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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 previous correspondence relating to the abovementioned subject matter, and more recently to our meeting at Customs House in Canberra on 30 October 2014 and to your emails dated 5 and 7 November 2014 following up various matters that were discussed at that meeting.

In this letter we respond to the matters raised in your emails, as well as providing additional submissions relating to the same subject matter. The submissions herein are made on behalf of both ABB Limited of Thailand (“ABB Thailand”) and ABB Ltd of Vietnam (“ABB Vietnam”).

Thank you for your interest in the information and submissions that we have presented on behalf of our clients, and for your continued consideration of these issues.

| | | |
|----------|--|----------|
| 1 | The relevant “different purchasers” from ABB Thailand and ABB Vietnam | 2 |
| | (a) Separate arms-length sales..... | 2 |
| | (b) End users buy power transformers, installation and services..... | 3 |
| | (c) Contracts are clearly separate and independent | 4 |
| | (d) Legislative amendment..... | 4 |
| 2 | Revenue figure in respect of individual unit [CONFIDENTIAL TEXT DELETED – number] ... | 4 |
| 3 | Difference between EP/CTMS ratios advised on 9 and 29 October | 5 |
| 4 | Impacts of movements in exchange rates during quotation process | 6 |
| 5 | Contracts relating to [CONFIDENTIAL TEXT DELETED – end user name and numbers] | 7 |
| 6 | Expiry dates of quotations | 8 |
| 7 | [CONFIDENTIAL INFORMATION DELETED – inquiry about profitability] | 8 |
| 8 | Contract-based EP/CTMS ratios | 9 |

1 The relevant “different purchasers” from ABB Thailand and ABB Vietnam

Before embarking on a response to your specific inquiries, we wish to clarify that the presentation of any information in this letter concerning quotations offered or prices charged by ABB Thailand and ABB Vietnam for power transformers exported to Australia relates to ABB Australia as the invitee of those quotations and as purchaser and contracting party under the contracts for the sale of those exported power transformers. **[CONFIDENTIAL TEXT DELETED – transactions between ABB group companies]**.^{1 2}

Any consideration of end-users – being those parties that ABB Australia **[CONFIDENTIAL TEXT DELETED – transactions between ABB group companies]** contracted with for the supply and installation of power transformers - as the “different purchasers” for the purposes of Section 269TACB(3)(a) is incorrect. These end users were not the purchasers with whom ABB Thailand or ABB Vietnam negotiated the export price. They are remote to those export prices and did not pay those export prices. The end users are customers of ABB Australia under separate and distinct contracts.

Our clients strongly contest the claimed ability of the Commission to “vault” ABB Australia and treat the export prices of ABB Thailand and ABB Vietnam to ABB Australia as if they were the export prices of those exporters to ABB Australia’s customers.

(a) Separate arms-length sales

Multiple facts were identified, verified and accepted by the Commission in this investigation relating to the question of the arm’s length nature of ABB’s business practices and the independent profit motivated behaviour of all parties in the production, sales and installation/commissioning chain. ABB takes great care in its costing and pricing procedures, to ensure that pricing takes place at arm’s length and **[CONFIDENTIAL TEXT DELETED – commercial details relating to profitability]**. This is not convenient hyperbole. In terms of input costing to the ABB factories concerned; sales of transformers to ABB AU; and **[CONFIDENTIAL TEXT DELETED – commercial details relating to profitability]** ABB AU’s own sales and service activities, the Commission has found that ABB’s related company transactions took place at arm’s length. ABB’s costs and price were found to be reliable for normal value and export price purchases in every facet. ABB Australia’s external transactions prices were found to have taken place at arm’s length.

The prices paid by ABB Thailand and ABB Vietnam for inputs from related companies were heavily investigated. This involved significant and extensive questions about the costs and prices of various inputs from ABB companies supplied from countries such as **[CONFIDENTIAL TEXT DELETED – source countries of transformer inputs]**. ABB’s related party transactions were fully costed at the Commission’s request. **[CONFIDENTIAL TEXT DELETED – commercial details relating to profitability]** the Commission made no adjustments whatsoever to the costs as recorded in the financial records of ABB Thailand and ABB Vietnam.

In the case of sales of power transformers to ABB Australia, the factory policies **[CONFIDENTIAL TEXT DELETED – commercial details relating to profitability]** FCMs prepared at time of quotation, **[CONFIDENTIAL TEXT DELETED – internal procedures]**, was explained and verified.

The Commission records the following in the export visit report for ABB Thailand:

[CONFIDENTIAL INFORMATION DELETED – sales procedures and terms]

During the verification visit ABB Thailand was requested to provide copies of key documents involved in the quotation process on one transformer constructed during the investigation

¹ **[CONFIDENTIAL TEXT DELETED – transactions between ABB group companies]**
² **[CONFIDENTIAL TEXT DELETED – transactions between ABB group companies]**

period. The documents provided supported the submissions made by ABB Thailand in relation to the quotation process (confidential attachment EXP 2). [underlining supplied]³

Similarly, for ABB Vietnam:

[CONFIDENTIAL TEXT DELETED – sales procedures and terms]⁴

In the case of ABB AU's own sales and services, the Commission found as follows:

*Subject to further inquiries with the respective exporters, we found no evidence that would suggest that the transactions between ABB Australia and its suppliers were influenced by the relationship between the companies. We consider that transactions between ABB Australia and the respective exporters to be arms-length.*⁵

Resultantly, ABB Australia was truly and validly the purchaser of the power transformers concerned from ABB Thailand and ABB Vietnam.

(b) End users buy power transformers, installation and services

End users do not pay “export prices”. End users do not buy power transformers *simpliciter*. ABB Australia is not a trader of documents of title relating to power transformers and is not a distributor of power transformers. ABB Australia is a sophisticated provider of power systems. In terms of major capital equipment in the form of power transformers, this involves everything from their supply, installation and commissioning within existing networks, to the design, construction and operation of entire power networks supporting sites for mining, for industry, and for communities.

It is simply not possible to equate an export price of ABB Thailand or ABB Vietnam to the price an end user pays, nor is the scope of supply under the contract that ABB Australia has with those exporters the same as that with its end user customers. ABB Australia supplies the products, further materials to complete the products, and elaborate services to complete and install the goods under contract with its customer.⁶ These supply and installation services cover the period from

[CONFIDENTIAL TEXT DELETED – trading terms] to final customer acceptance. In a simpler example, these include:

- off-loading and customs clearance including all quarantine inspections;
- loading at port for transportation to installation site;
- road transport of main tank and accessories from port to installation site (typically by way of two or three prime movers for the main tank, two or more separate semi-trailers or B-double vehicles for accessories);
- unloading by crane and positioning main tank on foundations;
- assembly of complete transformer with all working parts/accessories including, but not limited to, **[CONFIDENTIAL TEXT DELETED –details of transformer assembly by ABB Australia]**;
- connection of all secondary wiring;

³ ABB Thailand exporter visit report, confidential version, at pages 14, 15 and 16.

⁴ ABB Vietnam exporter visit report, confidential version, at pages 14, 15 and 16.

⁵ Public record document 095 – *Verification Report Importer ABB Australia* at page 15.

⁶ As requested by the Commission, this letter includes a copy of an example contract between ABB Australia and one of its customers – see 5 below **[CONFIDENTIAL DOCUMENT]**.

- supply transformer oil;⁷
- vacuum fill and process;
- site acceptance testing;
- restoration of paint finish following transport and assembly; and
- on-going warranty and whole of life maintenance programmes if required under terms of tender.

The price the customer pays is not the export price. The customer pays ABB Australia's price for the procurement of the subject power transformer/s and of assembling and installing them on site, with all attendant interconnections, commissioning and testing.

We continue to maintain that the Commission's attempt to look through ABB Australia as if it were not there, and its conflation of the concept of different purchasers to include ABB Australia's customers, involves an error of law.

(c) Contracts are clearly separate and independent

ABB Thailand and ABB Vietnam sell power transformers directly to ABB Australia. ABB Australia sells power transformers it purchases from ABB Thailand and ABB Vietnam to its customers. ABB Australia assumes possession and takes title to those power transformers. ABB Australia transfers title to those power transformers upon practical completion of its supply and installation contract with its customers.

ABB Australia is not the agent of its end user customers in the acquisition of the power transformers. ABB Australia's customers have no beneficial interest in the power transformers supplied to them prior to the time at which legal title is transferred.

(d) Legislative amendment

We urge the Commission not to undo its arm's length transaction findings, and not to ignore the contractual terms of the relevant contracts, and not to breach Australian law, by considering that the question of whether "*export prices differ significantly among different purchasers*" can be assessed by comparing export prices as if those export prices applied to purchasers that were not ABB Australia.

With respect, the extension of Section 269TACB(3) in that way is a matter for the Australian Parliament, not the Commission.

Consistent with the above, our clients do not accept that their export prices can be compared based on the ultimate end users of the power transformer and not on the basis of the purchasers with whom they negotiated the export price and to whom they sold the power transformers concerned.

With this preface in mind, we now turn to the specific questions that the Commission has asked of our clients.

2 Revenue figure in respect of individual unit [CONFIDENTIAL TEXT DELETED – number]

The first question in the Commission's email of 5 November is the following:

⁷ Note that oil itself, as must be supplied and sealed in the transformer by ABB Australia, can constitute as much as [CONFIDENTIAL TEXT DELETED – number]% of the contract price for the whole scope of works.

[CONFIDENTIAL TEXT DELETED – Commission’s request for information about ABB costs and profitability, containing details of ABB’s confidential commercial information]

[CONFIDENTIAL TEXT DELETED – ABB’s response to Commission’s request for information about ABB costs and profitability, containing details of ABB’s confidential commercial information]

3 Difference between EP/CTMS ratios advised on 9 and 29 October

The next question in your email of 5 November is the following:

[CONFIDENTIAL TEXT DELETED – Commission’s request for information about ABB costs and profitability, containing details of ABB’s confidential commercial information]

[CONFIDENTIAL TEXT DELETED – ABB’s response to Commission’s request for information about ABB costs and profitability, containing details of ABB’s confidential commercial information]

The point of the chart in our 27 August 2014 letter was to indicate to the Commission that an analysis of ABB Thailand’s data that was consistent with the test enunciated in Statement of Essential Facts No 219 provided evidence that contradicted the results of the Commission’s EP/CTMS ratio. The Commission’s EP/CTMS ratio does not measure estimated costs and pricing, which the Commission indicated was its objective:

The approach of using the ratio of export price to the full cost to make and sell was considered the most meaningful method available for comparison of export prices for power transformers. The Commission considers that this approach is reasonable for analysing export price patterns because the estimated cost to make and sell the goods was clearly a consideration for manufacturers when pricing the goods.⁸ [underlining supplied]

[CONFIDENTIAL TEXT DELETED – information about ABB price determination] On 29 October we submitted all of the final quotation FCM data, which was very laboriously collected by both ABB Thailand and ABB Vietnam, **[CONFIDENTIAL TEXT DELETED – information about ABB costs and profitability]**. This demonstrates the price behaviour of the ABB companies, based on exchange rates and other cost parameters that they expected to apply to the transactions concerned.

Nonetheless in our letter dated 9 October 2014 we looked at this issue from a different angle. We did this by providing a chart tracking full up actual costs and pricing, describing it as:

[CONFIDENTIAL TEXT DELETED - information from spread sheet prepared by Commission in relation to ABB costs sand prices].⁹

We did so in order to establish that using the measure of actual prices compared to the actual costs of the contractual bargains constituted by the sale of each power transformer by ABB Thailand did not fail the Commission’s “*differ significantly*” test, *viz*:

[CONFIDENTIAL TEXT DELETED – methodology that Commission has not disclosed to interested parties]¹⁰

The chart we provided to demonstrate this compares the full up costs of ABB Thailand’s compliance with its contractual obligations to ABB Australia against the full up revenue it received for doing so.

⁸ *Statement of Essential Facts No 219*, page 46.

⁹ Letter to the Commission on behalf of ABB Thailand dated 9 October 2014, at C6. The row references are references to the Commission’s own final spreadsheet for ABB Thailand.

¹⁰ Letter from the Commission to Moulis Legal dated 17 September 2014, at Attachment A.

This was a way of showing that the Commission's EP/CTMS ratio presented an incorrect impression of the outcomes of ABB Thailand's price decisions.

We note that at our meeting on 29 October there was a concern on the part of the Commission officials that a correct application of a test intended to consider whether "*export prices differ significantly*" would be to use export prices for that purpose, and that our chart used the actual contract data and factory costs. Whether or not the explicit use of "*export prices*" is a necessary feature of such a consideration, we wish to point out that working out whether "*export prices differ significantly*" is only one part of a two part test under Section 269TACB(3).¹¹ The second part of the test asks the Minister to consider whether those differences make the methods referred to in Section 269TACB(2) "*inappropriate for use*".

In the case of ABB Thailand, the Commission formed the view that export prices differed significantly on the basis of **[CONFIDENTIAL TEXT DELETED – outcome of application of methodology to ABB Thailand]**, which were referred to as follows:

[CONFIDENTIAL TEXT DELETED – outcome of application of methodology to ABB Thailand].¹²

The Commission also advised that:

[CONFIDENTIAL TEXT DELETED – outcome of application of methodology to ABB Thailand]¹³

Thus, if the Commission is intent on using an EP/CTMS ratio to work out whether export prices differ significantly, the chart in our 9 October 2014 letter offers evidence – from the Commission's own verified spread sheets – that ABB Thailand's prices to ABB Australia for power transformers that ABB Australia supplied and installed **[CONFIDENTIAL TEXT DELETED – profitability information]**. In that context, in the circumstances of this case, we submit that it cannot be inappropriate to use Section 299TACB(2) methodologies for comparison of export prices to normal values. In other words, whether or not the EP/CTMS ratio is used for the purposes of Section 269TACB(3)(a), the use of ABB Thailand's actual prices and actual costs can then indicate that there is no inappropriateness for the purposes of Section 269TACB(3)(b).

[CONFIDENTIAL TEXT DELETED – clarification of application of methodology to ABB Thailand]

4 Impacts of movements in exchange rates during quotation process

The next question in your email of 5 November, with clarification provided in your 7 November email, is the following:

[CONFIDENTIAL TEXT DELETED – information about ABB Thailand quotations and rates of exchange]

Hedging arrangements are employed within the ABB Group and are important in dealing with currency risk. **[CONFIDENTIAL TEXT DELETED – details of policies and procedures regarding currency exchange and hedging]**

¹¹ Indeed, ABB supports the consideration of export prices, as per the words of the Section, but does not understand why the Commission does not also consider the actual purchasers as the universe amongst which prices must be shown to significantly differ, also as per the words of the Section.

¹² Letter from the Commission to Moulis Legal dated 29 August 2014, at Attachment A.

¹³ *Ibid.*

5 Contracts relating to [CONFIDENTIAL TEXT DELETED – end user name and numbers]

For clarity... it would be much appreciated if ABB Australia could provide (1) a copy of its contract with ABB Thailand; and (2) a copy of its contract with the Australian customer.

Please find enclosed [CONFIDENTIAL DOCUMENT] copies of the following documents relating to transformers [CONFIDENTIAL TEXT DELETED – numbers] as requested:¹⁴

- ABB Thailand contract with ABB Australia, [CONFIDENTIAL TEXT DELETED – ABB contracting policy and contract documents]; and
- ABB Australia supply and install contract [CONFIDENTIAL TEXT DELETED – end user name/s and type of contract used].

Having provided these ABB Thailand quotation conditions and contract terms, and ABB Australia's supply and install contract with [CONFIDENTIAL TEXT DELETED – end user names], we would like to address the questions of the contractual relationships that ABB Thailand (and ABB Vietnam) have with ABB Australia for the sale and exportation of power transformers to Australia, the passing of property in and ownership of the goods, and ABB Australia's contractual relationship for the sale and installation.

First, the Commission records the following with respect to ABB Thailand's contracts with ABB Australia:

ABB Thailand stated that all exports of power transformers to Australia were initiated by contact from ABB Australia in response to an opportunity they identified in the Australian market. ABB Thailand indicated that its contractual relationship in relation to the export of power transformers to the Australian market was with ABB Australia. It understands that ABB Australia were responsible for any contractual obligations with the end user or the ultimate purchaser of the power transformer in Australia.¹⁵

Further:

[CONFIDENTIAL INFORMATION DELETED – sales procedures and terms]¹⁶

In the case of ABB Vietnam:

Except for the sales to ABB Hong Kong, ABB Vietnam stated that all exports of power transformers to Australia were initiated by contact from ABB Australia in response to an opportunity it identified in the Australian market. It understands that ABB Australia is responsible for any contractual obligations with the end user or the ultimate purchaser of the power transformers in Australia.

ABB Australia independently identifies tender opportunities for the provision of power transformers to customers in Australia. Responsibility for tender lodgement and negotiations with the tenderer in Australia are with ABB Australia.¹⁷

Based on this evidence, and the legal terms of sale between the ABB seller and the ABB buyer, a sale takes place, with the consequent passing of title to ABB Australia as per agreed Incoterms. In terms of technical compliance, and product specification and performance, [CONFIDENTIAL

¹⁴ [CONFIDENTIAL TEXT DELETED – information about contract with particular end user]

¹⁵ ABB Thailand exporter visit report, confidential version, at page 14.

¹⁶ *Ibid*, at page 15.

¹⁷ ABB Vietnam exporter visit report, confidential version, at page 15.

INFORMATION DELETED – ABB contractual arrangements]

Moving on to ABB Australia’s supply and install contract **[CONFIDENTIAL INFORMATION DELETED – ABB contractual arrangements]** statute law property in specific or ascertained goods is transferred to a buyer at such time as the parties to the contract intend it to be transferred. Such intention is to be evinced from the terms of the contract, the conduct of the parties, and the circumstances of the case.¹⁸

Without necessarily expressing a concluded view on this matter, under supply and install contracts involving “unascertained goods” property generally passes on delivery of the goods. The obligations on ABB Australia to obtain its customer’s acceptance, and the customer’s ability to hold back final payment until such acceptance, may also suggest passing of title on a Romalpa basis (upon final payment).

Whatever may be the case, the documents – which are typical in terms of their application to imports by ABB Australia and ABB Australia’s contracts with end users - establish that:

- (a) ABB Thailand sells power transformers to ABB Australia;
- (b) ABB Australia obtains title to those power transformers;
- (c) as part of its supply and install obligation to its customer, ABB Australia independently supplies the ITK with additional material and services that make up the complete scope of supply to its end customer;
- (d) ABB Australia passes title to those power transformers to its customer at a point in time after it has separately received title from ABB Thailand (whether at delivery at site or at practical completion and final payment);
- (e) ABB Australia’s end user customer has no beneficial interest in any power transformer it has contracted to buy from ABB Australia at any time prior to the time at which legal title passes to it from ABB Australia; and
- (f) ABB Australia is not an agent of the end user in its dealings with ABB Thailand.

6 Expiry dates of quotations

...it would also be useful if you could explain the meaning and utility of the “Expiry date of quotation (or award date)” that appears on each FCM.

[CONFIDENTIAL INFORMATION DELETED – details of sales process]**7 [CONFIDENTIAL INFORMATION DELETED – inquiry about profitability]**

Another matter about which you have requested clarification in your email of 5 November, and which also relates to the impacts of movements in exchange rates, is the following:

[CONFIDENTIAL TEXT DELETED – information about ABB Thailand quotations and rates of exchange]

Our client has reviewed these FCMs and responds as follows to the Commission’s inquiries:

[CONFIDENTIAL TEXT DELETED – information about quotations and impacts on quotations]

¹⁸ **[CONFIDENTIAL TEXT DELETED – information that may identify end-user]**

There are typically a range of factors that impact on the “as booked” FCM in comparison to the final quotation FCM. Our client submits, with respect, that it does know what it is doing, and that it must have established its *bona fides* with the Commission by this time such that its explanation of why net margins change over time is acceptable.

Nonetheless if the Commission continues to think it is necessary for ABB to work out every change of any magnitude **[CONFIDENTIAL TEXT DELETED – information about costing procedures]** in a precise mathematical sense, please advise.

8 Contract-based EP/CTMS ratios

The next question in your email of 5 November, being another follow up matter arising from that meeting, is the following:

Contract numbers for each FCM that was supplied on 29 October 2014 (to allow analysis by contract)

Please find enclosed spreadsheets **[CONFIDENTIAL DOCUMENT]** that group together the power transformer units exported by ABB Thailand and ABB Vietnam according to contracts.

To conclude, ABB Thailand and ABB Vietnam stand by this submission and their previous submissions to the Commission on the topic of an “*alternative approach to dumping margin assessments*”.

We urge the Commission to accept that:

- The purchasers referred to in the expression “*export prices differ significantly among different purchasers*” are the purchasers from the exporters concerned.
- All of ABB Thailand’s and ABB Vietnam’s final quotation prices **[CONFIDENTIAL TEXT DELETED – information about quotations]**.
- It is not inappropriate to use the methods under Section 269TACB(2) to compare export prices and normal values for ABB Thailand and ABB Vietnam.
- The method that the Commission has used to compare export prices and normal values for ABB Thailand and ABB Vietnam is not a transaction to weighted average method. It is a transaction to transaction method, with zeroing.
- The practice of zeroing is not permitted by Sections 269TACB(3) and (6).

Yours sincerely



Daniel Moulis
Principal

Encs