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## **Subject: Investigation into Alleged Dumping of Power Transformers Exported to Australia from the PRC – the GOC's Position Paper**

The Government of China (**GOC**) would like to express its concern about the investigation initiated by the Australian Anti-dumping Commission (**Commission**) into alleged dumping of power transformers exported from the People's Republic of China, especially the Commission's intended refusal to consider TBEA Shenyang Transformer Group Co., Ltd. (**TBEA**) as an exporter eligible for an individual dumping rate in this investigation, on the ground that TBEA did not export the subject goods to Australia during the period of investigation (**POI**) but merely signed contracts of sale for the supply of the subject goods to Australian customers after the period of investigation.

Firstly, as the Commission would be aware, TBEA is an "interested party" to this investigation within the meaning of section 269T(1) of the *Customs Act 1901* as it is a party that is or is likely to be directly concerned with the exportation of power transformers to Australia.

TBEA has filed with the Commission a response to the exporter questionnaire. It is unclear to the GOC why, or on what grounds, the Commission would not calculate a dumping margin for TBEA based on the information that TBEA has provided in its response to the exporter questionnaire. The fact that TBEA has not exported the subject goods to Australia during the POI does not preclude it from being an "interested party" nor from having an individual dumping margin calculated for it.

Article 6.10 of the WTO Anti-Dumping Agreement (**ADA**) provides:

*"The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation."*

*In European Communities – Definitive Anti-Dumping Measures on Certain Iron or*

*Steel Fasteners from China*, the Appellate Body ruled that Article 6.10 imposes a mandatory obligation on an investigating authority unless an exception to this obligation is explicitly provided.<sup>1</sup> In that case, the Appellate Body has only identified two situations that may constitute such an exception, namely, (1) where “sampling” has been conducted by an investigating authority, and (2) where an investigating authority is not able to identify an exporter or producer.<sup>2</sup> Significantly, the Appellate Body rejected the proposition that “the situation of a known producer that does not export the product during the period of investigation” constitutes an exception to the obligation of an investigation authority to calculate individual margins for a known exporter or producer, and observed that this situation is expressly covered by Article 9.5 of the ADA.<sup>3</sup> In *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, the Appellate Body held that “known exporter or producer” “covers the exporters or foreign producers of which the investigating authority knows at the time the calculation of the margins of dumping is made.”<sup>4</sup>

Accordingly, the GOC believes that the Commission is obligated to calculate an individual dumping margin for TBEA, a known exporter and producer of the subject goods. Failing to do so will render the Australian government in breach of its WTO obligations. Under which article of the ADA, Article 6.10 or Article 9.5, such an individual dumping margin need to be calculated is a different issue.

That said, the GOC wishes to draw the Commission’s attention to the WTO obligations contemplated in Article 9.5 of the ADA. Article 9.5 provides:

*“If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product.”*

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<sup>1</sup> WT/DS397/AB/R, para. 320.

<sup>2</sup> Ibid., paras. 318-327.

<sup>3</sup> Ibid., para. 326.

<sup>4</sup> WT/DS295/AB/R, para. 255.

The Appellate Body has ruled that Article 9.5 imposes an obligation on an investigating authority to carry out an expedited review of a new exporter as long as it is established that the exporter (i) did not export the subject merchandise to the importing Member during the POI, and (ii) demonstrated that it was not related to a foreign producer or exporter already subject to anti-dumping duties.<sup>5</sup>

The GOC believes that if the Commission decides not to calculate an individual dumping margin for TBEA in accordance with its international legal obligation under Article 6.10 of the ADA, then the Commission still has an obligation under the ADA to calculate an individual dumping margin for TBEA under Article 9.5 of the ADA.

Secondly, the GOC is concerned about the fact that the **POI** has not been updated to match the eight month extension of the date by which the Statement of Essential Facts is to be published (i.e. from 18 November 2013 to 16 July 2014).

The GOC questions whether data relating to a POI of 1 July 2010 to 30 June 2013 remains current and whether it is relevant and sufficiently reliable to be the basis on which a decision to impose anti-dumping measures may be made. That is, it is questionable whether findings of dumping or injury or causation in 2010, 2011, 2012, or even 2013 could be relied upon to decide whether exports occurring in 2014 are at dumped prices or causing injury. It is for this reason that Article 5.10 of the WTO Anti-Dumping Agreement requires that investigations should be completed within twelve months and in any case within eighteen months of its initiation.

Finally, the GOC is of the view that in its application of the Australian anti-dumping rules, the Commission is responsible to ensure that the rules are not applied inconsistently with WTO rules. Further, it is certainly in the interest of the Commission that the rules are not applied in a way that discourages exporters and other interested parties from active cooperation in future investigations. The GOC would like to kindly request the Commission to seriously consider TBEA's active participation and full cooperation since the start of the investigation, and to accept TBEA as an exporter eligible for an individual dumping rate.

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<sup>5</sup> Ibid., para. 321.