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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 our previous letters on this topic dated 27 August and 4 September on behalf of our client ABB Limited of Thailand (“ABB Thailand”).

A The Commission’s procedures concerning this matter

On 17 September 2014 we received your correspondence setting out the further views of the Commission on the “*potential for use of alternative approach to dumping margin assessments*”, accompanied by spread sheets demonstrating the “*alternative approach*” to the dumping margin assessment for ABB Thailand. Those views and assessments are adverse to our client.

The letter advises as follows:

Given the timing of this letter is very close to the due date for the statement of essential facts (SEF) to be placed on the public record, the Commission considers it is reasonable for ABB Thailand to provide comments on this letter and confidential attachments by the same date that responses to the SEF are due.

Before we had received the letter, and despite the Commission’s letters dated 20 and 29 August 2014, our client was faced with a deficit of information. The Commission had not explained the situation for our client’s benefit in a direct and upfront way. It was only when we received the 17 September letter that the thinking and internal activities of the Commission were fully revealed to us.

Our client has adopted a most transparent approach in relation to the unusual developments concerning the “*potential for use of alternative approach to dumping margin assessments*” in the terms of the Commission’s Note for File dated 15 August 2014. Up until the date of the 17 September letter our client and ourselves were uninformed as to whether the potential for the use of an alternative approach remained following our previous letters, and what that alternative approach might be in a calculation sense.

The further ability to address this matter is of course appreciated. That this unprecedented and in our view unmerited change of approach came about on the 415th day of an investigation in which ABB Thailand had always enjoyed significant no dumping margins at all relevant times is not appreciated.

The SEF was then issued on the next day after receipt of your letter.

ABB wishes to record its complaint against the way it has been treated. Quite apart from the question of the legitimacy of this adverse conclusion, the process that has been adopted has been unfair and unreasonable. It is a matter of further concern that the Commission's response to the information and submissions that we presented on ABB Thailand's behalf in our letters dated 27 August and 4 September was not evaluated as openly and as considerately as it should have been. What we mean by this is:

- that ABB Thailand has been fully cooperative at all times, and its information was fully and successfully verified by Commission officials; and
- that the Commission's change of approach was advised to ABB Thailand at a very late stage of the investigation,

which should enable and require the Commission:

- to fairly consider ABB Thailand's information and submissions, and to accept them as being credible and reliable;
- to engage with ABB Thailand if it does require any specific item of information or clarification of any matters put to the Commission by ABB Thailand; and
- not to set up insurmountable barriers to the acceptance of further evidence by ABB Thailand, and certainly not to impose verification-like requirements for such acceptance.

B The Commission's queries about ABB Thailand's response

In Attachment A to the Commission's letter dated 17 September, three criticisms were made of the information that had been provided to the Commission. We will now treat them as questions of the Commission about the information provided, and address them in order:

- 1 *ABB Thailand did not provide the data underpinning the graph above*

In this passage in the Commission's letter the graph referred to is the graph that was provided in our letter of 27 August showing ratios of **[CONFIDENTIAL TEXT DELETED – descriptions of the way in which ABB's commercial data is presented and calculated]**. The data is now attached. **[CONFIDENTIAL ATTACHMENT – details of ABB's costs and prices]**. The information in the yellow tabbed worksheets is all based on ABB Thailand's estimated costs **[CONFIDENTIAL TEXT DELETED – descriptions of the way in which ABB's commercial data is presented and calculated]** at the point of purchase order, ie "as booked", as to which please see below. **[CONFIDENTIAL TEXT DELETED – descriptions of the way in which ABB's commercial data is presented and calculated]** The information in the other worksheets is the data we originally received from the Commission (on 20 August 2014) ie before the Commission corrected that data (on 29 August 2014).

- 2 *[ABB Thailand] also did not provide an explanation of its "full cost modelling"*

The Commission's criticisms could be taken to imply that the Commission just did not know what ABB Thailand was talking about when it made its submissions on this matter in its letters dated 27 August and 4 September. We understand that there have been many changes of personnel at the Commission of late, and that therefore some of the institutional memory may be missing. If the Commission cannot recall the nature of ABB's business and the operational models it employs, despite being advised of these things over the course of three verifications extending over two and a half weeks, in Australia and overseas, and in numerous documents that have been provided to the Commission, then that cannot be considered to be a failing on ABB Thailand's part. At the very least we invite the Commission to refresh its memory by openly requesting re-explanations or clarifications of things that it may no longer recall, rather than simply dismissing what we have to say based on our knowledge of what the Commission already knows.

Full cost modelling, or "FCM", is a disciplined procedure employed by ABB group companies that are involved in the manufacture, sale and supply of power transformers.

[CONFIDENTIAL TEXT DELETED – descriptions of the way in which ABB's commercial data is presented and calculated]

If the price offer is accepted, the FCM is re-checked and augmented for any developments between the time of the offer and its acceptance, **[CONFIDENTIAL TEXT DELETED – details of post-contractual cost impacts on transformers]**, and from then on becomes the working document within which all the actual costs of the manufacture and supply are recorded **[CONFIDENTIAL TEXT DELETED – descriptions of the way in which ABB's commercial data is presented and calculated]**. The expression "as booked" refers to the time at which the purchase order is received from the purchaser under the contract.¹

[CONFIDENTIAL TEXT DELETED – descriptions of the way in which ABB's commercial data is presented and calculated]

In the ABB Thailand visit report this is recorded by the Commission:

Given the unique nature of each power transformer, pricing is determined on an individual basis. [CONFIDENTIAL TEXT DELETED – pricing details]

The FCM is the document that regulates and records costs – **[CONFIDENTIAL TEXT DELETED – descriptions of the way in which ABB's commercial data is presented and calculated]**. It is the document that underpins the independent profit seeking behaviour of the individual ABB manufacturer company concerned.

3 **[CONFIDENTIAL TEXT DELETED – Commission's comments about ABB's commercial data, containing details of that data]**

The footnote seems to us to be clearly expressed and we have no difficulty in now explaining the matters about which the Commission appears to be uncertain.

- (a) The first thing to note about the footnote is that it explains that the chart uses the costs as estimated by ABB Thailand in its FCM for each of the relevant transformers. This estimation relates to all of the costs to the FOB point at the "as booked" time. **[CONFIDENTIAL TEXT DELETED – detail of price negotiation and contracting procedures]**

¹ In this regard we wish to correct our advice at 5 of our letter dated 27 August 2014, which mistakenly advised that the "as booked" date was the contract date. **[CONFIDENTIAL TEXT DELETED – details of contract procedures]**

We note that the Commission supports its use of a CTMS to FOB export price ratio for the purposes of its consideration of whether export prices were “*significantly different*” (“targeted dumping”) in the following terms:

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.

ABB Thailand has been able to collate the costs under the FCM at that point in time because this occasion – when the sale is “booked” [CONFIDENTIAL TEXT DELETED – details about ABB Thailand accounting system]. These costs are [CONFIDENTIAL TEXT DELETED – descriptions of the way in which ABB’s commercial data is presented and calculated] As per the SEF, these are the costs that the Commission seeks to rely upon in “*analysing export price patterns*”.

- (b) Secondly, we advise that the change in the FX rate has been advised to the Commission [CONFIDENTIAL TEXT DELETED –end-user information] strong scrutiny by the Commission, and ABB Thailand therefore went to great lengths to investigate the circumstances of [CONFIDENTIAL TEXT DELETED – end-user information] estimated costs and pricing. This is further explained in D below.

C Further submissions on the Commission’s export price/CTMS ratio

- 1 In previous correspondence the Commission has presented us with charts showing a ratio of ABB Thailand’s export price of exported power transformers against the cost to make and sell of each of those transformers.
- 2 At the outset please note that ABB Thailand only had one purchaser of its transformers, namely ABB Australia. Therefore an assessment of whether ABB Thailand’s export prices differed significantly among different purchasers can only come to one conclusion – that there was only one purchaser and therefore Section 269TACB(3) can have no application.
- 3 We also continue to reject the proposition that the Commission’s export price-to-CTMS ratio is an appropriate measure of price behaviour in a targeted dumping context. The Commission now states, in the SEF, that the approach that should be used is one which considers the “*estimated cost to make and sell the goods*” in terms of the exporter’s consideration “*when pricing the goods*”. The make-up of the data used by the Commission in its export price to CTMS ratio at the FOB level does none of these things. It uses actual costs, not estimated costs. It ignores a very important part of the selling cost of the goods, namely all costs past the FOB point. The price it uses is not the one that was negotiated when pricing the goods. Instead it is the price received a long time later.
- 4 It is for these reasons that we delivered to the Commission, in our letter dated 27 August 2014, a comparison of estimated cost to contract pricing. As it turns out, ABB Thailand and the Commission are in agreement that this is the correct manner to approach such a consideration, because the SEF now advises that this is exactly what the Commission wants in order to undertake its analysis of whether prices “*differ[ed] significantly*”. Therefore we continue to rely on the second chart as set out in our letter dated 27 August 2014.
- 5 Further, we would like to demonstrate the randomness of the Commission’s export price-to-CTM ratio methodology by now presenting a further chart, based entirely on data from the same spread sheets used by the Commission to construct its own chart, which presents a

different picture of the pricing about which the Commission appears to be concerned.

6 Using the spread sheet referred to as “CA2 Australian CTMS” from the Commission’s email dated 15 July 2014, we have prepared a chart which tracks the ratio of **[CONFIDENTIAL TEXT DELETED – confidential spread sheet information]** against **[CONFIDENTIAL TEXT DELETED – confidential spread sheet information]** of each of those transformers. This comparison does not arbitrarily exclude price and cost factors past the FOB point. Even if the Commission’s analysis was a valid one, we believe that the exclusion of these factors is a distortion of that analysis because it does not take into account all of the costs and all of the revenue for the sale concerned from the exporter’s perspective. In other words, our substitute comparison for that constructed by the Commission compares ABB Thailand’s full-up revenue against its full up cost for each individual transformer concerned.

7 The chart is as follows:²

[CONFIDENTIAL TEXT DELETED – chart setting out names of end users/projects and ratios on the basis described above]

8 On this basis – which is the same basis as the one the Commission is currently relying upon but which does not exclude any part of the costs that were relevant to the revenue received, nor *vice versa*, the price behaviour of ABB Thailand in relation to its sales to ABB Australia that were then supplied by ABB Australia **[CONFIDENTIAL TEXT DELETED – end user information]** is seen to be absolutely profitable **[CONFIDENTIAL TEXT DELETED – numbers]**, and profitable on an averaged basis **[CONFIDENTIAL TEXT DELETED – numbers]**.

D Further information concerning [CONFIDENTIAL TEXT DELETED – end user information] transformers

1 We also asked our client to provide us with more information about the circumstances relating to the manufacture and supply of **[CONFIDENTIAL TEXT DELETED – number]** transformers that are shown as having **[CONFIDENTIAL TEXT DELETED – cost and revenue data and numbers]**. We would now like to explain the circumstances pertaining to those two power transformers.

2 **[CONFIDENTIAL TEXT DELETED –number]** – this was a transformer sold under a contract for the supply of **[CONFIDENTIAL TEXT DELETED – number]** transformers. The other transformers **[CONFIDENTIAL TEXT DELETED – numbers]**. **[CONFIDENTIAL TEXT DELETED – commercial details relating to profitability]** On that basis we would not have thought it to be necessary to explain the circumstances pertaining to the pricing of that individual transformer, but we will do so.

[CONFIDENTIAL TEXT DELETED – detailed commercial information about ABB Thailand costs and about currency fluctuation]

3 **[CONFIDENTIAL TEXT DELETED – number]** – this was also one of **[CONFIDENTIAL TEXT DELETED – number]** power transformers sold under the one contract. The other transformers sold under this contract **[CONFIDENTIAL TEXT DELETED – numbers]**. **[CONFIDENTIAL TEXT DELETED – commercial details relating to profitability]** On that

² **[CONFIDENTIAL TEXT DELETED – end user information]** none of those sales dropped below the 100% ratio on a full revenue to full cost basis.

basis we would not have thought it to be necessary to explain the circumstances pertaining to that transformer, but we will do so.

**[CONFIDENTIAL TEXT DELETED – detailed commercial information
about ABB Thailand costs and about currency fluctuation]**

E Conclusion

No “targeted dumping” methodology can be applied against ABB Thailand as a matter of law.

Even in a “factual” context, argued on the basis that has been put forward by the Commission, there is no evidence of behaviour of a “targeted dumping” nature under Section 269TACB, and no grounds for a finding of export prices that “*differ significantly*”.

[CONFIDENTIAL TEXT DELETED – commercial details relating to profitability]

ABB unequivocally rejects the Commission’s proposal to apply a so-called “targeted dumping” methodology and to practise “zeroing” as an aspect of that methodology so as to thereby construct a positive dumping margin for ABB Thailand. The method of calculation that the Commission proposes to use to achieve that objective, as was revealed to us on 17 September 2014, is not required to be adopted because prices cannot be said to have “*differ[ed] significantly*” among different purchasers, and because it is unlawful in any event.

ABB Thailand submits that the Commission must reverse the intention evinced in both its letter dated 17 September, and in the SEF, to adopt adverse dumping margin conclusions against ABB Thailand. We respectfully submit that the justifications and the evidence that have now been provided to the Commission for such a reversal are absolutely compelling.

The pricing behaviour and the competitive practices of the ABB group of companies in the matters under investigation by the Commission have been absolutely fair and commercially reasonable at all times, and ABB intends to fully defend the integrity of its business operations.

Yours sincerely



Daniel Moulis
Principal