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Director, Operations 3
Anti-Dumping Commission
GPO Box 2013
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Dear Sir, Non-C**onfidential**

Anti-Dumping Investigation – Exports of Power Transformers from China

As you would be aware, I act for Toshiba International Corporation Pty Ltd and its related bodies corporate in relation to this investigation, including the joint venture company, Changzhou Toshiba Co Ltd (CTC).

This submission is further to my client's previous submissions.

This submission addresses the following issues:

- the application of Article 9.2 of the WTO Anti-Dumping Agreement and its implications for injury analysis
- whether Wilson Transformers Company Pty Limited has responded for requests for tender in respect of which Toshiba succeeded, whether it had the capability to supply power transformers that met the requirements of those requests for tender and other requests for tender for the supply of large power transformers.

This is not addressed in Wilson Transformers Company Pty Limited's Application nor does it list those requests for tender it has won and lost nor provided any details as to why its bids were successful or unsuccessful.

These issues are further elaborated below.

Your attention is drawn to Article 9.2 of the WTO Anti-Dumping Agreement that relevantly provides:

> "*9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement*

> *have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved."* (underlining added)

There are two issues under this Article.

First, the Article requires a determination of "*all sources found to be dumped and causing injury*". Article 3.3 of the WTO Anti-Dumping Agreement is relevant in this regard as it allows "*cumulation*" where the goods under consideration are sourced from more than one country. There is nothing in the WTO Anti-Dumping Agreement that provides for "*cumulation*" where imports are from one country only.

In *EC – Fasteners (China)* the WTO Appellate Body found that the "*appropriate amount*" of an antidumping measure that can be imposed must be an individual one, not on a country-wide basis:

> "*Article 6.10 of the Anti-Dumping Agreement contains an obligation to determine individual dumping margins for each exporter or producer, except when sampling is used or if a derogation is otherwise provided for in the covered agreements. We observe that, where an individual margin of dumping has been determined, it flows from the obligation contained in the first sentence of Article 9.2 that the appropriate amount of anti-dumping duty that can be imposed also has to be an individual one. We do not see how an importing Member could comply with the obligation in the first sentence of Article 9.2 to collect duties in the appropriate amounts in each case if, having determined individual dumping margins, it lists suppliers by name, but imposes country-wide duties. In other words, unless sampling is used, the appropriate amount of an anti-dumping duty in each case is one that is specified by supplier, as further clarified and confirmed by the obligation to name suppliers in the second sentence of Article 9.2.*"

Further, the Appellate Body in *EC – Fasteners (China)* upheld a Panel finding interpreting the term "*sources*" in Article 9.2 as referring to individual exporters or producers, and not to the country as a whole:

> "*Article 9.2 of the Anti-Dumping Agreement requires that anti-dumping duties be collected on a non-discriminatory basis from 'all sources' found to be dumped and causing injury, except from 'those sources' from which price undertakings have been accepted. We agree with the Panel that the term 'sources', which appears twice in the first sentence of Article 9.2, has the same meaning and refers to individual exporters or producers and not to the country as a whole. This is indicated by the fact that price undertakings mentioned in the first sentence of Article 9.2 are accepted, according to Article 8 of the Anti-Dumping Agreement, from individual exporters and not from countries. Therefore, the requirement under Article 9.2 that anti-dumping duties be collected in appropriate amounts in each case and from all sources relates to the individual exporters or producers subject to the investigation.*"

Accordingly, neither the collection of securities pursuant to a preliminary affirmation determination and the imposition antidumping measures cannot be on a country-wide basis but must be on individual exporter basis.

Also, the imposition of antidumping measures must be on individual exporters found to be at dumped prices and causing material injury. *De minimis* supplies of the goods under consideration, even at dumped prices, cannot be causing material injury to the Australian industry, as is the case here.

Second, the Article requires the imposition of antidumping measures on named exporters. So-called "*country-wide*" antidumping measures are permitted only if "*several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned"*. Clearly that is not the case in exports of power transformers by Chinese exporters. In other words, to seek to impose "*country-wide*" measures would be in breach of Australia's international obligations under the WTO Anti-Dumping Agreement.

This clearly has implications for and affects any injury analysis.

In this regard, it is to be noted that:

> "*In EC – Fasteners (China), the Appellate Body discussed whether the exception in the third sentence of Article 9.2 would justify imposition of country-wide rates on suppliers that are all related to the State in order to avoid circumvention. The Appellate Body observed that "Article 9.2, third sentence, allows Members to name the supplying country concerned only when it is impracticable to name individual suppliers; it does not permit naming the supplying country when the imposition of individual duties is ineffective because it may result in circumvention of the antidumping duties.*"

Having regard to the foregoing, it is evident that the number of tenders that Toshiba International Corporation was successful in its bids, even assuming at dumped prices, could not conceivably have caused injury to Wilson Transformers Company Pty Limited, assuming the Wilson Transformers Company Pty Limited actually bid in those tenders and was capable supplying the power transformers in questions and met the end users requirements and evaluation criteria. This is a matter that should be raised with Wilson Power Transformers and relevant end users.

Finally, as discussed with the Commission's verification team that visited Toshiba International Corporation, there is a concern that Wilson Transformers Company Pty Limited has not bid on various projects involving large power transformers, possibly because it lacks the manufacturing ability to manufacture such transformers. Also, Wilson Transformers Company Pty Limited's application does not set out that those requests for tender that it responded to but were unsuccessful, or even successful, having regard to the fact as is commonly acknowledged that each power trans former supplied is unique as are the terms and conditions on which it is to be supplied.

Wilson Transformers Company Pty Limited should be requested to provide details on what requests for tenders it bid on, the size of the power transformers in question, whether it actually competes on the larger power transformers and if not why not, etc., and this should be verified by the Commission.

It is one thing to claim a certain capability, it is another to actually have that capability.

Also, as discussed with the verification team, there is a concern as to Wilson Transformers Company Pty Limited objective in applying for antidumping measures over an extended range of power transformers, which ties back into what requests for tender it has bid for and those that it has not bid for and what are its actual capabilities in the design, manufacture and supply of the range of power transformers to which its Application relates. This should be part of the Commission's verification of the Australian industry. Is Wilson Power Transformers' strategy given the range of power transformers is simply to lock out competitors from that whole range of power transformers the subject of the Application? This also should be part of the Commission's verification of the Australian industry and its injury analysis.

If you have any queries, please let me know.

Kind regards

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