

27 August 2014

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By email

Dear Director

Alleged dumping of power transformers - “potential for use of alternative approach to dumping margin assessments”

We refer to your letter dated 20 August 2014.

The letter refers to a re-examination by the Anti-Dumping Commission (“the Commission”) of the preliminary export prices and normal values established for our client ABB Thailand (“ABB TH”) in the investigation period. Apparently, in the Commission’s mind that re-examination has identified export prices of power transformers *“that appear to differ significantly among purchasers in the investigation period”*. The letter:

...invites comment from ABB Thailand, by close of business 27 August 2014 as to why the export prices to certain (specified) Australian purchasers differ significantly from the prices to other Australian customers in the investigation period. [emphasis in the original]

The suggestion made by the Commission – that is, that *“export prices to certain (specified) Australian purchasers differ significantly from the prices to other Australian customers”* is said to be supported by Attachment A to the letter. That Attachment compares ABB TH’s export prices to the CTMS for each of the export transactions indicated therein.

Initially, we do find it necessary to complain about the Commission’s timing in this regard. We received the letter that has raised these matters only 19 days prior to the date on which the Statement of Essential Facts is due to be published. This would be inappropriate in the circumstances of a “normal” investigation. But it is even more disproportionate in this investigation, when compared to the overall time that the Minister has allowed the Commission.

This investigation was initiated on 29 July 2013, and ABB TH submitted its Exporter Questionnaire (“EQ”) response on 2 October 2013. ABB TH’s EQ response was verified by Commission officials in early November 2013. A verification report was published on the public record three months later, on 21 February 2014.

The Commission has had ABB TH’s export sales information before it – and has considered and analysed that information - for 322 days before sending this most recent letter to us. One week has been allowed to ABB TH to consider what is now being suggested and to defend itself against the suggestion that has been made.

When the Commission published the file note about the potential use of Section 269TACB on 15 August 2014, we inquired of the Commission about the source of any submissions by the Australian

industry relating to this topic. We were referred to a letter dated 10 June 2014 which was placed on the public record on 17 June 2014. That letter has a heading which mentions “*targeted dumping*” but there is no content in the letter (as it appears on the public record) that deals with that subject matter. Nor is there a non-confidential summary explaining what might have been put to the Commission in that regard.

We recognise that a lack of time on the Commission’s part should not be an impediment against it raising what it might consider to be “relevant issues” with interested parties. Nonetheless this late development is not the kind of procedure that would feature in the guidebook to administrative fairness. We also note that the inability to obtain information because of limited time being available to arrive at a conclusion cannot count against an interested party. A lack of evidence or information to prove that a point of conjecture raised by the Commission is correct or defensible simply means that the point was not established, ie that the required satisfaction was not reached.

The letter appears to reflect upon tentative conclusions, which are different to those previously reached, with only two weeks to go before the Statement of Essential Facts is to be published. If these are in the nature of tentative conclusions, our client does hope and expect that they are contestable, and that the Commission will maintain an open mind on the matters raised until it has fairly considered ABB TH’s submissions.

[CONFIDENTIAL TEXT DELETED – matters of concern regarding the potential misuse of information by the applicant] This concern is a real one because the Commission’s letter has been received *after* the Commission had already seen the Australian industry’s 10 June letter and *after* it had advised ABB TH on 15 July 2014 – a month later - of a significant no-dumping margin which has no reference to Section 269TACB(3) of the *Customs Act* 1901 (“the Act”) at all.

The party who is said to have purchased power transformers at export prices that “*differ significantly*” is not identified in the letter, and the implications of any finding of alleged differential pricing against ABB TH is not explained either in the letter or in the file note on the public record which preceded the letter. We are left to sift through the Attachment and through hints in the file note and the letter to try to make our own conclusions about matters that the Commission wants us to comment upon but has not specified.

Further, what the Commission believes would flow from any attempt to activate Section 269TACB(3) in a margin calculation sense is not explained. We find this to be unnecessarily secretive, and at odds with the obligations imposed on investigating authorities under principles of administrative fairness and by the WTO *Anti-Dumping Agreement*.

Our client’s comments are not meant to be disrespectful. However there are strong concerns within our client’s organisation about these matters and we have been specifically instructed to make its concerns known to the Commission.

Although limited by the lateness of the suggestions in the letter and the lack of detail about them, our client does have these pertinent comments:

- 1 As already noted, the party or parties who are said to have purchased power transformers at export prices that “*differ significantly*” are not identified. The charts in the Attachment mention many parties (and projects) but ABB TH is not a party to any transactions with them.
- 2 Regardless of that, an analysis of the type that is reflected in the export price/CTMS ratio analysis set out in Attachment A can never be relevant to the operation of Section 269TACB(3) of the Act. It does not measure differential pricing at all. In the circumstances of the approach to normal value calculation that the Commission has adopted in this case, it is nothing more than a measure of whether certain sales are more likely to have been dumped

or not.¹

- 3 As has already been attested to by the Commission's verification team, ABB TH decides about its offer prices on the basis of [CONFIDENTIAL TEXT DELETED – ABB TH costing and pricing methodology]. That is when ABB TH decides on its prices to ABB Australia ("ABB AU"). If the Commission's objective is to work out whether ABB TH has targeted its prices in some differential manner, then using a measure that is impacted upon by factors that occurred after it set its prices – as is the upshot of the CTMS ratio in Attachment A – is not relevant.
- 4 Here is a time sequence graph showing all of ABB TH's export prices. It can be observed that the transformers that the Commission has marked in orange and brown on its "Chart 2" worksheet are not different from other prices when shown in a normal price context– not exceptionally, consistently or otherwise.

[CONFIDENTIAL GRAPH DELETED – names of end-users and projects, and prices shown]

- 5 Next we provide a graph showing ABB TH's export prices offered to ABB AU as a ratio of [CONFIDENTIAL TEXT DELETED – commercial arrangement between ABB TH and ABB AU].² This is a proper measure of ABB TH's price behaviour. Similarly, it can be observed that the transformers that the Commission has marked in orange and brown on its "Chart 2" worksheet (marked in the same colours on the graph) are not significantly different from other prices – not exceptionally, consistently or otherwise. For example, in this comparison the transformers that the Commission has marked in orange and brown mostly have higher anticipated profit margins than sales that ABB AU on-supplied to [CONFIDENTIAL TEXT DELETED – names of end-users and projects]:

[CONFIDENTIAL TEXT DELETED – names of end-users and projects, and price cost ratios]

- 6 The pattern established by the analyses in 4 and 5 above are of varied prices amongst all customers, with no one customer receiving a significantly different price. ABB TH's behaviour is seen to be one of consistent profit-seeking. The only pattern that is established by the analyses in Attachment A is that the purchases by ABB AU represented by the lowest bars of the bar charts in "Chart 1" and "Chart 2" were less likely to recover their ultimate cost.³ That says nothing about the consistency or otherwise of the prices of those sales with the prices of other sales.
- 7 An attempt to apply Section 269TACB(3) to this case, when the Commission has already conceded that each power transformer is unique and cannot be compared in other contexts, is especially difficult. The evidence for its application might be readily available in a case where the exporter sells the same thing to different purchasers and amongst those purchasers one or other was regularly charged significantly less for the same thing. The Minister could be relevantly satisfied of significant differences in the sense required by the Section if it was established that a homogenous product was being differently priced to a particular purchaser or region. Prices always vary, thus one would expect the difference to

¹ The "CTMS" information used in Attachment A is said to have been "taken from CA2 Australian CTMS.xlsx – Emailed to Daniel Moulis 15 August 2014". We can assure you that we have not received any such email and therefore assume this to have been an error.

² Instead of the actual CTMS to FOB export price ratio used in Attachment A, this chart uses an FOB [CONFIDENTIAL TEXT DELETED – commercial arrangement between ABB TH and ABB AU] to FOB export price ratio. [CONFIDENTIAL TEXT DELETED – names of end-users and projects] caused by a drop in the FX rate [CONFIDENTIAL TEXT DELETED - commercial arrangement between ABB TH and ABB AU, exchange rates and dates], being the date the price was offered.

³ We note, in this regard, that the comparison in Attachment A used CTMS with international freight included as compared with FOB export price (ie without international freight included).

be exceptional and consistent.

- 8 Section 269TACB(3)(a) requires export prices amongst different purchasers to be significantly different. Respectfully, and with the very greatest concern, we say that neither of these tests are met in ABB TH's case, and that the methodology presented in Attachment A is not suited to the task of reaching the relevant satisfaction. The question of whether it is inappropriate to use the Section 269TACB(2) methodologies for the sales for the period of any difference is not reached. We maintain that the Section 269TACB(2) methodologies are entirely appropriate, however without any reasoning from the Commission we really do not know what it would be necessary for us to address in this regard.
- 9 The Commission does not explain what it proposes to do if it maintains its allegation that *"export prices differ significantly amongst different purchasers"*. Our client appreciates this opportunity to comment, but does find it hard to accept that the Commission does not know – at this late stage - what it would propose to do if it applied Section 269TACB(3). The warnings in bold type in the file note that dumping margin assessments may vary significantly reinforces this opinion. Into this information vacuum we can only make limited observations, which now follow.

Even if the Commission finds that there were significant differences (and we very strongly maintain that this cannot be found, as we have explained in this letter) then:

- it is only the period in which the differences took place that could be relevant to Section TACB(6); and
- there is no basis for the exclusion of any export transactions from the dumping margin calculation under any of the provisions that the Commission has identified, nor under any other provision of the Act.

On 20 November 2013, the Commission made a preliminary affirmative determination. The Commission advised interested parties that, on the basis of the examination of ABB TH's EQ, the preliminary affirmative determination of dumping as made against exporters from other countries did not apply to any exporters from Thailand. This was on the basis that there was a **no-dumping margin** in relation to ABB TH's exports.

On 21 February 2014, when ABB TH's verification report was placed on the public record, the margin calculation for ABB TH was a **no-dumping margin** of 3.5%.

On 15 July 2014, when we were advised in writing that the Commission had completed its review of the revised margin calculations for ABB TH (following the release of the Issues Paper), ABB TH's margin calculation was a **no-dumping margin** of 10%.

The ABB Group has established protocols to ensure that each ABB entity operates competitively, profitably and independently. The outcome of the consideration of the export prices of the goods exported by ABB TH to Australia was that the purchases of those goods were arms' length transactions. The outcome of the consideration of the prices of inputs sourced by ABB TH from related parties was that none of ABB TH's costs required adjustment, meaning that they were also accepted as having been made at arms' length.⁴

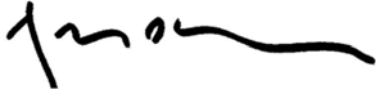
Our client does not accept that its export prices to ABB AU are amenable to a finding under Section 269TACB(3). The consideration that the Commission has mentioned in its letter – of what is colloquially known as "targeted dumping" - could be taken to impute a common endeavour on the part of two ABB companies to favour one client of one of them over others, and to injure a competitor. ABB TH rejects that imputation.

⁴ This finding was first made in the verification report. Then, for reasons which are not known to ABB, the Commission reinvestigated this matter. However the Commission came to the same conclusion a second time.

It is now day 394 of this investigation. There is one week remaining before the publication of the SEF. ABB TH appreciates the opportunity to comment and believes it has adequately addressed the matter raised by the Commission. We submit that there are no grounds for the Commission to overturn its present conclusions in respect of ABB TH's exports to Australia, and that even if it did do so, along the lines that it has now proposed, the outcome would still be a no-dumping margin.

It goes without saying that ABB TH and the ABB group at large reserve all of their legal rights in this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'DM', with a long horizontal flourish extending to the right.

Daniel Moulis
Principal