2:

Subject to the provisions governing fair comparison in paragraph 4, 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 s269TACB(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 (2) 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 s269TACB(3)(a) is concerned with is the monetary amount of export prices which may differ significantly. Elsewhere in s269TACB, 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 s269TACB(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. Section 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 s269TACB(2) to the actual use of the methodology in s269TACB(3). In s269TACB(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 s269TACB(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 s269TACB(3) is used then s269TACB(6) comes into play which, likewise, calls for the consideration of export prices as monetary amounts. Having regard to the scheme of s269TACB it would be quite anomalous if the comparison called for by s269TACB(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 s269TACB(3)(a), is to transpose the language and concepts in s269TAB into s269TACB(3)(a) remembering that s269TAB 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 s269TAB, it does illustrate, in my opinion, that the focus of s269TACB(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 s269TACB(3)(a) (as it is in Article 2.4.2 of the ADA) 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 s269TACB(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 s269TAB(1)(a) comprehend purchases from the importer. You acted on the basis it did.

The preceding analysis finds support in the language of the ADA and its consideration by the WTO Appellate Body. Section 269TACB(3) together with (6) reflect a method of analysis found in the second sentence of Article 2.4.2 of the ADA, in contradistinction to the methods of analysis in the first sentence of that provision which are reflected in s269TACB(2) . The provisions in Part XVB of the Customs 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 s269TACB(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



The Honourable Michael Moore

19 March 2015