Canberra Office
6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
Australian Capital Territory 2609
+61 2 6163 1000

Brisbane Office
Level 4, Kings Row Two
235 Coronation Drive
Milton, Brisbane
Queensland 4064
+61 7 3367 6900

Australia

facsimile: +61 2 6162 0606
email: info@moulislegal.com
www.moulislegal.com

moulislegal

commercial + international

2 March 2015

The Hon Michael Moore
Senior Panel Member
Anti-Dumping Review Panel
c/- Legal Service Branch
Department of Industry
10 Binara Street
Canberra
Australian Capital Territory 2601

By email

Dear Senior Panel Member

Review of Ministerial decision – power transformers
Interested party submission of ABB Ltd. of Vietnam

We refer to the application for review that was lodged on behalf of ABB Ltd (ABB Vietnam) on 9 January 2015.

In accordance with its rights as an interested party under Section 269ZZJ of the *Customs Act 1901* ("the Act"), ABB Vietnam wishes to supplement its application for review by way of the comments contained in this submission, as well as to address the various statements made by the Anti-Dumping Commission ("the Commission") in its letter dated 13 February 2015 ("the Commission's letter").

Specifically, as per ABB Vietnam's application, this submission will address the following findings:

- Finding 1 – the different purchasers were not the purchasers from ABB Vietnam;
- Finding 2 – export prices among different purchases did not differ significantly;
- Finding 3 – the incorrect finding that inappropriateness extended over the whole period;
- Finding 4 – the failure to apply the calculation method that was claimed to be applied; and
- Finding 5 – the incorrect determination of the "normal value".

At the outset of this submission, however, we are required to emphasise that the allegation that ABB Vietnam would intentionally dump power transformers, let alone "mask" such actions, is erroneous and deeply troubling to our client.

ABB Vietnam is a good corporate citizen that competes fairly.

ABB Vietnam cooperated freely and comprehensively with the Commission during the investigation, offering the Commission all assistance and every minutiae of information that was requested of it. The information referred to in this submission bears this out.

Finding 1 – the different purchasers were not the purchasers from ABB Vietnam

ABB Vietnam considers that the finding that its export prices *"differ[ed] significantly amongst different purchasers"* was not the correct and preferable decision. ABB Vietnam's submissions in this regard may be summarised as now follows:

A The finding that *"export prices differ significantly amongst different purchases"* is a threshold question to the application of the transaction to weighted average dumping determination methodology ("T-W methodology") under Section 269TACB(3).

B As a matter of legal interpretation, the "purchaser" referred to in Section 269TACB(3)(a) must be the purchaser in the transaction from which the export price was derived. Any other entity is not the "purchaser" and therefore, export prices cannot be said to differ between that other entity and any other entities.

C All export sales made by ABB Vietnam were found to have been made in arm's length transactions and, therefore, the export price for each export transaction was determined to be the invoice price between ABB Vietnam and its customer, in accordance with Section 269TAB(1)(a) and (c).

D ABB Vietnam only sold its power transformers to two customers – ABB Australia and ABB Hong Kong. These are the purchasers for the purpose of Section 269TACB(3)(a).

E In making its determination under Section 269TACB(3)(a), the Commission erroneously considered ABB Australia's customers to be the "purchasers" for the purposes of Section 269TACB(3)(a).

F Accordingly, the Commission's decision to apply the T-W methodology under Section 269TACB(3)(a) was incorrect, because it was not based on a determination of whether export prices differed between different purchasers, but rather, on a determination of whether export prices differed depending on who was the customer of the purchasers.

The Commission's letter states the following in relation to these points:

> *7.1.8 The Commission explained at Confidential Attachment 10 of REP 219 how it examined the export price differences at the point of export (FOB) and after having regard to the particular Australian purchaser that were the customers named in the contracts. The Commission considers that the word 'purchasers' in s. 269TACB(3) is capable of being read more broadly, to include those Australian customers, and it need not be confined to direct importers only. The Commission's view is that it would be too narrow, and in this case inappropriate, to read down s. 269TACB(3) as being confined to only those entities involved in the purchase of the goods directly from the exporter, especially when that entity is related to the exporter. Such narrow interpretation could also allow for 'masking' of a targeted dumping situation – all that would need occur is for an intermediary to be placed in the sales transactions so it becomes the direct purchaser but everything else may remain unchanged, including the price differentiation between purchasers, regions or periods.*
>
> *7.1.9 The involvement of a related party as an intermediary in the transaction between manufacturer and purchaser should not, in the Commission's view, preclude the Commission from testing whether export prices differ significantly among different purchasers, regions or periods for the purpose of s. 269TACB(3)*
>
> *…*

> *7.1.11 Transactions involving the export sale of power transformers to Australia involve manufacturers, Australian purchasers, and sometimes intermediaries. In all cases the parties are aware of the technical specifications of the unit and the identity of the parties involved in the manufacture and export sale of the unit. In the case of ABB Australia's sales the negotiations involve the Australian purchaser and ABB Australia, and ABB Australia and ABB Vietnam. However, it is reasonable to expect the negotiations between ABB Australia and ABB Vietnam must consider the requirements of the Australian purchaser and the conditions of competition particular to that purchaser's requirements and tender process.*

ABB Vietnam needs to correct a number of matters in this regard.

Firstly, ABB Vietnam is not certain what is meant by the reference to *"customers named in the contracts"*. The export contracts were between ABB Vietnam and its customer (ABB Australia or ABB Hong Kong), in which ABB Vietnam is the vendor and ABB Australia or ABB Hong Kong is the purchaser. The contract between ABB Australia and its own customers is a completely separate agreement to which ABB Vietnam is not a party.

Secondly, the Commission has not understood the nuance of ABB Vietnam's position. We do not submit that the *"purchaser"* for the purposes of Section 269TACB(3)(a) would always be the importer, but that the purchaser is the purchaser in the transaction from which the export price is derived. We note in this regard, where such transactions are found not to be arm's length then the Minister may determine the export price in accordance with Section 269TAB(2), in which case the relevant transaction used for the determination of the export price would be between the *"importer and a person who is not an associate of the importer"*. Under such circumstances, the purchaser would be the person to whom the importer sells the product.

The suggestion that the Commission can pick and choose between any purchasers in a train of transactions for the purposes of Section 269TACB(3)(a) is unprincipled. It cannot be the case that a comparison of export prices among different purchasers can be made using the prices that they did not pay. The Commission's claim that they can use whomever they like as the "purchaser" for Section 269TACB(3) purposes is rejected.

Thirdly, and this is interrelated to the issue discussed in the preceding paragraph, the concept that a company might easily "place" an intermediary within the sales transaction so that it somehow avoids Section 269TACB(3) scrutiny is, with respect, far-fetched. In any case, up until this investigation there was no usage of the Section in anti-dumping practice in Australia. No company, or not at least the ABB companies, would set up a sales system to sidestep the application of Section 269TACB(3), especially when no one had any idea that the Commission would chose to use it as it has done.

In any regard, we note that if such a scheme were in place, it would be uncovered through the importer verification process. In considering the arm's length nature of sales between the exporter and importer, the Commission considers, amongst other things, the profitability of those sales and whether the relationship between them affects the price in the transaction between the two entities. And if the Commission has some problem with this, then perhaps a legislative "solution" might be proposed and debated, instead of the "long jump" over the law - that seems to have occurred on this occasion - in order to get from policy to outcome.

We also need to correct the inference that ABB Australia is a mere intermediary of ABB Vietnam. This is emphatically not the case. ABB Australia operates as an independent entity, and has done so for decades. Its role in the Australian market is much bigger than simply shipping in power transformers. It engages fully in the tender process; in the assembly of the complete transformer; at site acceptance testing, vacuum fill and processing; integration into the overall power system and ongoing warranty and life-maintenance programs; among other things. If the ADRP requires further information in this regard, we would ask you to review the submission on behalf of ABB Vietnam and

ABB Limited of Thailand ("ABB Thailand") entitled *Alleged dumping of power transformers – "potential for use of alternative approach to dumping margin assessments"* dated 11 November 2014, as well as the ABB Australia *Importer Verification Report* dated September 2013 (the Verification Report").[1] ABB Australia's prices to its customers are its own concern, and ABB Vietnam fully expects those prices to be at a cost and profit margin well above the export price that it pays to ABB Vietnam.

Fourthly, ABB Vietnam is dismayed by the Commission's point of view that *"it is reasonable to expect the negotiations between ABB Australia and ABB Vietnam must consider the requirements of the Australian purchaser and the conditions of competition particular to that purchaser's requirements and tender process"*. The implication of this statement appears to be that because ABB Vietnam and ABB Australia are related, then ABB Vietnam and ABB Australia will collude in order to target particular Australian customers. If that is the implication, then our client submits that it is an outrageous implication that is wholly unsupported by evidence.

ABB Vietnam was subject to a rigorous verification process. As per page 11 of the Verification Report, the sales process is described as follows:

- *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.*

  …

- [CONFIDENTIAL TEXT DELETED – as redacted from original]

Importantly, as we have stated a number of times, the Commission accepted that ABB Vietnam's sales to its importers were arm's length. This is a legal finding, which has legal consequences. Section 269TAA of the Act provides that the purchase or sale of goods shall not be treated as an arm's length transaction where, among other things:

> *…the price appears to be influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller…*

In finding that ABB Vietnam's export sales were arm's length, the Commission made a finding that the price was not influenced by the relationship between ABB Vietnam and its customers. This was a finding that was based on the facts that were verified by the verification teams who visited ABB Australia and ABB Vietnam. The case that the Commission now presents, that ABB Vietnam has somehow targeted customers of ABB Australia, contradicts this earlier finding, in the sense that it implies that the price between ABB Vietnam and ABB Australia is somehow modified in order to win specific tenders to which ABB Australia responds here in Australia. The former position – that ABB Vietnam and ABB Australia conducted business on an arm's length basis - was determined on the basis of the verification of the records and practices of both ABB Australia and ABB Vietnam. The latter position is an assumption that is based on no evidence. We would not wish to think that it had arisen merely because it supports the Commission's application of punitive anti-dumping measures against ABB Vietnam.

ABB Vietnam reiterates that there was no basis to consider the customers of ABB Australia to be "purchasers" within the meaning of that term in Section 269TACB(3). Moreover, the mischaracterisation of ABB Australia as an "intermediary" is grossly misleading.

Accordingly ABB Vietnam concludes that the Commission's decision to apply the T-W methodology was incorrect, as it had not established that export prices differed significantly between different

[1] Files No. 189 and No. 95 on the public record, respectively.

purchasers. The correct decision therefore is to determine whether dumping occurred in accordance with Section 269TACB(2)(b), which results in a dumping margin of negative 7.9%.

Finding 2 – export prices among different purchases did not differ significantly

In alternative to the submission made under Finding 1, ABB Vietnam submitted that:

A The export prices (by which we mean "export price-CTMS ratios") which the Commission determined to be significantly different were not significantly different, nor were they particularly unique.

B The test used by the Commission to determine whether export prices differed significantly did not even consider export prices, but rather only considered the export price-CTMS ratios calculated by the Commission.

The Commission's letter refers back to the Commission's consideration of export prices in Confidential Attachment 10 to *Report to the Minister No. 219 – Power transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* ("Report No. 219") and considers that the reasonableness of the approach adopted is adequately explained in Section 6.6.6 of Report No. 219. There are two points to emphasise in this regard.

Firstly, the term *"export prices"* is given meaning under the Act through Section 269TAB. Nowhere in Section 269TAB is the term export price considered to be the export price-CTMS ratio. If indeed the usages of that term in Section 269TACB(3)(a) could be given a broader meaning than the definition in Section 269TAB, could that broader definition also be ascribed to the other 12 usages of *"export price"* or *"export prices"* in the rest of Section 269TACB? There is no basis for such an outcome. Accordingly, the Commission has failed to establish export prices differed significantly, because it did not compare them.

Secondly, and without detracting from the first point, if the term *"export prices"* as used in Section 269TACB(3) can be given a broader meaning than it has under Section 269TAB, then how is the export price-CTMS ratio relevant? This is a pertinent question because the only real explanation that was given for the relevance of this metric was that given in the *Statement of Essential Facts No 219 – Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* ("SEF No. 219"). Therein the Commission took this position:

> *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.*[2] [emphasis added]

ABB Vietnam considers that the Commission adopted this position because it considered that a pattern of export prices that differed significantly could only be established if a pattern of dumping behaviour was identified. Accordingly, ABB Vietnam responded to SEF No. 219 by explaining to the Commission that all its pricing decisions were based on a full-cost modelling of the design of the transformer at the time of final quotation.[3] This full cost model ("FCM") considered **[CONFIDENTIAL TEXT DELETED – pricing model and practices of ABB Vietnam]**. Accordingly, it is these FCMs

[2] Page 46.

[3] This was something that had been explained to the Commission's verification team in November 2013, but understandably may have been overlooked when SEF No. 219 was published 10 months later.

that best represent the estimated cost to make and sell the goods at the time when ABB Vietnam was pricing the transformers it sold to ABB Australia during the period of investigation.

Based on this statement from SEF No. 219, ABB Vietnam provided the Commission with a summary of **[CONFIDENTIAL TEXT DELETED – pricing model and practices of ABB Vietnam]** for each power transformer that ABB Vietnam exported to Australia during the period of investigation. Copies of these FCMs were also provided to the Commission.[4] As evidenced by this documentation, at no time did ABB Vietnam intend to make a loss on any of its sales to Australia, including those that the Commission alleged to have been dumped in some "targeted" way.

The Commission's position then evolved in the time between the publication of SEF No. 219 and Report No. 219:

> *The Commission is of the view that the actual export price and the actual cost to make and sell data are the most appropriate values for the purposes of establishing the ratios...*[5]

The problem with this is that the "actual" CTMS used by the Commission is only known months, or years, after the pricing decision is made. Over that period of time the costs of manufacture of the power transformer may fluctuate, exchange rates can rise and fall and designs may need to be amended or corrected. Although there is some flexibility for price adjustment under the contracts, the price is generally "locked in" at the time of ordering.[6] Therefore, the "actual" CTMS does not provide any indication of ABB Vietnam's considerations at the time it prices its power transformers. Given it was this window into the mind of ABB Vietnam at the time it was setting its price that the Commission considered so meaningful, ABB Vietnam is forced to question why the Commission ultimately considered the "actual" CTMS to be of higher probative value. It has not provided any clarification in this regard.

To be clear, the CTMS used by the Commission is not representative of ABB Vietnam's estimated cost to make and sell at the time it priced the power transformers. It provides no insight into ABB Vietnam's price consideration, other than to show that despite the best intentions of ABB Vietnam a small amount of transformers were "dumped" as a result of external factors that impacted the costs to make and sell those transformers. Why this is a sufficient basis to impugn the reputation of ABB Vietnam with accusations of "targeted dumping" and "masked dumping" is entirely unclear.

The simple fact is that the export price-CTMS ratio adopted by the Commission does not achieve the thing it is meant to achieve which, according to the Commission, was to evidence the consideration of ABB Vietnam when it was pricing its transformers. Therefore, even if the term *"export prices"* as it is used in Section 269TACB(3) has a broader meaning than it is given by Section 269TAB, an analysis of export price-CTMS ratio still cannot be relevant to determining whether export prices are significantly different, nor can it provide any meaningful conclusion for the purposes of Section 269TACB(3).

ABB respectfully reinforces its submission that the Parliamentary Secretary's decision that export prices differed significantly for the purposes of Section 269TACB(3)(a) was incorrect. The correct decision was that export prices did not differ significantly and that, resultantly, whether dumping

---

[4] This information can be found if the ADRP has regard to the content of the emails entitled *ABB Thailand and ABB Vietnam – FCMs as requested by ADC email 1* through to *ABB Thailand and ABB Vietnam – FCMs as requested by ADC – email 11 – last email,* all of which were sent to the Commission on 29 October 2014. This information is, by its nature, confidential, however it is information to which the Commission has regard when making its findings as set out in its report to the Minister, as it is information that is referenced on page 56 of that report, and so it is *relevant information* within the meaning of that term as provided in Section 269ZZK of the Act.

[5] Page 57.

[6] Despite this, we still note that the Commission only considered **[CONFIDENTIAL TEXT DELETED – number]** of the total Australian sales to have prices that differ significantly and which were unprofitable, so ABB Vietnam's pricing policy is generally sound and accurate.

occurred should have been considered in accordance with Section 269TACB(2)(b), which results in a dumping margin of negative 7.9%.

Finding 3 – the incorrect finding that inappropriateness extended over the whole period

In its application, ABB Vietnam made the following submission:

A Section 269TACB(3) only operates where there are different export prices between purchasers, regions or periods, and those differences make the use of the normal dumping margin calculation methodologies inappropriate for a period ("the period of inappropriateness"). Where this is found to have occurred the Commission may use the T-W methodology "for that period", being the period of inappropriateness.

B Section 269TACB(6) only applies to the period of inappropriateness.

C In the case of ABB Vietnam, the Commission considered the period of inappropriateness to be the entire period of investigation. The period of investigation was three years, from 1 July 2010 to 30 June 2013.

D This finding that the period of inappropriateness applied to the entire period of investigation was not justifiable.

In relation to Finding 3, the Commission's letter does the following three things:

- states that:

> *in comparing export prices among different purchases, regions of periods the Commission considered all export prices for goods exported to Australia in the investigation period. This is consistent with the period (investigation period) used for comparing export prices and normal values to determine whether dumping occurred*;

- reiterates its reasoning for picking a three year investigation period at the initiation of the investigation; and

- states that ABB Vietnam has provided no compelling reason as to why the export price comparisons ought to be restricted to a shorter period of time than the full investigation period.

ABB Vietnam respectfully submits that the Commission has failed to grasp the gravamen of this review ground. The Commission appears to consider that ABB Vietnam was referring to the period in which the Commission "compared export prices" for the purposes of Section 269TACB(3)(a). This is not the case.

One of the elements required for the application of the T-W methodology under Section 269TACB(3) is that the significant export price differences determined under paragraph (a) of that Section render the use of the weighted average to weighted average ("W-W") or transaction to transaction ("T-T") methodologies "inappropriate" for a specific "period". Section 269TACB(3) expressly limits the application of the T-W methodology to this specific period. It was the finding that this period of "inappropriateness" was the entire period of investigation that ABB Vietnam challenged, not the Commission's use of the whole period of investigation for what it has termed the export price comparisons under subparagraph (a) of Section 299TACB(3).

The Commission has not been able to explain how it is able to consider that the "inappropriateness" that it found to have occurred should apply to the entire period of investigation. In this regard, we note that:

- [CONFIDENTIAL TEXT DELETED – number] of the **[CONFIDENTIAL TEXT DELETED – number]** power transformers that were found to have export prices that differ significantly for the purposes of Section 269TACB(3) were sold in the [CONFIDENTIAL TEXT DELETED – number] months between [CONFIDENTIAL TEXT DELETED – period of time];[7] and

- in this same [CONFIDENTIAL TEXT DELETED – number] month period a further [CONFIDENTIAL TEXT DELETED – number] power transformers were sold which were not found to have export prices that "differ significantly" for the purposes of Section 269TACB(3)(a).

As ABB Vietnam explained in its application, the inappropriateness that was said to infect the entire period of investigation was explained by the Commission as follows:

> *The Commission considers that the observed differences make the methods for comparison of export price and normal value under s. 269TACB(2) inappropriate for use in respect of the whole investigation period. That is, in undertaking the aggregation of each transaction-to-transaction dumping margin the differential pricing is effectively masked. The Commission considers that export prices that 'differ significantly' for certain ABB Vietnam transactions are masked and not taken into account appropriately when the weighted average to weighted average or transaction to transaction methods for determining dumping are applied. The Commission also considers that the margin of dumping particular to those sales, and the volume of those sales at dumped prices, has caused injury to the Australian power transformer industry*
>
> *In these circumstances, the Commission considers that injurious dumping would have been masked by the weighted average to weighted average or the transaction to transaction approaches to calculating dumping margins. Therefore, the Commission considers it is inappropriate to use s. 269TACB(2) for working out whether dumping has occurred in relation to ABB Vietnam export sales to Australia in the investigation period*

This reasoning will be subject to further discussion elsewhere in ABB Vietnam's submission. For current purposes, ABB Vietnam questions whether this can truly be said to justify the finding that the export prices that were found to be significantly different rendered the use of the T-T and W-W methodologies inappropriate for the entire period of investigation. ABB Vietnam would like to emphasise the following points:

- If this [CONFIDENTIAL TEXT DELETED – number] month period is considered in isolation, then the total product dumping margin – including the [CONFIDENTIAL TEXT DELETED – number] transactions which have export prices which "differ significantly" - is a no dumping margin of -[CONFIDENTIAL TEXT DELETED – number]%.

- Therefore, if the inappropriateness was the "masking" of the "differential pricing", then that masking took place during the [CONFIDENTIAL TEXT DELETED – number] month period in which the differential pricing arose. Extending the T-W methodology to the entire period of investigation is unjustified, because the remaining [CONFIDENTIAL TEXT DELETED –

[7] As for the **[CONFIDENTIAL TEXT DELETED – number]**, which was a power transformer sold by ABB Australia to **[CONFIDENTIAL TEXT DELETED – name of customer]** on **[CONFIDENTIAL TEXT DELETED – date]**, it was highly profitable and was not found to be dumped on its own numbers (the Commission calculated a "T-W" margin for that particular transformer of negative **[CONFIDENTIAL TEXT DELETED – number]**%) and therefore could not be said to have attributed to the "inappropriateness" the Commission has identified.

number] power transformers sold outside that [CONFIDENTIAL TEXT DELETED – number] month period could not and should not be considered to mask the "differential pricing" and therefore it cannot be considered to be inappropriate to use the T-T methodology for them. Accordingly, the application of the T-W methodology to the entire period of investigation is without principle or justification.

The significance of the period of inappropriateness is that it defines the period in which the T-W methodology can be applied. If it is accepted that exports that are found not to be dumped can be "zeroed" under Section 269TACB(6) following the application of the T-W methodology - which is the Commission's position - then the period of inappropriateness also defines the period in which "zeroing" can be applied. This is evident from the terms of Section 269TACB(6), which limits the operation of that Section to a comparison undertaken in Section 269TACB(3), which, as we have already established, is itself limited to the period of inappropriateness.

If it was considered that the period of inappropriateness is the [CONFIDENTIAL TEXT DELETED – number] month period, then we can see that the resultant dumping margin would be significantly different to that calculated by the Commission:

	Total FOB export price	Dumping margin	% of total FOB export price
Export transactions in period of inappropriateness	**[CONFIDENTIAL TEXT DELETED – numbers]**		
Export transactions for the remainder of the period of investigation			
Total			**-5.2%**

Note that in this case the dumping margin for the period of inappropriateness is the "zeroed" dumping margin, which the Commission considers it is able to calculate under Section 269TACB(6), whereas the dumping margin for the remainder of the period of investigation is the normal, non-zeroed dumping margin calculated in accordance with Section 269TACB(5). However, all other assumptions used by the Commission are in place.[8]

On this basis, there can be no argument that the "price differential" margins are masked – they are no longer counterbalanced by the non-dumped sales made during the period of inappropriateness – so, the Commission's perceived inappropriateness is fully accounted for in the final dumping margin. As this analysis shows, there was no factual basis and no legal justification for finding the period of inappropriateness to be the entire period of investigation.

Accordingly, ABB Vietnam reiterates its position that the decision that the "period of inappropriateness" determined under Section 269TACB(3)(b) was the entire period of investigation was neither correct nor preferable. This decision is not based on law, evidence or analysis, and has no justification.

Finding 4 – the failure to apply the calculation method that was claimed to be applied

In relation to Finding 4, ABB Vietnam has submitted that:

[8] If the ADRP is not in a position to undertake its own calculations, then may we suggest that the ADRP uses its power to direct the Commission to reinvestigate and report back to the ADRP to verify the accuracy of these numbers and percentages.

A The T-W methodology prescribed by Section 269TACB(3) allows the Minister to compare, for the period of inappropriateness *respective export prices determined in relation to individual transactions during that period with the weighted average of corresponding normal values over that period*.

B The term *"weighted average of corresponding normal values over the period"* refers to a singular value, being the weighted average of all normal values arising during the period of inappropriateness.

C The Commission calculated individual *"weighted average normal values"* equal to the singular normal value for each export price.

D In effect, the Commission applied the T-T methodology under Section 269TACB(2)(a) which requires a comparison of individual export prices with individual normal values, and simply labelled it a T-W methodology.

E It is a prerequisite of the application of the T-W methodology that the significant difference in export prices identified causes a period in which it is inappropriate to apply either the W-W methodology or the T-T methodology.

F Having used what was in fact a T-T method, the Commission should have been precluded from finding that it was inappropriate to use the T-T method under Section 269TACB(2)(a). Resultantly, the outcome of the T-T methodology should have been the no dumping margin of 7.9%.

The Commission's letter does not advance its position in anyway. It simply refers back to the findings made in Report No. 219. In response ABB Vietnam simply wants to emphasise that the requisite inappropriateness referred to in Section 269TACB(3)(b) is expressly related to the use of either the W-W methodology of the T-T methodology, and that it does not relate to the separate question of the "dumping margin" which is covered by Sections 269TACB(4), (5) and (6). Therefore, if it is appropriate to adopt what is in fact a T-T methodology, the "inappropriateness" required for the application of Section 269TACB(3) does not exist.

Therefore, ABB Vietnam once again submits that the decision to apply the T-W methodology was not the correct or preferable decision, because the inappropriateness required for the application does not exist, as is evident from the fact that the Commission did in fact apply a T-T methodology. The correct decision was that the Commission should have applied a T-T methodology, subsequent to which the dumping margin worked out under Section 269TACB(5) would have been negative 7.9%. As a result, the correct decision would have been that no dumping duties could be imposed on ABB Vietnam's power transformers.

Finding 5 – the incorrect determination of the "normal value"

In relation to Finding 5, ABB Vietnam made the following submissions:

A In order to publish a dumping duty notice under Sections 269TG(1) and (2) of the Act, the Parliamentary Secretary was required to be satisfied that the export price of the subject goods was less than the normal value of those goods.

B In accordance with Section 269TG(3)(d), that notice must include a statement of the respective amounts the Parliamentary Secretary had ascertained was or would be the normal value of the goods.

C Section 269TAC of the Act explains how the Parliamentary Secretary was to ascertain the normal value and Section 269TAB of the Act explains how the Parliamentary Secretary was to ascertain the export price.

D The value identified as a normal value in the anti-dumping notice applicable to ABB Vietnam was determined by adding the sum of the zeroed dumping margin to the sum of FOB export prices, and then dividing that amount by the number of power transformers ABB Vietnam exported to Australia during the period of investigation.

E This value was not ascertained under Section 269TAC of the Act.

F Consequently, the Parliamentary Secretary's decision to publish a dumping notice was unlawful because he could not have been satisfied that the export prices of the subject goods were less than the normal values, and the dumping duty notice was itself unlawful, because it did not state a normal value.

G The actual normal values ascertained by the Parliamentary Secretary at the time of the publication of the anti-dumping notice were ascertained under Section 269TAC(2) of the Act. When these are compared to the export prices ascertained under Section 269TAB of the Act, the normal value is less than the export price.

H The correct decision was that the Parliamentary Secretary could not be satisfied that the export price was less than the normal value of the goods, and resultantly he would have been precluded from publishing an anti-dumping notice.

The Commission's letter fails to address the issues that ABB Vietnam has identified. With regard to the *faux*-normal value, the Commission explains:

> *7.5.17 The Commission then sought to ensure the ascertained variable factors in the notice pursuant to s. 269TG(1) and (2) were consistent with the findings that export price of the goods was less than normal value of those goods (being the normal value of all goods exported in the investigation period) by an amount of 3.8%. Accordingly, the Commission calculated that the normal value of all goods exported to Australia in the investigation period was an amount that was 3.8% higher than the ascertained export price. To do otherwise would mean there is no remedy against the dumping the Commission had identified as causing an injury and it would require a recommendation for dumping duty notices using variable factors, and a resulting dumping duty, where no duty could be collected. The Commission considers that having made a determination of a dumping margin under s. 269TACB(3) in this case, the Minister's notices under s. 269TG which notify the results of the investigation must give effect to that determination.*

The Commission does not even try to legitimise its use of its ersatz normal value. The Commission even identifies that, if the actual ascertained normal values were used, no dumping duty could be collected. We consider that this should be sufficient to establish ABB Vietnam's position regarding Finding 5.

However, the Commission has attempted to wallpaper over the legal holes in its position by adopting the rhetoric of "policy", "remedy" and "injury". This rhetoric is flawed. It cannot overcome the fact that the position adopted by the Commission is clearly inconsistent with the architecture of the Act and has resulted in the unlawful imposition of dumping duties.

However, ABB Vietnam is affronted by the continued inferences that it has somehow acted inappropriately, and is therefore compelled to further address the Commission's position.

Specifically, ABB Vietnam wishes to expose the errors in what the Commission claims to be the legal and policy bases for its use of zeroing.

The Commission's claims regarding the legality of zeroing

As should be apparent from our submissions in relation to Finding 5, the Parliamentary Secretary could not be satisfied that the export price of the goods was less than their normal value, as he was required to be under Section 269TG(1) and (2). This resulted in the publication of an anti-dumping notice that incorrectly identified an ersatz normal value as a normal value ascertained in accordance with Section 269TAC, which it patently is not. ABB Vietnam believes that this issue arises because the Commission has used zeroing, a practice that is not permissible under WTO jurisprudence and which is inconsistent with the architecture of Australian anti-dumping law.

The Commission believes it is able to zero because:

> *Subsection 269TACB(6) is silent on how to treat goods in other [non-dumped] transactions.*[9]

The Commission interprets this silence as allowing it to ignore non-dumped transactions. ABB Vietnam would firstly submit that there is no basis for implying such a punitive position into the Act, rather if it was the intention of the parliament to allow for such a practice it would have been expressly legislated. In any regard, even if Section 269TACB(6) is silent as to what to do with non-dumped transactions, Section 269TACB(1) is not. Section 269TACB(1) provides:

> *(1) If:*
>
> *(a) application is made for a dumping duty notice; and*
>
> *(b) export prices in respect of goods the subject of the application exported to Australia during the investigation period have been established in accordance with section 269TAB; and*
>
> *(c) corresponding normal values in respect of like goods during that period have been established in accordance with section 269TAC;*
>
> *the Minister must determine, by comparison of those export prices with those normal values, whether dumping has occurred.*[emphasis added]

The Section required the Parliamentary Secretary to determine whether dumping had occurred by comparing the export price for all goods exported to Australia during the period of investigation with corresponding normal values. So, although Section 269TACB(6) may be silent on how non-dumped transactions are treated, Section 269TACB(1) is not. Therefore, the Commission's interpretation of Section 269TACB(6) is inconsistent with the express terms of Section 269TACB(1). We would also suggest that Section 269TACB(6) is silent about the case where the normal value is less than the export price precisely because those products are not dumped.

ABB Vietnam notes that such a reading is consistent with WTO jurisprudence. The Appellate Body has previously ruled that the amount of dumping duties imposed cannot be in excess of the margin of dumping for "the product as a whole", in accordance with Article VI(2) of the *General Agreement on Tariffs and Trade* ("GATT") and Article 9.3 of the *Anti-Dumping*

[9] The Commission's letter, paragraph 7.5.13.

Agreement ("ADA").[10] It is not ABB Vietnam's intent to go into detail regarding this WTO jurisprudence but, suffice it to say, zeroing in any form conflicts with such a requirement, because measures imposed in accordance with a zeroed margin will always be more than the margin of dumping for the "product as a whole".[11] Given that the Act implements Australia's obligations under the GATT and the ADA, and its architecture is based on those international obligations, we would suggest that this is why zeroing so offends against the operations of the Australian anti-dumping law, and creates inexplicable outcomes, like the use of a normal value which is not actually a normal value. The architecture of Australian anti-dumping law is premised on the basis that a single, "whole of product" anti-dumping margin will be calculated.

The normal value issue simply does not arise if the Commission was to determine whether dumping had occurred in accordance with Section 269TACB(1), which is to say if that comparison was made on the basis of all export prices in respect of goods the subject of the application exported to Australia during the period of investigation, and their corresponding normal values. Therefore, we submit that the Commissions interpretation of Section 269TACB(6) is incorrect. Zeroing is neither permissible nor justified.

The Commission's claims regarding the policy underpinning of zeroing

ABB Vietnam also needs to address the policy that the Commission claims to be enacting through the use of zeroing, because this appears to be a case of the tail – in this case the policy – wagging the dog. With regard to the policy the Commission claims to be enacting, its letter states the following:

> *As noted, the Commission's view is that the purpose of this section is to allow particular dumping margins to be taken into account only. As a simple example, consider a case where dumping is occurring in relation to goods exported to one Australian state, but not other parts of Australia (i.e. export prices differ significantly among different regions). The dumping of those goods exported to that one state may be found to have caused material injury to the Australian industry. If all of the export transactions were taken into account it may be that there is no dumping margin overall. This section provides the remedy. Likewise, the Commission considers that where there are export prices that differed significantly among different purchasers or periods, a remedy is intended under this provision.*
>
> *The Commission considers this interpretation is consistent with the intention of these provisions which is to unmask and take into account export prices that differ significantly among different purchasers, regions or periods. In doing so, the Commission has identified and addressed 'targeted' or 'masked' dumping that can cause material injury. The Commission considers that this approach is available*

[10] See *United States - Final Anti-Dumping Measures on Stainless Steel from Mexico* (WT/DS344/AB/R), paras. 96 and 102; *United States - Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* (WT/DS294/AB/R), para. 130; *United States - Measures Relating to Zeroing and Sunset Reviews* (WT/DS322/AB/R), paras. 155-156; and *United States - Continued Existence and Application of Zeroing Methodology* (WT/DS350/AB/R), paras. 286-287 and 314.

[11] With regard to the Commission's comment that *"in the long history of WTO jurisprudence concerning zeroing there has been no findings made by a WTO body that zeroing is not covered by the circumstances covered by s. 269TACB(3)"*, we note that this is merely because neither the Panel nor the Appellate Body has had the chance to consider the issue. This is because targeted dumping methodologies only came into vogue after zeroing in non-targeted dumping cases was expressly rejected. As the requirements of Article VI:2 of the GATT 1994 and Article 9.3 of the ADA limit the level of duty that can be imposed in an investigation, and because "silence" is not a justification to depart from "non-silence", then it seems highly unlikely that a special exception to the "whole product rule" will be made for targeted dumping. In that light the claim, at paragraph 7.5.14, that the Commission's use of zeroing is "consistent" with WTO jurisprudence, is completely incorrect and misleading.

under Australian law and that it is consistent with WTO jurisprudence, as noted above. [12]

The Commission considers that the purpose of Section 269TACB(3) is *"to unmask and take account of export prices which differ significantly among different purchases, regions or periods".* The Commission then considers that its interpretation of Section 269TACB(6) provides a remedy to such an occurrence. As should be apparent from the bulk of this submission, the Commission's view that Section 269TACB(6) allows it to take into account "particular dumping margins" does not reflect its practice. The Commission has taken into account all dumping margins – irrespective of whether they were determined to be "targeted dumped" under Section 269TACB(3)(a) or not – and has ignored all non-dumping margins.

In this regard, there is a mismatch between the "purpose" identified by the Commission and the "remedy" identified by the Commission. As discussed above, there were **[CONFIDENTIAL TEXT DELETED – number]** power transformers that the Commission claims to have unmasked as having *"export prices that differ significantly"* under Section 269TACB(3)(a). Only **[CONFIDENTIAL TEXT DELETED – number]** of these were dumped, and therefore only **[CONFIDENTIAL TEXT DELETED – number]** of these power transformers were included in the final dumping margin. If the purpose of Section 269TACB(6) is to remedy these specific instances of dumping, why then are the remaining **[CONFIDENTIAL TEXT DELETED – number]** transformers that the Commission found to be dumped – but not to have export prices that differ significantly - included in the calculation of the final dumping margin? Surely if, as the Commission suggests, the purpose of Section 269TACB(6) is to remedy the export price differential identified in Section 269TACB(3)(a), the inclusion of these other **[CONFIDENTIAL TEXT DELETED – number]** transformers in the final dumping margin is unfairly punitive and unnecessary. This is particularly so in the circumstances discussed in relation to Finding 2 above, in which ABB Vietnam established that it did not intend to dump any of its products, including the **[CONFIDENTIAL TEXT DELETED – number]** that the Commission has identified as having significantly different export prices for the purposes of Section 269TACB(3)(a).

As well as being irrelevant to the circumstances particular to ABB Vietnam, the example cited by the Commission with regard to the exportation of dumped goods to a particular Australian State is oversimplified, in that it does not recognise that Section 269TACB(3)(b) requires the significantly different export prices to create a period in which it is inappropriate to apply the W-W or T-T methodologies. The example also fails to recognise that, if there is some amount of dumping to other States, dumping that does not fall within the export price pattern that Section 269TACB(3) identifies and which Section 269TACB(6) is supposed to remedy, then the dumping to the non-"targeted" States will also be "remedied" by the zeroing under Section 269TACB(6), irrespective of its extent and the merits of doing so.

The Commission goes on to state that it has *"identified and addressed 'targeted' or 'masked' dumping that can cause material injury".* Again, we can see that the Commission considers that the zeroed dumping margin, ie the remedy, is designed to address the "injurious" masked dumping, being the export transactions which were found to have significantly different export prices. Elsewhere, the Commission has explained that the *"margin of dumping particular to those sales, and the volume of those sales at dumped prices has caused material injury to the Australian industry".*[13] So again, we can see that it is the materially injurious nature of these particular transactions, **[CONFIDENTIAL TEXT DELETED – number]** in total, which the Commission considers Section 269TACB(6) operates to remedy.

[12] Paras 7.5.13- 7.5.14.
[13] Confidential Attachment 10, page 4.

> In this regard, ABB Vietnam notes that if a dumping margin had been worked out where all results but those of the **[CONFIDENTIAL TEXT DELETED – number]** "masked" and "materially injurious" export transactions were zeroed, the dumping margin would have been **[CONFIDENTIAL TEXT DELETED – number]**%, which is *de minimis* under the terms of Section 269TACB(1)(b)(ii). Resultantly, we are forced to question on what basis these particular transformers were considered to be materially injurious, and furthermore, why it is appropriate to remedy that injury with a dumping margin that was more than double the dumping margin attributable to the "targeted" export transactions.
>
> With regard to the "injury" point, we also note that the Commission has not analysed whether these **[CONFIDENTIAL TEXT DELETED – number]** "targeted" sales were actually awarded in tenders in which the Australian industry participated. Surely, given the punitive nature of the zeroed margin, and the resulting dumping margins, it was incumbent upon the Commission to determine whether this was the case.

In terms of more general policy, ABB Vietnam questions what the benefit is of imposing dumping duties on ABB Vietnam's power transformers on the basis of the Commission's findings. The vast majority – indeed, **[CONFIDENTIAL TEXT DELETED – number]** – of these items were found not to be dumped, and were clearly competitive on their own merits. We would also emphasise that at the time when the price was crystallised for the remaining **[CONFIDENTIAL TEXT DELETED – number]** transformers, including the **[CONFIDENTIAL TEXT DELETED – number]** that the Commission considers to have been "masked", ABB Vietnam fully intended to earn a profit, which, but for extraneous circumstances, would have meant that they were not dumped either. ABB Vietnam is a good corporate citizen which manufactures a product that is highly valued by the Australian market. ABB Vietnam competes fairly in order to make sales to the Australian market. Why then, is ABB Vietnam being subject to the imposition of dumping duties in these circumstances?

We are once again reminded of the statement made by Nicholas J, regarding the purpose of the anti-dumping system:

> *Further, I do not agree with Capral that the purpose of Part XVB of the Act is "to protect Australian industry". The purpose of Part XVB is far more complicated. It is apparent from the scheme of Part XVB that the legislature has sought to strike a balance, as the relevant international agreements no doubt seek to do, between various interests including not only those of Australian industries but also other WTO members and their own domestic industries, Australian consumers (in the broadest sense of that word) who may have an interest in acquiring imported goods at the lowest available prices and Australian exporters that supply their goods to other countries that are also members of the WTO.*[14]

Contrary to the words of Nicholas J, the Commission appears to have zealously embraced a policy that exclusively considers the interests of the Australian industry and is blind to the integrity and the commerciality of the exporter concerned.

****

In summary, ABB Vietnam reiterates its submissions that the basis put forward to the Parliamentary Secretary for the publication of the Section 269TG notices, and the notices themselves, are invalid.

The decision was itself driven by an ill-considered policy.

The decision was based on a misinterpretation of Section 269TACB(6) which conflicts with the terms of the Act and which does not allow the Minister to ascertain a normal value under Section 269TAC.

[14] *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 (30 August 2013)

The correct decision was that the Parliamentary Secretary compare all ascertained export prices with all ascertained normal values, and on that basis determine that ABB Vietnam had not dumped the power transformers it exported to Australia.

Conclusion

On behalf of ABB Vietnam, we respectfully request that the ADRP recommend to the Minister that he revoke the reviewable decision and substitute a new decision to be specified by the ADRP, being either:

(a) the variation of the relevant notices by way of the exclusion of any references to exports from ABB Vietnam from those notices; or

(b) the revocation of the relevant notices and substitution of them by notices that do not refer to exports from ABB Vietnam.

We thank you for your consideration of this submission.

Yours sincerely

Alistair Bridges
Senior Lawyer