Australian Government
Anti-Dumping Review Panel

ADRP Report No. 100

Wind Towers exported from the People's Republic of China and the Republic of Korea

April 2020

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
Act	*Customs Act 1901*
Anti-Dumping Agreement	WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
China	The People's Republic of China
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Dumping Manual	Dumping and Subsidy Manual November 2018
Goods	Wind towers
GUC	Goods under consideration
Inquiry period	1 January 2017 to 30 June 2018
Korea	The Republic of Korea
Minister	Minister for Industry, Science and Technology
OCOT	Ordinary course of trade
Regulation	*Customs (International Obligations) Regulation 2015*
REP 487	The report published by the Commission in relation to wind towers from China and Korea and dated 12 March 2019
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Minister made on 25 March 2019 to secure the continuation of anti-dumping measures in respect of wind towers exported from China

SEF 487	Statement of Essential Facts No. 487
SG&A	Selling, general and administrative
TSP	Shanghai Taisheng Wind Power Equipment Co., Ltd
WTO	The World Trade Organization

Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology (the Minister) to secure the continuation of anti-dumping measures in respect of wind towers exported from the Peoples' Republic of China (China). The applicant for the review was Shanghai Taisheng Wind Power Equipment Co., Ltd (TSP).

2. For the reasons set out in this report, I recommend that the reviewable decision be revoked in so far as it relates to exports by TSP and that the Minister substitute it with another decision, namely that the Minister decide pursuant to s.269ZHG(1)(b) of the *Customs Act 1901* (the Act) that she has decided to secure the continuation of the anti-dumping measures relating to wind towers exported to Australia from China, with the exception of those exported by TSP.

Introduction

3. TSP applied under s.269ZZC of the Act for a review of the decision of the Minister made on 25 March 2019 to secure the continuation of anti-dumping measures pursuant to s.269ZHG(1) of the Act in respect of wind towers exported from China.

4. The application was accepted and notice of the proposed review, as required by s.269ZZI, was published on 8 May 2019.

5. As the Senior Member of the Anti-Dumping Review Panel (Review Panel), I directed in writing in accordance with s.269ZYA of the Act that the Review Panel be constituted by me.

Background

6. Anti-dumping measures in the form of an Anti-Dumping Notice (ADN) were imposed on exports of wind towers from China and the Republic of Korea (Korea) on 16 April 2014.[1] The measures were due to expire on 16 April 2019. On 23 April 2018, the Commissioner of the Anti-Dumping Commission (the ADC) invited certain persons to apply for the continuation of the measures.

[1] ADN 2014/33.

7. On 22 June 2018, an application was received from Keppel Prince Engineering Pty Ltd (Keppel) for a continuation of the anti-dumping measures. The application was supported by Ottoway Fabrication Pty Ltd and Crisp Bros. and Haywards Pty Ltd (Haywards) representing the Australian industry. On 16 July 2018, the Commissioner initiated an inquiry into whether the continuation of the anti-dumping measures was justified.[2] The inquiry period for the continuation inquiry was 1 January 2017 to 30 June 2018.

8. A Statement of Essential Facts (SEF) was published on 25 January 2019.[3] On 12 March 2019 the Commissioner made a report to the Minister recommending that the Minister declare:

    - pursuant to s.269ZHG(1)(b), that she had decided to secure the continuation of the anti-dumping measures relating to wind towers exported to Australia from China with effect from 17 April 2019.

    - pursuant to s.269ZHG(1)(a), that she has decided not to secure the continuation of the anti-dumping measures relating to wind towers exported from Korea with effect from 17 April 2019.[4]

9. The Minister accepted the recommendations of the Commissioner and on 25 March 2019 the Minister made the declaration pursuant to s.269ZHG(1)(b) of the Act securing the continuation of the measures relating to wind towers exported to Australia from China with effect from 17 April 2019 (the reviewable decision).[5]

Conduct of the Review

10. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision, if they are satisfied that the decision is the correct or preferable one, or revoke it and substitute a new specified decision. In undertaking the review s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if

[2] ADN 2018/115.
[3] SEF 487 Document 014 EPR.
[4] Report No. 487.
[5] ADN 2019/33.

it were the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

11. Subject to certain exceptions,[6] the Review Panel is not to have regard to any information other than relevant information pursuant to s.269ZZK, i.e. information to which the Commissioner had regard or ought to have had regard when making its findings and recommendations to the Minister.

12. Three submissions were made to the Review Panel in accordance with s.269ZZJ of the Act. These submissions were by Keppel, Haywards and the ADC. A non-confidential version of the submissions was published on the Review Panel web-site.

13. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference, to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information. A conference was held with representatives of the ADC on 19 June 2019. A further conference was held with a representative of TSP on 25 June 2019. A further conference with the ADC was held on 23 December 2019. Non-confidential summaries of the information obtained at the conferences were made publicly available in accordance with s.269ZZX(1) of the Act.

14. On 4 July 2019, I required the Commissioner to conduct a reinvestigation of certain findings pursuant to s.269ZZL of the Act. The report by the Commissioner on the reinvestigation was initially due on 2 September 2019. Three extensions of time for the report were requested and granted and the report was finally due on 5 March 2020. The report was provided by the Commissioner on the extended due date.

15. After receipt of the Reinvestigation Report from the Commissioner, I had further conferences under s.269ZZHA with representatives of the ADC to obtain more information relating to the calculation of the normal value and, in particular, the conduct of the ordinary course of trade (OCOT) test and the adjustment for physical differences pursuant to s.269TAC(8) of the Act. I also asked the ADC

[6] See s.269ZZK(4).

representatives to do certain calculations with the information and these were provided to me at a subsequent conference. Non-confidential summaries of these conferences were placed on the Review Panel website.

16. In conducting this review, I have had regard to the application and documents submitted with or referenced in the application and to submissions received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information. I have also had regard to REP 487 and information referenced in that report and to relevant information obtained at the conferences. As required by s.269ZZK(4A) of the Act, I have had regard to the report provided by the Commissioner on the reinvestigation under s.269ZZL(2), including documents referenced in the report such as the submissions made by TSP.

Grounds of Review

17. The grounds of review relied upon by the applicant, which the Review Panel accepted, are as follows:

- There were errors in the determination of the dumping margin, namely

  • the incorrect determination of the amount of profit for the normal value, particularly the incorrect application of s.45(2) of the *Customs (International Obligations) Regulation* 2015 (the Regulation); and

  • the incorrect and unreasonable determination of the cost of production for the normal value.

- The expiration of the measures would not be likely to lead to the recurrence of dumping or material injury attributable to exports by TSP.

Consideration of Grounds

Dumping Margin/Normal Value

The determination of the amount of profit

18. TSP contends that the ADC did not correctly calculate the dumping margin for TSP's exports as it did not determine the amount of profit for normal value purposes as required under s.269TAC(2)(c). The submission by TSP does not take issue with the use of s.269TAC(2)(c) as it notes the ADC's finding that there was an absence of sales of like goods in the market of the country of export. TSP points out that despite this finding the ADC insisted that it should apply s.45(2) of the Regulation for the determination of the amount of profit.

19. The use of s.45(2) was, according to TSP, incorrect for two reasons. The first is because there were no sales of like goods in the market of the country of export. The second was that the OCOT test could not be carried out for the purpose of the Regulation in the circumstances of TSP's exports.

20. As noted above it is common ground that the ADC should have used s.269TAC(2)(c) to determine the normal value of TSP's exports. That paragraph provides that the normal value is:

    (i) *such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and*

    (ii) *on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export – such amounts as the Minster determines would be the administrative, selling and general costs associated with the profit on that sale.*

21. Subsection 269TAC(5B) provides that the amount of profit to be determined on the sale of goods under s.269TAC(2)(c)(ii) must be worked out "in such manner, and taking account of such factors, as the regulations provide for that purpose". Section

45 of the Regulation is the relevant provision for the working out of profit for the purpose of s.269TAC(2)(c)(ii). Section 45(2) provides:

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

22. In support of its contention that the use of s.45(2) was incorrect, TSP relies on the submission it made in response to the SEF. In the submission, it is pointed out that the ADC found that TSP did not have any domestic sales of like goods to the goods under consideration (GUC) exported to Australia during the inquiry period. The SEF did indeed find:

> *Therefore, the Commission is of the view that there is an absence of sales of like goods in the market of the country of export that would be relevant for the purposes of determining a price under subsection 269TAC(1)*.[7]

23. Given this finding made by the ADC, it is not surprising that TSP took exception to the ADC using s.45(2) of the Regulation which is only applicable if there are sales of like goods by the exporter. Of course, there can be sales of like goods which otherwise meet the requirements of s.269TAC(1) but which are nevertheless not suitable or relevant for the ascertainment of the normal value under s.269TAC(1) because they fall within one of the categories in s.269TAC(2). For example, there may be a low volume of sales. Such sales may nevertheless be used for the ascertainment of the profit in a constructed value pursuant to s.45(2). There do however have to be sales of like goods in the ordinary course of trade for s.45(2) to be used.

24. The explanation given by the ADC in REP 487 (and in the ADC's submission to the Review Panel) for the seeming inconsistency is as follows:

> *As noted in section 6.4.2 of this report, the Commission has found that, whilst wind towers may vary from project to project and have different technical properties, they nevertheless are like goods. However, these differences*

[7] Statement of Essential Facts No. 487 section 6.4.2 at page 30.

mean that there are no relevant sales of like goods on the domestic market to enable matching to the goods exported to Australia.[8]

25. It is difficult to understand this explanation in the context of the legislation. It is presumably based on the wording of s.269TAC(2)(a)(i) which refers to there being an absence of sales of like goods that "would be relevant for the purpose of determining a price under subsection (1)". Relevant sales for the purpose of determining a price under s.269TAC(1) are the sales described in that subsection, that is, "goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not sold by the exporter, by other sellers of like goods".

26. There is no reference in the legislation to sales not being suitable for the ascertainment of normal value under s.269TAC(1) because technical differences mean the models of the goods sold domestically cannot be matched with the models exported to Australia. Those technical differences may mean that the goods are not like goods. If, however the goods sold domestically in the country of export are like goods and those goods are sold by the exporter in the OCOT and in sales that are arms length, then they are relevant sales for the purpose of s.269TAC(1).

27. The ADC's approach requires a gloss to be put on the wording of s.269TAC(1). There is no basis for this. There is no ambiguity in the wording of s.269TAC(1) and it is the words of s.269TAC(1) to which regard must be had.[9] If there are domestic sales within the description of s.269TAC(1) then those sales are to be used to ascertain the normal value of the exported goods, subject to any adjustments under s.269TAC(8). Of course, if any of the circumstances described in the following subsections such as a low volume of sales or a particular market situation are found then s.269TAC(1) is not applicable.

28. The Exporter Verification Report notes that "the verification team considers that model matching between Australian and domestic sales to determine a normal value under subsection 269TAC(1)…is not possible". The use of model matching may be a practical way of taking into account differences in like goods or between

[8] REP 487 section 6.4.2.4 at page 36.
[9] *Anti-Dumping Authority & Anor v Degussa AG & Anor* [1994] FCA 677 per Sheppard J at page 7.

the different GUC. To the extent that like goods are not identical, then adjustment may need to be made as required by s.269TAC(8). However, difficulties in taking a model matching approach are not a basis for discarding domestic sales of like goods which otherwise meet the criteria of s.269TAC(1) and do not fall within the excluding categories in s.269TAC(2).

29. The approach taken by the ADC to s.269TAC(2) would mean that the Minister had a broad discretion under s.269TAC(2) to disallow sales which were not considered to be comparable or relevant for determining a price under s.269TAC(1). I can discern no such legislative intention in s.269TAC(2) and it would be contrary to the otherwise prescriptive nature of the circumstances in s.269TAC(2) which allow the Minister to ascertain the normal value of exports under s.269TAC(2)(c).

30. In *Anti-Dumping Authority & Anor v Degussa AG & Anor*[10] the Full Court of the Federal Court confirmed that sales which fell within s.269TAC(1) could not be ignored on the basis of some criteria not found in the legislation. It is the words of s.269TAC(1) to which regard must be had. While the decision in *Degussa* was distinguished by the court in *Pilkington (Australia) Ltd v Minister of State for Justice & Customs,*[11] on the basis of subsequent changes to the legislation, this does not affect the comments with respect to s.269TAC(1) and s.269TAC(2) on this point.

31. While I do not consider s.269TAC(1) and (2) to be ambiguous on this issue, when regard is had to the relevant provision of the Anti-Dumping Agreement,[12] the proper construction is confirmed. That provision is Article 2.2 which provides:

> 2.2 *When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of*

[10] As above.
[11] [2002] FCAFC 423.
[12] WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

32. Subsection 269TAC(2) was intended to reflect Article 2.2 of the Anti-Dumping Agreement.[13]

33. I agree with the submission of TSP that the approach by the ADC with respect to the determination of profit is inconsistent with its approach to s.269TAC(2). If there are no sales of like goods in the OCOT and arms length transactions, then s.45(2) is not available to be used. Given the inconsistent findings in REP 487 regarding whether or not there were domestic sales of like goods in the OCOT which were arms length transactions, I referred the finding as to normal value to the Commissioner for reinvestigation pursuant to s.269ZZL of the Act.

34. Another reason TSP gave for the non-application of s.45(2) was that it was not possible for the ADC to conduct an OCOT test on TSP's domestic sales. In the Exporter Verification Report for TSP it was stated:

> *In the absence of weighted average CTMS data to conduct a recoverability test, sales at a loss are also considered not recoverable in this case*.[14]

In REP 487 the ADC noted that it had conducted a recoverability test on TSP's domestic sales by comparing the net invoice revenue to the weighted average cost to make and sell (CTMS) over the inquiry period. REP 487 then stated:

> *However, due to the nature of wind towers being produced on a project by project basis, the CTMS, which in this case is calculated on a project by project basis, is equal to the weighted average CTMS over the inquiry period*.[15]

35. The above comments caused me to raise the issue of the OCOT test with representatives of the ADC in a conference under s.269ZZHA of the Act. From information obtained at the conference and from a review of the spreadsheet "487-

[13] Explanatory Memorandum to the Customs Legislation (World Trade Organisation Amendments) Bill 1994 at para 34.
[14] Exporter Verification Report section 7.2 at page 13.
[15] Final Report 487, section 6.4.2.4 at page 36.

TSP-Appendix 3-Domestic Sales" it seems that what the ADC did is to include only those sales of the wind towers in projects which were profitable. If the projects were not profitable then those sales were not included for the purpose of applying s.45(2).

36. As noted above, s.45(2) requires the Minister to work out the profit on the sale of goods "by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade". There is no definition of the OCOT for the purpose of s.45(2) (or for that matter s.269TAC(1)) but s.269TAAD provides one instance of when goods will be taken not to have been sold in the OCOT. Subsection 269TAAD(1) provides:

> *If the Minister is satisfied, in relation to goods exported to Australia:*
>
> *(a) that like goods are sold in the country of export in sales that are arms length transactions in substantial quantities during an extended period:*
>
> *(i) for home consumption in the country of export; or*
>
> *(ii) for exportation to a third country;*
>
> *at a price that is less than the cost of such goods; and*
>
> *(b) that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period;*
>
> *the price paid for the goods referred to in paragraph (a) is taken not to have been paid in the ordinary course of trade.*

37. Subsection 269TAAD(3) provides that the cost of goods "are taken to be recoverable within a reasonable period of time if, although the selling price of those goods at the time of their sale is below cost at that time, the selling price is above the weighted average cost of such goods over the investigation period". The weighted average cost of the goods is required to be worked out in accordance with a formula set out in s.269T(5A). This formula essentially requires the sum of the

cost per unit of the goods sold during the inquiry period to be divided by the sum of the number of units of the goods involved in those sales.

38. The approach taken by the ADC means that the sales included in the s.45(2) calculation of profit were in the OCOT. However, it is possible that other sales of wind towers during the inquiry period may also have been sold in the OCOT but have not been included.

39. It is not clear that the legislation allows the ADC to include only those sales of wind towers in projects which were profitable in the calculation under s.45(2) or for the purpose of s.269TAC(1). Subsection 269TAAD(3) would indicate to the contrary. There is also judicial comment which would indicate that sales which could come within s.45(2) cannot be disregarded.

40. In *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science*[16] (an appeal from a decision of Robertson J.) Perram J., when referring to s.45(3)(a) of the Regulation, noted:

> *The primary judge accepted (at [86]) that once the general category had been identified the Commissioner could not lawfully disregard some subset of the general category in carrying out the profit calculation*.[17]

His Honour also noted that it had not been suggested to the Full Court that Robertson J. was incorrect in his Honour's construction of s.45(3)(a).

41. I can see no reason why the approach would be different for s.45(2). This is also consistent with the decision in *Degussa.*[18]

42. The reasons given by the ADC for not doing an OCOT test have some validity. Nevertheless, the difficulty faced by the ADC in conducting an OCOT test does not allow an approach not supported by the legislation. Again, it may mean that s.269TAC(6) has to be used.

[16] [2018] FCAFC 20.
[17] As above at paragraph 65.
[18] *Anti-Dumping Authority & Anor v Degussa AG & Anor* [1994] FCA 677.

43. For the above reasons, I agree with the submission of TSP that the approach by the ADC with respect to the determination of profit is inconsistent with the reason given for using s.269TAC(2)(c) to construct a normal value. If there are no domestic sales of like goods by TSP in the OCOT then s.45(2) is not available to be used. In addition, sales which because of s.269TAAD(3) would be in the OCOT, cannot be excluded from the calculations for the purpose of s.45(2). Further it would not be possible for the Minister to be satisfied that there was an absence or low volume of sales for the purpose of s.269TAC(2) when an OCOT test cannot be undertaken.

44. The approach by the ADC to the OCOT test was another reason for requiring a reinvestigation of the finding as to the normal value of TSP's exports.

The Reinvestigation Report

45. The reinvestigation report by the Commissioner was received by the Review Panel on 5 March 2020. In summary, the Commissioner found:

    - Wind towers sold by TSP on the domestic market in China were like goods to the wind towers exported to Australia;

    - TSP had sales of like goods in the OCOT and sales of like goods that were not in the OCOT; and

    - The normal value for TSP's exports could be determined under s.269TAC(1) with relevant adjustments under s.269TAC(8).

46. The above findings did not however result in a change to the normal value of the exports.

47. TSP made two submissions to the ADC during the reinvestigation. It took issue with the finding that the wind towers sold by TSP domestically in China were like goods to those it exported to Australia. As noted above, TSP submitted to the Review Panel that the application of s.45(2) was inconsistent with the finding by the ADC that the normal value should be determined under s.269TAC(2)(c) as there were no sales of like goods domestically by TSP.

48. As the ADC reinvestigation did not determine the normal value of TSP's exports under s.269TAC(2)(c), the inconsistency relied upon by TSP disappears. TSP did not rely in its application to the Review Panel on the arguments it put to the ADC during the reinvestigation in support of its contention that the wind towers sold domestically in China were not like goods to those exported to Australia. However, I did consider the arguments put to the ADC by TSP on the like goods issue. I did not discern any error in the approach by the ADC to this issue.

49. There are a number of issues which arise with the approach the ADC took to the calculation of the normal value of TSP's exports which I consider are covered by the grounds raised in TSP's application. These issues are:

    - The OCOT test;
    - The sales excluded from the normal value on the basis that the wind towers were produced by third parties; and
    - The adjustment under s.269TAC(8) for the physical differences between the wind towers sold domestically and those exported to Australia.

50. The issue of the OCOT test was raised directly in the application grounds. The issue of the excluded sales was raised by TSP in its submission to the SEF on the margin calculation[19] which was also relied upon by TSP in its application to the Review Panel. An issue with the s.269TAC(8) adjustment is the uplift for the costs of production. This uplift was based on that made to the costs of production as part of the s.269TAC(2)(c) determination of normal value. This was also raised in TSP's application for review.

51. I also consider the issues related to the OCOT test, the excluded sales and the s.269TAC(8) adjustment to be part of the calculation of the normal value and consequent dumping margin. The first ground of TSP's application for review was that there were errors in the calculation of the dumping margin.

[19] Submission by TSP dated 13 February 2019 Doc No. 15 EPR 487.

52. Given the above, I consider each of these issues as they arise from the Reinvestigation Report below.

The OCOT test

53. The principal difference in the OCOT test conducted by the ADC for the purpose of the reinvestigation and the test conducted for REP 487 is that the ADC conducted the substantial quantities and recoverability assessment on the sections sold within each project rather than the wind towers. The reference to sections is to the sections of the wind towers sold in a project. As noted in the Reinvestigation Report, wind towers are comprised of various sections, each with different specifications, which when assembled form a wind tower unit.[20]

54. The reference to substantial quantities is a reference to the requirement in s.269TAAD(2) of the Act that sales of goods found to be unprofitable are taken to have occurred in substantial quantities during an extended period if the volume of sales of such goods is not less than 20% of the total volume of sales over that period. For the reinvestigation, the ADC calculated the substantial quantities with reference to the number of sections within each project.

55. The recoverability assessment was similarly conducted by the ADC using the unit cost of production of each section and then using that information to calculate the weighted average cost of the sections in a project. As the ADC notes in the Reinvestigation Report, the practical implication is that the outcome of the recoverability test is the same as the profitability assessment.[21] This means that if a project was found to be unprofitable, then the cost of the sections in that project were not recoverable.

56. In its application to the Review Panel on the OCOT issue, TSP relied on its submission to the ADC in response to the SEF. TSP's position was that the OCOT test could not be carried out due to the nature of each wind tower being a unique product.[22] In its submissions to the ADC, TSP argued that if the ADC treated TSP's domestic sales as like goods, then such treatment must be applied consistently at

[20] Reinvestigation Report 487 section 2.3.1 page 10.
[21] As above section 3.6.3 page 25.
[22] TSP submission dated 13 February 2019 Doc No. 15 EPR 487 at page 3.

each step in the normal value determination, including the OCOT test. On this basis, the OCOT test would be conducted in relation to all domestic sales of like goods as a whole and not on the project level.

57. I agree with TSP that, having determined that the wind towers sold domestically by TSP are like goods to those it exported to Australia, the OCOT test had to be conducted consistently with that finding. By effectively limiting the recoverability of costs to the project in which the wind towers were sold, the ADC approach is not consistent with the legislation.

58. The first point to be made is that sales at a loss are not necessarily outside the OCOT.[23] Correspondingly, as the Dumping Manual points out, profitable sales may be.[24] Section 269TAAD provides for certain sales to be treated as outside the OCOT provided those sales come within the terms of that section.

59. Section 269TAAD is intended to reflect Article 2.2.1 of the Anti-Dumping Agreement.[25] When considering Article 2.2.1, the WTO Panel in *EC- Salmon AD Measure*,[26] the WTO Panel noted that below cost sales had to display three characteristics, namely they had to be made:

    - within an extended period of time;
    - in substantial quantities; and
    - at prices which do not provide for the recovery of all costs within a reasonable period.

    It was only below-cost sales that are found to exhibit all three of these characteristics that, according to the WTO Panel, may be treated as not being made in the OCOT by reason of price.[27]

[23] *McDowell & Partners Pty Ltd v Button* [1983] FCA 356.
[24] Dumping and Subsidy Manual November 2018 section 7.2 page 33.
[25] Explanatory Memorandum to the Customs Legislation (World Trade Organisation Amendments) Bill 1994 clause 29.
[26] European Communities - Anti-Dumping Measure on farmed salmon from Norway WT/DS337/R.
[27] As above at para 7.233.

60. For s.269TAAD to apply to sales the Minister has to be satisfied:

    - that like goods are sold in the country of export in sales that are arms length transactions;
    - in substantial quantities for an extended period;
    - for home consumption in the country of export (or for exportation to a third country);
    - at a price that is less than the costs of such goods; and
    - it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period.

    Again, each of these characteristics has to apply before the price paid can be taken not to have been paid in the OCOT.

61. The reference to like goods is to goods which are like goods to those goods exported to Australia. In this case, the ADC has found that the domestic sales of wind towers in China by TSP are sales of like goods. It is to that cohort of sales that the test set out in s.269TAAD has to be applied.

62. The first step in applying the test under s.269TAAD is to determine the profitability of the sales. Section 269TAAD(1) simply refers to the like goods being sold at a price that is less than the cost of such goods. Pursuant to s.269TAAD(4), the cost of goods is to be worked out by adding the cost of production or manufacture of those goods in the country of export together with the amount of the SG&A costs associated with the sale of those goods. These amounts are to be worked out in accordance with the Regulations.[28]

63. The ADC worked out the profitability of TSP's domestic sales of wind towers on a project level for the purpose of the continuation inquiry and REP 487. The cost of each project was subtracted from the invoice price of each project to determine

[28] Section 269TAAD(5).

which project was profitable. The same approach was taken for the reinvestigation. The reason for this approach was that TSP accounted for its cost records at the wind tower project level.[29]

64. I understand from TSP's submissions to the ADC during the reinvestigation that it does not take issue with determining the profitability of the sales of wind towers by considering the profitability of the projects for which the wind towers were sold. This approach would appear to be a reasonable one and not inconsistent with the terms of s.269TAAD.

65. Subsection 269TAAD(2) provides that sales at a loss will have occurred in substantial quantities during an extended period if the volume of sales of such goods at a price below cost is not less than 20% of the total volume of sales over that period. There is no prescription in s.269TAAD as to what should be considered an "extended period". The Dumping Manual states that the ADC has an administrative practice of treating the extended period as the investigation period.[30] In this case that would be the inquiry period.

66. In a footnote to Article 2.2.1 of the Anti-Dumping Agreement, it is stated that the extended period of time should normally be one year but in no case less than six months. For the purpose of the continuation inquiry in this case, the inquiry period was 1 January 2017 to 20 June 2018. Treating the inquiry period as the extended period would be consistent with the Dumping Manual and not inconsistent with Article 2.2.1.

67. In the Reinvestigation Report, the approach to whether the sales at a loss were in substantial quantities was described as follows:

> *The reinvestigation calculated the substantial quantities with reference to the number of sections within each project.*[31]

From my review of Confidential Appendix 3 to the Reinvestigation Report, and in particular Tab(c), it appears that what the ADC did was to treat the sales in a project

[29] Reinvestigation Report section 3.6.1 page 23.
[30] Dumping and Subsidy Manual November 2018 page 34.
[31] Reinvestigation Report section 3.6.2 page 24.

as within the OCOT if there were less than 20% of the sections sold unprofitably in that project. Conversely, if there were 20% or more, the sales in that project were considered to be in substantial quantities.

68. The approach by the ADC does not conform with the test in s.269TAAD in one respect. It considered the goods to be the sections which made up the towers. While sections of wind towers are included in the description of the goods under consideration for the purpose of the inquiry, the goods sold in China by TSP during the inquiry period, which were found to be the like goods to those exported to Australia, were wind towers.

69. Although the calculation of the substantial quantities was done on a project level, the effect was that the ADC did effectively calculate the substantial quantities with respect to the total of the sales of the goods (albeit using sections as the goods) over the inquiry period. This is because, while they treated every section in an unprofitable project as unprofitable, they considered the overall number of sections sold unprofitably as a percentage of the total sales. The result was that there were sections sold in substantial quantities. Apart from the use of sections, as opposed to wind towers, for the calculation, I do not consider the assessment of substantial quantities to be inconsistent with s.269TAAD.

70. TSP in its submission to the ADC as part of the reinvestigation, submitted that the loss making projects were not sold in substantial quantities. According to TSP, [redacted]% of TSP's sales were profitable or, if the toll-processed sales were included, over [redacted]% were profitable.[32] The difference with the ADC's findings is the use of uplifted costs of production by the ADC in calculating the CTMS of the sections. I address the use of uplifted costs below.

71. The final characteristic to be assessed under s.269TAAD is that the unprofitable domestic sales have to be at a price which is unlikely to allow the exporter to recover the cost of the goods within a reasonable period. While s.269TAAD does not specify what a reasonable time should be, the Dumping Manual states that it will normally be the investigation period.[33]

[32] TSP's Submission dated 20 January 2020 EPR 487 Doc No. 24.
[33] Dumping and Subsidy Manual November 2018 section 7.3 page 34.

72. The policy of the ADC of treating the investigation period as a reasonable period of time would seem consistent with s.269TAAD(3) which provides that costs of goods are taken to be recoverable within a reasonable period of time, if, although the selling price of those goods at the time of their sale is below cost at that time, the selling price is above the weighted average cost of such goods over the investigation period.

73. To assess the recoverability of costs in the reinvestigation, the ADC calculated the weighted average cost of the sections sold in a wind tower project by multiplying the unit cost of the section by the number of sections sold and then dividing that number by the number of sections sold. The figure derived from this calculation was then compared to the invoice price. If there was a loss then the sales were considered not recoverable.

74. As can be quickly seen from the above, the approach of the ADC is that the unit cost of a section sold in a project is the same as the weighted average cost. Consequently, any sections sold in a project which was unprofitable would also fail to pass the recoverability test. This approach has the same result as that for the inquiry for REP 487, namely that sales in an unprofitable project were taken to be not in the OCOT.

75. Not surprisingly, TSP took exception to the ADC's approach. I have to agree with a number of the criticisms. My first difficulty is the use of sections of wind towers rather than the wind towers. The domestic sales by TSP were of wind towers and these were the goods which the ADC found to be like goods to those exported to Australia.

76. My principal difficulty though is that the ADC's approach does not properly assess the recoverability of the unprofitable sales. This is a mandatory requirement for unprofitable sales to be treated as not in the OCOT because of price.

77. The Reinvestigation Report states that the approach taken to recoverability is consistent with the legislation and, in particular, that the formula for calculating the weighted average cost was done in accordance with s.269T(5A). As noted above, the formula in s.269T(5A) essentially requires the sum of the cost per unit of the

goods sold during the inquiry period to be divided by the sum of the number of units of the goods involved in those sales. This is not what the ADC did.

78. Not only did the approach of the ADC not apply the formula in s.269T(5A) but by using the unit cost of the sales instead of the weighted average cost it effectively did not allow for any recovery of costs in unprofitable projects over the inquiry period. The approach only allows a finding of two of the three characteristics required for the sales to be treated as not in the OCOT.

79. The reason given in the Reinvestigation Report for the approach the ADC took to recoverability is that the ADC considered each project to comprise a model and that the OCOT test could therefore be undertaken at the project level. It is possible that in some cases, a model approach could be consistent with the legislation. However, at the very least, the models of goods would have to be sold in reasonable numbers over the period of the investigation or inquiry.

80. The wind towers sold in a particular project do not have the attributes of a particular model of the wind towers available for sale. They are bespoke. They may or not be the same as the other wind towers sold in the same project. There is some dispute as to this between TSP and the ADC. However, there is only the one sale of the "model". To assess recoverability on this one sale and the unit cost of the goods sold in that sale does not comply with the wording or the intent of s.269TAAD(3).

81. The unit cost of the wind towers or sections of wind towers in one sale of such goods is not the "weighted average cost of such goods over the investigation period". The reference to "such goods" in s.269TAAD(3) is a reference to the wind towers sold domestically by TSP in unprofitable sales which the ADC found to have been like goods to those exported to Australia. It is the same cohort of sales that are assessed for the purpose of the test in s.269TAAD(2).

82. There is nothing in the wording or structure of s.269TAAD that supports the ADC's approach. To the contrary, the recoverability test in s.269TAAD(3) makes a distinction between the costs of the goods at their time of sale and the weighted average cost of those goods over the investigation period. There are two points to be made about this wording.

83. First, it assumes that there are other sales of the goods over the investigation period and that these are to be used in the recoverability test. This is supported by the formula in s.269T(5A). It is unlikely that, if there was only one domestic sale of the goods that were like goods to those exported to Australia, such a sale would be sufficient for the ascertainment of the normal value of the exported goods.

84. Second, the wording looks to the entire period of the investigation period for the weighted average cost. Subsection 269T(5A) refers to the weighted average costs of goods "over a particular period" and "P" in the formula is the cost per unit "in the respective transactions during the period". Given the wording of s.269TAAD(3), the period for the formula is the investigation period or, in this case, the inquiry period.

85. I also note that in *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science*,[34] Perram J. stated that departure from a period based assessment would most likely contradict s.269T(5A).[35]

86. By adopting the project unit cost as the weighted average cost, the ADC is not looking at the cost of the goods (that is, the wind towers) over the inquiry period. TSP did not just sell wind towers in one project. It had multiple sales of them over the inquiry period. Subsection 269TAAD(3) requires that the cost of the wind towers for the purpose of the recoverability assessment is the weighted average cost of all of those wind towers sold during the inquiry period.

87. The Reinvestigation Report gives another reason for the approach taken to the recoverability test, namely that if it was not done at the project level, it would invariably cause all lower cost models to not be recoverable and higher cost models to always be recoverable. This may be the case and it may at first seem illogical. However, lower cost models may not need to be tested for recoverability as their sales are more likely to be profitable.

88. In any event, the ADC, the Review Panel and the Minister are bound by the legislation and only those sales which have the three characteristics described in s.269TAAD can be treated as not in the OCOT. Given the bespoke nature of wind

[34] [2018] FCAFC 20.
[35] As above at para 99.

towers, the approach taken by the ADC may seem for practical reasons to be sensible. However, I note the following comment of the Federal Court:

> *While pragmatism has an instinctive appeal in seeking to further the overall objectives of the legislative scheme, it cannot prevail unless that is what the Act and Regulations permit.*[36]

89. I appreciate the difficulty that the ADC had with applying the legislation to the circumstances of the sales of wind towers. The legislation is not easily applied to sales of a product when each sale involves goods with unique characteristics. Still, it is the legislation which has to be applied.

Excluded Sales

90. The ascertainment of the normal value for TSP's exports for both the original continuation inquiry and the reinvestigation excluded from TSP's domestic sales of wind towers, certain sales which involved some or all of the production being done by a third party. These sales involved toll manufacture by an entity unaffiliated with TSP.

91. TSP contended both at the time of the continuation inquiry and the reinvestigation that the toll-manufacture sales should not be excluded from the normal value determination solely on that basis. In the Reinvestigation Report, the ADC noted that TSP had not provided the ADC with evidence that the domestic sales of wind towers produced by unrelated parties were made by TSP. Further, the ADC noted that none of the wind towers exported to Australia was produced by third parties and, in those circumstances, the ADC considered it appropriate to only consider domestic sales manufactured by TSP and its subsidiaries in the normal value. On that basis the ADC excluded sales of goods produced by third parties from the normal value calculations.[37]

92. The legal basis upon which the ADC relied for the exclusion of the toll-manufacture sales is not clear. There is a reference in the Reinvestigation Report to s.269TACB

[36] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20 per Bromwich J. at para 138.
[37] Reinvestigation Report section 4.3.1 page 42.

but no explanation as to why that section allows or requires the exclusion of the sales. Given the finding by the ADC in the reinvestigation that the normal value of TSP's exports could be ascertained under s.269TAC(1), the normal value of TSP's exports is the price paid for like goods sold by TSP in the OCOT for home consumption in China in sales that are arms length transactions.

93. The explanation by the ADC does not establish why the toll-manufactured sales did not come within the description of the s.269TAC(1) sales. There is no discretion given in the legislation to exclude sales from the determination of the normal value if they meet the description in s.269TAC(1). From information given in a conference held with ADC representatives it may be that a reason for excluding the sales was they could not verify the production costs of the third parties who did the manufacturing or that all SG&A costs were captured.

94. Given that the ADC was satisfied that the toll manufacturing was done in arms length transactions, it is not clear why the amount charged by the third party to TSP is not a reliable indicator of the cost together with any further costs and SG&A expenses incurred by TSP. Given that the ADC could use another methodology when s.43 of the Regulation was not available, the ADC could have used those costs, uplifted as appropriate.[38]

95. During a conference with ADC representatives, I was informed that a number of the toll-manufactured sales were unprofitable. Clearly, if the sales were not in the OCOT they should not be included in the normal value determination. Otherwise, I do not consider they should be excluded.

Subsection 269TAC(8) adjustment

96. As the wind towers sold domestically by TSP during the inquiry period were not identical to those exported to Australia, the ADC had to consider, as part of the reinvestigation, an appropriate adjustment to remove any effect the physical difference would have on the comparability of the domestic prices with the export prices.

[38] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20 at para 108.

97. The Reinvestigation Report sets out three options for making the adjustment under s.269TAC(8). These were called Options A, B and C. Option B, which involved using a surrogate model, was not considered appropriate for the reasons given in the Reinvestigation Report and TSP agreed that Option B was unsuitable.

98. Option A was an adjustment made by using the cost difference between the weighted average cost to make all domestic goods and the weighted average cost to make all exported goods during the inquiry period. The ADC applied a gross profit margin and an amount for SG&A to the cost difference. The resulting specification adjustment was then applied to all domestic selling prices of like goods to determine the normal value for TSP's sales.

99. Option C involved the ADC taking the weighted average sales price of like goods, sold in arms length transactions in the OCOT. The ADC then established a "market price" for identical goods to those exported and then compared the difference between these two prices to adjust the sales of all like goods sold in the OCOT.

100. The market price for Option C was the sum of the cost to make the exported goods, plus the profit achieved in the sales of all like goods made in the OCOT and the SG&A expenses for like goods sold on the domestic market. The ADC considered that this approach created a reasonable estimate of the price for which the goods exported to Australia would have been sold as if they were sold on the domestic market.

101. The ADC did not use Option A as it considered it did not remove differences in physical characteristics due to the difference between the size and design of the towers sold on the domestic and export markets. According to the Reinvestigation Report, this option if applied to an export sale would result in some export sales having no cost of production.

102. In response to the submission by TSP arguing for the application of Option A, the Reinvestigation Report provides a further basis for rejecting Option C. An analysis conducted for the purpose of identifying a surrogate model for Option B showed that even if projects have similar costs, the descriptions of the projects differ. This

suggested that other differences between the wind towers and factors such as timing or specific characteristics may also affect cost.[39]

103. In its submission to the ADC during the reinvestigation, TSP contended that Options A and C should have basically the same result. The reason the adjustment made under Option C was different, according to TSP, was that the ADC used an "uplifted" cost to make and not the actual cost. Further, TSP claims that the adjustment made under Option C basically adjusts for the difference between the uplifted cost to make of the goods and the actual cost.

104. In the Reinvestigation Report, the ADC acknowledged that it had used uplifted costs on the same basis that it had done in REP 487. This was on the basis that the raw material costs provided by TSP did not reasonably reflect competitive market costs in accordance with s.43(2)(b)(ii) of the Regulation. As such, the ADC was not required to work out an amount for the cost of production using the information as set out in TSP's records. The ADC accepted that the Regulation was no longer relevant but remained of the view that the need for the uplift had not changed from REP 487.

105. The reason for the view taken by the ADC on the uplift is stated in the Reinvestigation Report to be that having "established that the cost of raw material input does not reflect market prices, it would be inappropriate to ignore this finding when trying to establish what a market price, free from distortion was, to compare to the domestic sales made in the OCOT".[40] There is some logic to this statement. However, I am unable to understand how there is any legislative basis for it.

106. The difficulty with the ADC's approach is that it has determined that the normal value of TSP's exports should be ascertained under s.269TAC(1). Accordingly, the normal value has to be based on the prices obtained by TSP in its domestic sales in the OCOT in arms length transactions. It is not open to the ADC, having found that there were domestic sales of like goods to the exported goods for the purpose of s.269TAC(1), to then use a constructed normal value.

[39] Reinvestigation Report section 4.3.3.2 page 45.
[40] As above page 46.

107. If the ADC was satisfied that the prices in the domestic market were distorted because the cost of raw materials did not reflect market prices, then it should have recommended that the Minister be satisfied that there was a particular market situation for the purpose of s.269TAC(2)(a)(ii) and ascertained the normal value under s.269TAC(2)(c). It did not however make this finding. Given this, and the fact that it determined that it was suitable to use the domestic sales under s.269TAC(1), I do not see how it can now use what is, in effect, a constructed normal value.

108. I do not consider that the requirement on the Minister to make an adjustment under s.269TAC(8) for physical differences can be the basis for a constructed normal value or for the costs of the exporter to be uplifted as if s.43(2)(b)(ii) of the Regulation applied. An adjustment under s.269TAC(8) is limited to the purpose for which it is being made.

109. In *GTE (Aust) Pty Ltd v Brown*, Burchett J. when referring to an earlier legislative version of s.269TAC(8) stated:

> *the domestic price paid is required to be adjusted in accordance with directions by the Minister, so that those differences would not affect its comparison with the export price. I have said it is required to be adjusted, because I think that is the effect to be given to the words "is to be taken to be". The extent of the adjustment required is indicated by the purpose: it is to be "so that those differences would not affect its comparison" with the export price.*[41]

110. The purpose of an adjustment to the normal value has also been described as “to ensure that like is compared to like”.[42]

111. The extent of the adjustment that can be made under s.269TAC(8) is only what is required to remove the effect the physical differences have on the comparison between the exported goods and those sold domestically. It is not necessary to

[41] [1986] FCA 536 at page 51.
[42] *Powerlift (Nissan) Pty Ltd v Minister of State for Small Business, Construction and Customs & Ors* [1993] FCA 38 per Hill J.

remove the effect of the physical differences to uplift the cost of the goods sold domestically. It is not necessary to compare like to like.

Recalculation

112. For the above reason, I consider that the ascertainment of the normal value of TSP's export for the original continuation inquiry and the reinvestigation was not in accordance with the Act. In order to ascertain a normal value and consequent dumping margin, I requested the ADC to do certain calculations. A copy of the request is attached to this report.

113. The ADC provided its recalculations of the normal value as requested. These recalculations are attached as a confidential attachment to the report. As I considered there was a basis for either Option A or Option C, I asked the ADC to do the normal value calculations using both options in the alternative (except without the uplift to costs in Option C). However, as the Reinvestigation Report recommended Option C, I will recommend to the Minister that the adjustment under s.269TAC(8) for physical differences be in accordance with Option C in the confidential attachment.

114. The normal value whether calculated using an adjustment based on Option A or Option C (without the uplift to costs) resulted in a significant negative dumping margin.

The costs of production

115. A further issue which TSP had with the normal value ascertained by the ADC is the cost of production determined by the ADC for the wind towers. TSP submits that the ADC incorrectly determined that TSP's financial records for the costs of plate steel did not reasonably reflect competitive market costs associated with the production of like goods under s.43(2) of the Regulation. In addition, TSP submits that the cost uplift determined by the ADC was incorrect and unreasonable.

116. As noted above, in the original continuation inquiry the ADC used s.269TAC(2)(c) to ascertain the normal value of the wind towers exported by TSP. However, in the reinvestigation, the ADC ascertained the normal value under s.269TAC(1). The

ADC did however use the uplifted cost of production when determining the cost of production for the purpose of the OCOT test under s.269TAAD.

117. Pursuant to s.269TAAD(5), the cost of production of goods under s.269TAAD(4) is to be worked out in the manner provided for in the regulations. The relevant regulation is s.43 of the Regulation. This regulation relevantly provides that if the exporter or producer of like goods keeps records relating to the like goods, then the Minister must use the information in those records to work out the cost of production of the goods, provided the records:

    - are in accordance with generally accepted accounting principles in the country of export; and

    - reasonably reflect competitive market costs associated with the production or manufacture of like goods.

118. In REP 487, the ADC found that the Government of China's involvement and influence over the steel industry and the market for raw materials used in the production of steel in China had created distortions that meant that TSP's records did not reasonably reflect competitive costs associated with the production of wind towers. As a result, the ADC uplifted the prices of raw material steel plate used to calculate the cost of production of TSP's domestically sold wind towers.

119. The methodology used by the ADC to uplift the plate steel costs was described in the ADC's submission to the Review Panel as follows:

    - The ADC had regard to TSP's uplifted plate steel costs in Report 221 where a competitive market cost for plate steel was established using verified domestic selling prices in other markets for plate steel from a concurrent investigation (REP 198).

    - These selling prices were then compared to the unadjusted Chinese normal values established in the same case.

- The difference in these prices was then applied to the purchase cost of plate steel as reflected in TSP's records for REP 221, as a proportional uplift that would be inclusive of any relevant grade differences.

- The ADC then indexed the uplifted costs from REP 221 by reference to movements in the Steel Bulletin Board (Platts) benchmark from the original investigation period in REP 221 to the inquiry period for REP 487.

120. TSP has two issues with the approach of the ADC. First, it contends that the Minister should have found that TSP's recorded costs did reasonably reflect competitive market costs. As an alternative, the competitive market cost should have been determined having regard to contemporaneous and relevant data.

121. On the first issue, TSP contends that the ADC failed to engage with the facts related to TSP and the period of the inquiry in determining whether TSP's cost of production reflected competitive market costs. In its submission during the continuation inquiry, TSP claimed that the Government of China's involvement in the steel industry did not provide evidence that TSP's cost of plate steel was artificially low and must be uplifted.

122. TSP also pointed out that TSP's steel plate cost was comparable to the benchmark for competitive cost identified by the ADC. Indeed, according to TSP's submission to the Review Panel, the benchmark selected by the ADC was on average lower than TSP's steel plate cost.

123. It was not clear to me from REP 487 or the ADC's submission to the Review Panel, why the ADC did not just adjust TSP's costs by reference to the Platts benchmark. For this reason, I held a conference with representatives of the ADC to obtain further information on this issue. At this conference I was informed that, because of the lack of comparability of the Platts benchmark, it is not possible to simply adjust the cost data in TSP's records to achieve a competitive market price for the steel plate based on the Platts benchmark.

124. I was subsequently referred by the ADC to Confidential Attachment 4-487-Steel Cost uplift analysis (China) and to the tab called "Specification". The ADC also supplied me with the following documents:

- 487 - KPE - GP10-B - 812109 Material 2016-19 – Plate.

- 487 - TSP - EWP Attachment - GP11 - TSP spreadsheets received on 18 October 2018.

125. Having considered the information provided by the ADC and the further explanation provided (and the information provided by TSP's representative at a conference), I am satisfied with the reason given for not simply using the Platts benchmark for the determination of a competitive market cost.

126. TSP's second issue is that there was more relevant and up to date facts for the determination of competitive market cost. Other sources suggested by TSP were using the Australian industry's purchase costs or the cost of the plate steel purchased by TSP from Japan.

127. In its submission to the Review Panel, the ADC disagreed with TSP's suggestions. The first argument was that the ADC's task was to establish a cost that would be reflective of a competitive market cost of steel in China. Further, the volume of steel purchased by TSP from Japan was a relatively small share of its total steel purchases and less than the volume purchased for the wind towers exported to Australia.

128. The ADC also noted in its submission that the recorded grades were different to those for the steel used to produce the wind towers exported to Australia and the ADC did not receive any information that would enable it to account for the grade differences.

129. With respect to the Australian industry steel purchases, the ADC did not have any means of adjusting the costs to reflect a competitive market cost of steel in China. Also, the ADC was not able to account for relevant grade differences.

130. I have some sympathy for the point made by TSP regarding the use of an uplift calculated on the cost of steel from 2012 /2013. This information is dated. However, I am satisfied with the reasons given by the ADC for using it as part of the uplift methodology and for not using other methodologies.

The recurrence of dumping or material injury

131. In support of its contention that the anti-dumping measures should cease to apply to it, TSP relied upon two points in support of its second ground. The first was that as TSP's exports to Australia were not dumped, injurious dumping on TSP's part was unlikely to recur. The second point related to particular circumstances surrounding TSP's Australian sales which, TSP argued, indicated the unlikelihood of any recurrence of dumping.

132. REP 487 found that, in respect of China, the expiration of the measures applying to wind towers exported to Australia from China would lead, or would be likely to lead, to a continuation, or recurrence of dumping and the material injury that the measures were intended to prevent. This formed the basis of the recommendation to the Minister to secure the continuation of the measures with respect to exports from China.

133. Part of the reasoning by the ADC for the above finding was that the ADC had found that TSP had exported wind towers from China to Australia at dumped prices.[43] REP 487 also concluded that dumped prices for wind towers conferred a price advantage in the market to Chinese exporters.[44]

134. The calculation of the normal value and dumping margin in the confidential attachment shows a significantly negative dumping margin. Given this, the finding by the ADC in REP 487 that TSP's exports were at dumped prices is no longer applicable. Consequently, the reasoning in REP 487 regarding whether the expiration of the measures would be likely to lead to dumping and material injury attributable to TSP's exports is no longer applicable.

135. In these circumstances, I must agree with the first point put by TSP in support of this ground of its application.

136. While it is not necessary for me to consider the second point made by TSP regarding the circumstances of its Australian sales, I consider that the reasons put

[43] REP 487 section 7.3.2 at page 41.
[44] As above section 7.5 at page 48.

by the ADC in REP 487 and in its submission to the Review Panel, supported by the submissions of the Australian industry, support the findings made by the ADC in this regard. I do not agree with the arguments made by TSP in support of the second point it made.

Recommendations

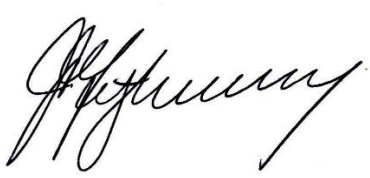
137. Pursuant to s.269ZZK(1) of the Act and for the reasons given above, I consider that the reviewable decision in so far as it related to TSP's exports was not the correct or preferable decision.

138. I recommend that the Minister revoke the reviewable decision in so far as it related to TSP's exports and substitute it with another decision that the Minister declares with effect from a date to be decided by the Minister:

    - pursuant to s.269ZHG(1)(b), that she has decided to secure the continuation of the anti-dumping measures relating to wind towers exported to Australia from China, except for those exported by TSP; and

    - pursuant to s.269ZHG(1)(a) that she has decided not to secure the continuation of the anti-dumping measures relating to wind towers exported from China by TSP.

139. I also recommend that the Minister direct that the adjustments to the normal value as set out in the confidential attachment be made pursuant to s.269TAC(8), using Option C (without the uplift to costs) for the adjustment for physical differences.



Joan Fitzhenry
Senior Panel Member
Anti-Dumping Review Panel
6 April 2020

Review 2019/100 Wind Towers from China

Conference under s.269ZZHA: 11 March 2020

Information on recalculation of normal value for TSP's exports

First calculation

1. Calculate the normal value for TSP's exports using those domestic sales of wind towers by TSP during the inquiry period which are sales in the OCOT that are arms-length transactions. Do not exclude toll-processed sales on the sole basis that some of the manufacturing was done by a third party (acknowledging that such sales may be excluded for other reasons e.g. they were not in the OCOT).

2. Conduct the OCOT test as follows:

    a. To determine which sales are profitable, treat the sale of wind towers in a project as profitable sales if the project is profitable and unprofitable if the project is unprofitable (a similar approach to that in REP 487).
    b. If the number of wind towers that were sold unprofitably is 20% or greater, than conduct a recoverability test for those unprofitable sales (use the number of wind towers sold unprofitably not the number of unprofitable projects for the 20% or greater test).
    c. If the number of unprofitable sales of wind towers is less than 20%, include all sales in the normal value calculation.

3. Assuming that the unprofitable sales are 20% or greater of the total wind towers sold during the inquiry period, then conduct the recoverability test on those unprofitable sales as follows:
    a. Calculate a unit price for the wind towers sold in unprofitable projects by dividing the invoice amount for the project by the number of wind towers sold in that project.
    b. Calculate a weighted average cost for the wind towers by using the following formula:

        ADD the cost of wind towers in each project i.e. Project 1 (unit cost of towers x number of towers) + Project 2 (unit cost of towers x number of towers….[redacted] (unit cost of towers x number of towers)

        DIVIDE the total amount above by the total number of towers in the projects i.e. Project 1 (number of towers) + Project 2 (number of towers)…[redacted] (number of towers)

c. If the unit price for the wind towers in a project is greater than the weighted average cost as calculated in b. above, then treat the sales of wind towers in that project as in the OCOT and include in the normal value.

4. Include in the calculation of normal value all the sales in 2a above plus those found to be in OCOT in 3c (unless all sales are being included under 2c).

5. Make an adjustment under s.269TAC(8) for the physical differences in the wind towers to those exported to Australia. The S.269TAC(8) adjustment for physical differences should be based on Option C in the reinvestigation report but without the uplift to the cost of the raw materials. Use the sales found to be in the OCOT from the OCOT test above (i.e. those used for 4. Above) for the profit calculation.

Second Calculation

6. Please do the above calculation of normal value but use Option A in the reinvestigation report for the s.269TAC(8) adjustment for physical differences. Use the production costs without the uplift for the calculation.

Dumping Margin

Please provide the resulting dumping margin for the above calculations of the normal value.