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Dear Sir,

18 August,2014

Power Transformers-Toshiba International Corporation ("TIC") -Response to "File Note" re: Potential Use of Subsection 269 TACB (3) Customs Act ("the Act")

TIC and its respective exporters appreciate the opportunity to respond to the Anti-Dumping Commission's ("ADC") "File Note" dated 15 August, 2014 concerning the above topic.

It is recognised that the ADC's administrative procedures must have regard to Australia's relevant dumping legislation in ascertaining normal values, export prices and dumping margins.

Where therefore the ADC for one reason or another believes that it is required to have regard to subsection 269 TACB (3) then it must do so but subject to our comments below.

1 Observations on Natural Justice Issues

TIC and its exporters offer the following general comments on the procedural issues arising from the proposal outlined in the ADC's File Note. These points are in summary only and are communicated in this form without elaboration because of the time constraints. TIC and its exporters are happy to expand on any of the following points if requested.

In summary, the thrust of the following points is to highlight the perceived procedural unfairness arising from the course of conduct by the ADC outlined in the 15 August File Note. This perception is merely based on TIC's understanding of the ADC's intentions from the wording of that File Note.

1.1 The ADC does not provide any insight whatsoever on how it actually proposes to calculate the "weighted average" which it advises may potentially be used as an alternative approach to some or all dumping margin assessments. That is for example, will it utilise one of the "zeroing" methodologies? After approximately 12 months of investigation, TIC needs to know the case against it!

1.2 The ADC has not provided any plausible reason (or reason whatsoever) for proposing the potential usage of subsection 269 TACB (3) of the Act. Accordingly, interested parties cannot ascertain whether or to what extent they may be contributing to the pre-requisite reasons required by the provision. Again, TIC is ignorant of the case against it!

1.3 The time provided for affected parties to offer any considered comment is 22 August which, having regard to the fact that no one yet comprehends the proposed methodology, is grossly inadequate. This dumping investigation exceeds 12 months in duration. Communication on this potential usage should have been communicated previously. It seems unconscionable at this late stage of the investigation to announce a method of formulating the normal value which until this time has not been mentioned.

2 Observations on the Law

In determining a Normal Value there is an initial obligation to have regard to those provisions in the Australian law which enshrine Article VI paragraph 1 of the GATT 1994. Those provisions are found at section 269 TAC of the Act which relevantly provides 3 methods for determining normal value.

There is some flexibility within section 269 TAC of the Act for determining a normal value. However, this flexibility is not permitted to be exercised in an arbitrary way but rather by having regard to the conditions imposed in the prefacing words to subsection 269 TAC (2). Attachment 1 provides some insight to the "order" which should be used by administrators in ascertaining Normal Values.

A similar flexibility is contained within section 269 TACB of the Act which provides the methodology for determining whether dumping has occurred.

While subsection 269 TACB (1) anticipates that normal values (section 269 TAC)) have already been established (in accordance with one of the 3 methodologies referred to above), subsections (2) & (3) of the provision provide guidelines on the methods of comparison.

The 4 alternatives provided in subsection 269 TACB (2) of the Act are uplifted and enshrined in Australia's law from the first sentence of Article 2.4.2 of the Agreement.

The comparison methodology permitted pursuant to 269 TACB (3) of the Act is uplifted from sentence 2 of Article 2.4.2 of the Agreement.

Therefore, in any examination of the context, object or purpose of subsections 2 & 3 of section 269 TACB (particularly where there is no Australian extrinsic material), it is convenient to refer to Article 2.4.2 of the Agreement and those observations are found at Appendix 2.

3 Observations on Law arising from File Note

3.1 The ADC should certainly have regard to section 269 TACB of the Act.

3.2 In considering comparison methodologies arising from either subsection 269 TACB (2) and/or 269 TACB (3) there is a general obligation for the ADC to make a "fair comparison" between export price and normal value (see Appendix 2).

3.3 Where the ADC is considering comparison methodologies it perhaps could have regard to the relevant WTO jurisprudence which has determined that **normally** the two general methodologies provided within section 269 TACB (2) of the Act "shall be" used by an investigating authority (see Appendix 2).

3.4 Where the ADC is considering the comparison methodology provided at section 269 TACB (3) it should ensure that there is clear evidence in terms of the prerequisites for using that provision described at subsection 269 TACB (3) (b) and also the purpose, context and wording of the equivalent underlying Agreement provisions on which the Australian law is based (see text of second sentence to Article 4.2.2 of the Agreement).

Conclusion

To ensure that TIC and its exporters interests are fully protected it would like to initiate the verification process referred to in your e-mail of 16 April. TIC very much wants to arrange this verification meeting prior to the ADC issuing the Statement of Essential Facts. Because of the brief time period between now and then could we organise this verification with the ADC at your proximate convenience please.

Yours Sincerely

Alan Bennett Legal

Extract from Article 2.4 of the Agreement

"2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

Attachment 1 -Order for ascertaining Normal Values Paragraph 1 of GATT 1994

Paragraph 1 of Article VI of the GATT 1994 sets out 3 ways for administrators to determine the normal value of exported goods in dumping investigations.

Where an administration considers that it is not possible to find a comparable price in the ordinary course of trade for like products when destined for consumption in the exporting country then no provision in the GATT 1994 prevents the authorities from using one of the other two criteria laid out in Article VI (see Panel Report on "*Swedish Anti-Dumping Duties*" -15L/328, adopted on 26 February 1955).

The order for consideration of the criteria outlined in Paragraph 1 of Article VI has been authoritatively addressed in the "*1959 Report* of the *Group of Experts on "Anti-Dumping and Countervailing Duties"* which relevantly provides:

> "The group had some discussion on whether the criteria in paragraph 1(b(i) and paragraph 1(b)(ii) of Article VI were alternative and equal criteria to be used at the discretion of the importing country, or whether paragraph 1(b)(ii) could only be used in cases where it had not been possible to determine normal market value under paragraph 1 (a) or paragraph 1 (b) (i) of Article VI. The Group was of the opinion that paragraph 1 (b) (i) and paragraph 1 (b) (ii) laid down alternative and equal criteria to be used at the discretion of the importing country but only after it had failed to establish a normal market value under paragraph 1 (a) of Article VI..... the Group thought that no order of priority for these two criteria could be imposed but, though it might often be easier to collect the necessary information for the use of the criterion under paragraph 1 (b) (i), the use of the criterion under paragraph 1 (b) (ii) was sometimes preferable in that, since it was normal and reasonable for different prices to be charged in different markets, the use of the criterion under paragraph 1 (b) (i) could often produce misleading results. The Group agreed that the criteria under paragraph 1 (b) of Article VI could only be used where no domestic price existed as defined in paragraph 1 (a) or in cases where there were sales to the home market but where it was not possible to determine normal value from those sales, for example

because they did not fall within "the ordinary course of trade" as required by paragraph 1 (a)": *16L/978, adopted on 13 May 1959, 8S/145, 148, para. 10.*

Appendix 2 – Australia's World Trade Organisation ("WTO") Obligations

Australia as a WTO member "shall ensure the conformity of its laws, regulations and **administrative procedures** with its obligations as provided in the annexed Agreements" (our emphasis) Article XVI (4) of *Marrakesh Agreement Establishing the World Trade Organisation.*

Two of the "annexed Agreements" referred to in Article XVI (4) include the *GATT 1994* and the *Agreement on Implementation of Article VI of the GATT 1994* ("the Agreement").

It is apparent therefore that Australia's dumping law and the administrative procedures effecting this law should be in "conformity" with Australia's relevant international commitments contained in above-mentioned 2 Agreements.

The Appellate Body in *EC – Bed Linen* referred to Article 2.4 as part of the context of Article 2.4.2 as follows:

> "Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in Article 2.4".

The Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* referred to the choice available within Article 2.4.2:

> "The first sentence of Article 2.4.2 sets out the two methodologies that "shall normally" be used by investigating authorities to establish "margins of dumping". Although the transaction to transaction and weighted -average to weighted-average comparison methodologies are distinct, they fulfil the same function. They are also equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two. An investigating authority may choose between the two depending on which is most suitable for the particular investigation. Given that the two methodologies are alternative means for establishing "margins of dumping" and that there is no hierarchy between them, it would be illogical to interpret the transaction to transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted-average to weighted-average methodology."

The Panel observed in the case of *US – Stainless Steel (Korea):*

> The chapeau of Article 2.4 states that "a fair comparison shall be made between the export price and the normal value." Whatever the relationship of the fair comparison language of the chapeau to the specific requirements of Article 2.4 – an issue of dispute between the parties – it is evident to us that the provisions of Article 2.4.2 must be read against the background of this basic principle. In fact the provisions of Article 2.4.2 itself are "subject to the provisions governing fair comparison in

paragraph 4". An interpretation of Article 2.4.2 that required a Member to compare transactions that were not comparable would run counter to this basic principle."