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18 November 2014

Mr G Gleeson
Director, Operations 1
Anti-Dumping Commission
Customs House
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

By email

Dear Director

## Alleged dumping of power transformers - "potential for use of alternative approach to dumping margin assessments"

We refer to our previous correspondence on behalf of ABB group companies in this matter.

The Commission will directly know, and has been made aware in the submissions of interested parties, about the non-compliance of "zeroing" with the permissible requirements for a determination of dumping from the perspective of dispute settlement reports of the World Trade Organisation ("WTO") Dispute Settlement Body.

We have consistently submitted that the practice of zeroing is non-compliant with the WTO *Anti-Dumping Agreement* ("the ADA") and is not permitted nor facilitated by Sections 269TACB(3) and (6) of the *Customs Act* 1901 ("the Act").[1]

In our letter dated 15 October 2014 we stated the following:

> *The Commission has practised zeroing against the ABB companies in the calculation of their respective dumping margins. Australian law does not permit zeroing. The World Trade Organisation's Dispute Settlement Body has rejected zeroing. Australian agencies and policy makers, such as the Productivity Commission and the Department of Foreign Affairs and Trade,[2] have publicly stated that Australia does not use the practice of zeroing and that Australia should not adopt the practice. The Commission's own Dumping Manual is written on the basis that the practice of zeroing is not employed in Australia.* [footnote not in original]

We wish to draw the Commission's attention to the most recent rejection of "zeroing" by a WTO panel, this time in *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*.[3] In that dispute, Viet Nam challenged the use of "zeroing" by the US Department of Commerce ("DOC") in administrative reviews of duties in respect of shrimp imported into the United States from Viet Nam.

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[1] This is a legal matter, and not merely a policy matter. Section 269TACB(6) does not give *carte blanche* to ignore the margin in respect of other goods. The wording is plain.

[2] We believe the Commission would be aware of Australia's international position on zeroing under the free trade agreements with Malaysia and Korea, where Australia confirms that it does not engage in "zeroing" and that it does not expect to engage in "zeroing" in the future.

[3] WT/DS429/R, 17 November 2014.



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Viet Nam contended that this practice was inconsistent with Article 9.3 of the ADA and Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

Article VI:2 is the key legal permission given to Members to levy anti-dumping duty. It states:

> *In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*

Article VI:2 refers back to paragraph 1 of that Article. Paragraph 1 is the seminal and ruling provision relating to the determination by a Member of whether dumping has occurred. Paragraph 1 states:

> *1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another*
>
> *(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,*
>
> *(b) in the absence of such domestic price, is less than either*
>
> *(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or*
>
> *(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.*
>
> *Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.**

The chapeau to Article 9.3 states:

> *The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.*

Article 2 expands on Article VI:1 of the GATT 1994. Indeed, it contains the phrasing which – it must be assumed - Section 269TACB(3) of the Act intends to implement.[4]

The Panel upheld Viet Nam's claim that the DOC had practiced zeroing in the subject administrative reviews, and found that practice to be inconsistent with both Article VI:2 of the GATT 1994 and Article 9.3 of the ADA.

In so doing, the Panel observed as follows:

> *7.77. In prior disputes, the Appellate Body has consistently held that the text of Article 2.1 of the Anti-Dumping Agreement, as well as the text of Article VI:1 of the GATT 1994, indicate clearly that the term "dumping" is used in relation to the product as a whole, and not in*

[4] ADA, Article 2.4.2.

*relation to individual export transactions. The Appellate Body has also found that the "margin of dumping" is used in relation to the dumped "product as a whole" and must be determined on the basis of all export transactions of a given exporter or foreign producer. The Appellate Body also stressed on various occasions that the terms "dumping" and "margin of dumping" are exporter-specific concepts.*[129] *The Appellate Body has clarified that, while an investigating authority may choose to undertake multiple comparisons or multiple averaging at an intermediate stage to establish margins of dumping, it is only on the basis of aggregating all these intermediate values that the investigating authority can establish margins of dumping for the product as a whole.*[130]

*7.78. We further note that, according to the Appellate Body, these definitions of "dumping" and of the "margin of dumping" apply throughout the Agreement, including under Article 9.3, and under Article VI:2 of the GATT 1994. It therefore follows that the amount of anti-dumping duties assessed pursuant to those provisions cannot exceed the margin of dumping as established for the "product as a whole".*

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[129] Appellate Body Reports, *US – Zeroing (EC)*, paras. 127-129; *US – Zeroing (Japan)*, paras. 111-112 and 150; *US – Stainless Steel (Mexico)*, paras. 83-95; and *US – Continued Zeroing*, paras. 282-283.

[130] Appellate Body Reports, *US – Softwood Lumber V*, paras. 92-100; *US – Zeroing (EC)*, para. 126; *US – Softwood Lumber V* (Article 21.5 – Canada), para. 122; *US – Zeroing (Japan)*, paras. 108-110, 115, and 151; *US – Stainless Steel (Mexico)*, paras. 97-99; and *US – Continued Zeroing*, paras. 276-287.

[underlining supplied]

The third parties in that dispute were unanimous in their support of Viet Nam's position:

*7.70. **China** submits that, in light of the consistent and well-founded decisions by the Appellate Body, to the extent that Viet Nam has established the use of the zeroing methodology in the three administrative reviews, the application of zeroing in those reviews is also inconsistent with the Anti-Dumping Agreement and the GATT 1994.*

*7.71. The **European Union** submits that the issue of zeroing has been extensively litigated in the WTO and does not warrant repeated scrutiny. The Panel should therefore deal with it in a summary manner and uphold Viet Nam's "as applied" claims.*

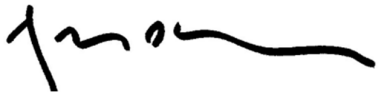
*7.72. Recalling previous Appellate Body jurisprudence with respect to zeroing in administrative reviews, **Japan** submits that the Panel should find that the zeroing methodology, as it relates to the use of simple zeroing in administrative reviews, is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:3 of the GATT 1994.*

*7.73. While not taking a position on the facts of this case, **Norway** agrees with Appellate Body rulings in previous cases that the use of all forms of zeroing in all forms of proceedings is inconsistent with the Anti-Dumping Agreement.* [footnotes omitted][5]

[5] *Ibid.*, paras 7.70 to 7.73.

Respectfully, the ABB companies reiterate their position that zeroing is not allowed under the Act, and again ask the Commission not to apply zeroing in its determination of dumping margins in respect of the subject exports from the companies concerned.

Yours sincerely



Daniel Moulis
Principal