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Dear Sir,

10 June, 2014

**Toshiba International Corporation ("TIC") -Response to Issues Paper No 2014/01 re:
Power Transformers**

TIC would like to offer the following comments on certain matters raised in the above Issues Paper so that the Anti-Dumping Commission ("ADC") may consider TIC's views before publishing the Statement of Essential Facts.

1 "The goods and like goods to the goods the subject of the application"

TIC has reviewed the ADC's proposed position under this heading and agrees with the ADC that there seems no reason to exclude various transformers from this dumping investigation merely because the company describes particular goods in a certain way i.e. "distribution transformers".

However, TIC believes that there is a more substantive issue under this same heading which has not been addressed in the Issues Paper. That issue is what goods should be covered by the application?

The key representation made in TIC's February submissions to the ADA related to the issue surrounding "capability of production". This issue was raised because the applicant's webpage (brochure) specified that it had capability to manufacture from "4 to 250 MVA at up to 362 kV" and "up to 250 MVA 362 kV". TIC believes capability is not the test (see below). But even if it is, what is the evidence that the applicant has tendered to the ADC concerning

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its capability to manufacture the upper end of the power transformer range beyond the capability it claims on its website? The scope of "the goods" which have been accepted for this particular investigation ("with power ratings of equal to or greater than 10 MVA and a voltage rating of less than 500kV") exceeds the manufacturing capability actually claimed by the applicant.

TIC redirects the ADA's attention to comments contained in our February submission:

"International dumping jurisprudence seems consistent on the point that anti-dumping duty should only be considered in the context of protecting that class or category of goods where the evidence demonstrates that the goods have been produced by the claimant. It is not a matter of claims for capability to produce but actual production by the applicant. Therefore where the Australian applicant does not make the actual product under consideration (the upper range referred to above) the goods cannot be like goods for the purposes of dumping law".

TIC again requests that the ADC have proper regard to what evidence exists to justify the claim by the applicant that it actually manufactures power transformers at the upper level of the range i.e. what is the maximum voltage rating for which the applicant has successfully manufactured its 250 MVA transformers?; and, what is the maximum MVA rating which the applicant has successfully manufactured for the nominal system voltage 330kV (362kV)?

Without repeating in this note the detailed submissions made in TIC's 11 February representations (important issues like capability v actuality), TIC believes that this particular issue is a "relevant consideration" and is fundamental to the scope of this investigation. Failure by the ADC to have proper regard to the relevant evidence sustaining actual current manufacturing of this upper range of power transformers would be, it is submitted, procedurally incorrect.

TIC requests that to the extent that the ADC has not already done so, that its full arguments under this heading in TIC's 11 February representations be taken into consideration by the ADC in its drafting of the Statement of Essential Facts.

2 Identification of Which Export Shipments Are Used for Dumping Margin Calculations

TIC would like to comment on the ADC's proposed position at the bottom of page 3 under the above heading. These comments are offered because TIC (and its exporter CTS in China) have requested the ADC to calculate normal values on CTS's proposed exports to Australia of goods under consideration (see e-mail correspondence dated 15 April 2014). The data to enable the ADC to do this was provided to the ADC by CTS in its exporter questionnaire in March 2014.

TIC understands that the ADC's proposed position on this point is only to calculate dumping margins exported to Australia during the investigation period. This position will adversely impact on TIC and in particular its exporter CTS. TIC believes that such a restricted reading of the provision is inconsistent with Australia's international obligations contained within the *Agreement on Implementation of Article VI of the GATT* (see submissions already forwarded on 15 April 2014) and, Australia's law for the following reasons.

Firstly, it is difficult to discern the purpose of section 269TACB if it is not intended to identify, prescriptively, the means by which the Minister is to determine whether dumping of the goods the subject of the application has occurred. Section 269TACB of Australia's Customs Act referred to in the final paragraph on page 3 of the Issues Paper identifies one means where the Minister can determine the question of whether dumping has occurred **as a matter of historical fact** in relation to goods that have been exported to Australia. Section 269TACB is in language which suggests it probably only relates to the goods the subject of the application. It is argued however that the section does not provide the only means of determining that matter.

Neither the language of section 269TACB nor the statutory scheme in which it is found suggests, in my opinion, that the Minister is constrained by that section when deciding, for the purposes of s 269TG, whether dumping is likely to occur **in the future** or whether **there has already been dumping of like goods not the subject of the application**. These situations are anticipated by reference to either the goods referred to in the opening words of sub-section 269TG(2) or the goods referred to in sub-section 269TEA(2) (which appears to comprehend the goods referred to in sub-section 269TG(1)(d)).

In my opinion, it seems that information can be presented to the Minister which is outside the investigation period. This observation is supported by the Federal Court decision of *Pilkington (Australia) Ltd v Minister for Justice and Customs [2002] FCA 770 (18 June 2002)* and the subsequent full Federal Court decision in this case where the appeal was rejected. A further relevant case on point is the Full Federal Court decision in *Anti-Dumping Authority v Deggussa [1994] FCA 1337*.

It seems from this brief analysis that section 269 TACB while critical is not prohibitive in the ADC having regard to information provided by interested parties relating to transactions not falling within the investigation period. When this legal hurdle is overcome it provides the opportunity for the ADC to legitimately consider the export data provided by the interested party (as that term is defined) CTS even though it has not exported to Australia within the investigation period.

Further detailed representations on this point have been made on 15 April 2014 which observations rely on obligations arising from the *Agreement on Implementation of Article VII of the GATT*.

CTS the proposed supplier of power transformers to TIC for the Australian market has supplied data to the ADC for its review/verification and requests that the data which it has supplied be so reviewed in accordance with what it sees as Australia's law and international obligations.

TIC/CTS therefore request that the ADC has proper regard to our observations on Australia's law above and to the further submissions dated 15 April, 2014 to the ADC based on the International Agreement.

3 Calculation of Credit Adjustment

TIC (and its exporters which have provided "exporter questionnaire data") note the ADC's proposed treatment of "credit adjustments" in the context of this investigation.

TIC (and particularly its relevant exporters) reserve their respective rights to insist on the adjustments provided by sections 269 TAC (8) & (9) of the *Customs Act 1901*.

Yours sincerely

A handwritten signature in dark ink, appearing to read "Alan Bennett". The signature is written in a cursive style with a long horizontal stroke at the end.

Alan Bennett Legal