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Dear Sir, **Non-Confidential**

Anti-Dumping Investigation – Exports of Power Transformers from China

I refer to our recent discussion regarding this investigation. As foreshadowed, set out below are a number of questions, some of which have previously been raised, that we would appreciate the Commission's response. It is acknowledged that the Commission may not be able to respond to some. However, we would appreciate the Commission's response to these queries in advance of publication of the Statement of Essential Facts so that they can be addressed before the publication of the Statement of Essential Facts.

1. ***Termination of the investigation***

   Having regard to the documents on the Commission's electronic public file, including the verification visit report for the Australian industry placed on the public file 2 August 2019, is the Commission able to advise that the investigation will be terminated and, if so, when?

2. **Australian industry verification visit report**

   (a) It is noted that in several sections of this report it is stated that WTC's records are "*reasonably*" complete and accurate. For example, in section 6.3 of the report it is stated that:

   > "*The verification team considers that WTC's CTMS data is a reasonably complete, relevant and accurate reflection of the actual costs to manufacture and sell power transformers during the period from 1 January 2016 to 31 December 2018.*" (Underlining added)

   Presumably WTC's records and data are either complete or they are not and, if they are not complete, what implications does this have? How can an incomplete CTMS and sales data be relied upon? Is this not an "*uncooperative*" Australian industry?

What is this "*reasonableness*" test and why is such a "*reasonableness*" test not equally applied to data from exporters and importers?

Is there a legal basis for such a test either under Australian domestic law or international legal requirements under the WTO Anti-Dumping Agreement?

(b) It is noted that in the verification report, injury was assessed on a volume (units) and value (i.e. sales value) basis. A number of questions arise from this assessment, namely:

- as each power transformer being supplied is unique in terms of its physical specifications and the terms and conditions on which it is being supplied, how is it logically and legally possible to make an assessment based on volumes and values without adjusting for and taking into account differences in the supply of each power transformer, both in terms of their physical characteristics and terms and conditions of supply, including testing requirements, customer specifications, voltage ratings, power ratings, project specific requirements, transport characteristics, project risk profiles"?;
- as the Commission would be aware, dumping essentially involves a product being exported, in this case to Australia, at an export price that is less than the domestic selling price of a like good in the country of export and this price differential (i.e. the "*low*" export price) is causing a material injury to an Australian industry producing "*like goods*". However, at least in the case of Toshiba, power transformers are not supplied into the Australian market by the exporter (CTC) but by the importer (TIC). Given this, it is not possible to compare TIC's prices and other terms and conditions of supply of power transformers to those of WTC for a dumping/injury analysis. Does the Commission agree and, if not why not and what relevance does TIC's prices and terms and conditions of supply have to a dumping injury analysis?;
- in the injury analysis, what are the "*like goods*" produced by WTC. The test in the verification visit report for the Australian industry refers to a "*likeness*" test. This is the wrong test. The test is whether the Australian industry produces "*identical goods*" and, if not, goods that have "*characteristics closely resembling*" those on the goods being imported. This requires, in the absence of the production of "*identical goods*", identifying the "*characteristics*" of the imported goods and, then identifying the "*characteristics*" of those produced by the Australian industry and then assessing whether the later closely resemble the former.

  Nothing to do with "*likeness*". Does the Commission agree having regard to the statutory definition of "*like goods*" and that in the WTO Anti-Dumping Agreement? Why has it not applied that test?;

  A determination of "*like goods*" requires not only to the statutory definition but also to Section TB of the *Customs Act 1901,* which defines what are the "*goods under consideration*" (i.e. those being in a consignment of goods to Australia). The description of the "*goods under consideration*" in WTC's application does not reflect this. Why not and why was such an application accepted by the Commission?;

- if the purpose of antidumping measures is to prevent material injury to an Australian industry producing "*like goods*" caused by the export of allegedly dumped goods, has the Commission analysed the alleged injury being caused at the correct level of trade, that is at the point of importation and not where the goods in question are being supplied to the Australian market in response to a tender are by importers who have added their import costs, SG&A and profit margins to the goods in question?;

- in the Australian industry visit the "*like goods*" are described as:

> "*liquid dielectric power transformers with power ratings of equal to or greater than 10 MVA (mega volt amperes) and a voltage rating of less than 500kV (kilo volts) whether assembled or unassembled, complete or incomplete*".

How does this description of the "*goods under consideration*" reflect the power transformers being exported from China? Does it and has this been verified?

An "*incomplete power transformer*" is described as:

> "*Incomplete power transformers are subassemblies consisting of the active part and any other parts attached to, imported with or invoiced with the active parts of power transformers. The active part of a power transformer consists of one or more of the following when attached to or otherwise assembled with one other:*
>
> - *the steel core;*
> - *the windings;*
> - *electrical insulation between the windings; and*
> - *the mechanical frame.*"

Is an "*incomplete power transformer*" a "*power transformer*" or something less? Is a subassembly such as a "*mechanical frame*" a "*power transformer*"? Is the application by WTC for the imposition of antidumping measures on components of power transformers exported to Australia from China?

In other words, what makes a "*power transformer*" a "*power transformer*"?

Are Chinese exporters exporting the above components of power transformers to Australia? If so, how do such exports compete with power transformers assembled by WTC from imported components and supplied to the Australian domestic market?

Are the components identified above properly classified as "*parts*" under Heading 8405.90 of the Third Schedule to the *Customs Tariff Act 1995* and not to any other preceding Heading in 8405?

- is the Commission aware that the CEO of WTC has advised, which advice is available on the WTC website, that WTC, as a high cost producer of power transformers, does not compete on price in the supply of power transformers but on other factors and what those factors are?

  The CEO claims that those competitive advantages are:

  > *"*Our costs are always going to be higher than that of firms in low labour-cost countries, but w*e focus on our strategic advantages, which are meeting local requirements, providing superior value, reducing risk in the supply chain and providing quick deliveries*".

  Which transformers is the CEO talking about – see paragraph (c) below - and does WTC deliver on these factors giving it a comparative advantage? Has this been verified by the Commission?

  It would seem from the Public Record file note on the Responses to the Australian Market Questionnaire that WTC is failing to meet its claimed competitive advantages, thereby causing its own injury and not causally linked to any alleged dumping.

  Do "*distribution transformers*" constitute "*like goods*" as per the description of the "*goods under consideration*" and have they been included/excluded from the injury analysis?

  It is noted that end-users have expressed a different view in their submissions on WTC's claimed competitive advantage. Has the Commission verified these views of end-users?

  In particular, how many power transformers has WTC supplied into the Australian domestic market of a similar size and capability as that supplied by TIC, whether that power transformer failed factory testing and, if so, how many times and how late was WTC in delivering that power transformer to the end-user? Why is this not addressed in the WTC verification visit report? Given WTC's performance, which is understood that testing failed several times and delivery was one year late assuming this understanding to be correct, why would end-users source power transformers of this nature from WTC given such performance?

  Further, WTC in its submission to the Commission dated 1 August 2019 has claimed that it was precluded from tender bids by end-users by "*very onerous restrictions*". See point 7 of WTC's submission. Were these restrictions actually onerous or merely reflected an end users' requirements it had for a power transformer to be supplied to it? Has this been investigated by the Commission – i.e. what are the "*onerous requirements*"

referred to by WTC in its submission and why WTC apparently could not comply with such "*onerous requirements*"?

(c) In an article in *CEO Magazine*, the CEO of WTC advised that:

> its "*distribution transformers are primarily for the local market while its power transformers are also shipped around the world*".

It would seem, according to the CEO of WTC, that WTC's main focus is in the Australian market on distribution transformers, while it is not in power transformers supplied to the Australian market but power transformers that it exports to overseas markets.

No mention is made of this market segmentation in the WTC verification visit report and obviously, it is relevant to the injury analysis. That is, WTC's power transformers are competing in overseas markets against other suppliers of power transformers in those markets. This is not an issue of power transformers being exported to Australia competing with any power transformers produced and exported by WTC.

Has this market segmentation been investigated and verified by the Commission and factored into its injury analysis?

This does not seem to have been addressed in Section 3.2 of the Report in the erroneous application of a test of "*likeness*", as opposed to the statutory definition of "*like goods*" and because of this there appears to be a failure by the Commission to recognise that the market segmentation mentioned above. Does the Commission intended to address this market segmentation and in its injury analysis in the Statement of Essential Facts?

(d) Price suppression

WTC has claimed that its prices have been suppressed by imports from China and this is reflected in the verification visit report.

At issue is what prices have been suppressed – that is, in relation to which power transformers? The distribution power transformers supplied to the Australian market and/or the power transformers exported and, if the latter, how is this "*relevant*"?

Further and importantly, 7.5.1 Price suppression of the WTC Visit Report the Commission states:

> *"Due to the specialised nature of power transformers it is not meaningful to use an averaged unit price in order to ascertain trends in pricing. As such the verification team has analysed the total sales values and CTMS for like goods over the injury analysis period. It was found that the CTMS was consistently higher than the sales value at ex-works across the period, and that the gap was wider after 2016:*

Due to the recognised 'specialised nature' and uniqueness of each power transformer sold and importantly WTC's stated high costs of production any analysis is likely to show a gap between costs and prices. However, this has nothing to do with alleged dumping. How can WTC's prices be suppressed when it publicly acknowledges that it is a high cost producer of power transformers, which no doubt is reflected in its prices. Simply, WTC is not competitive on it own acknowledged 'strategic advantages'. Is it the role of antidumping remedies to provide protection for high cost/high price domestic producers at the expense of end-users, consumers and the domestic economy generally?

Is it the role of antidumping measures to transfer wealth from exporters, importers, end-users, consumers and the domestic economy generally to a high cost, anticompetitive domestic producer? Has this been addressed by the Commission?

3. CTC verification visit report – relevance of domestic sales

The key word in the determination that the Commissioner is not satisfied that CTC's domestic sales data and CTMS is "*complete, relevant and accurate*" is the word "*relevant*".

The issue is how logically can "*all*" of CTC's domestic sales of power transformers and its CTMS for such power transformers be "*relevant*" when, as it is commonly acknowledged, that all power transformers are unique and the terms and conditions on which they are supplied are unique.

What is the "*relevance*" of "*all*" of CTC's domestic sales and CTMS to its exports of power transformers to Australia when appropriate adjustments have not been made to account for domestic sales and export sales to Australia to ensure a "*fair comparison*". This would require an adjustment to each domestic sale of a power transformer and its CTMS to ensure that each is comparable to each power transformer exported to Australia by CTC. Absent such adjustments, a "*fair comparison*" between power transformers supplied on the domestic market and those supplied for export to Australia cannot be made.

In this regard, determining a weighted average dumping margin is absurd and fails to take into account the unique nature of the power transformer industry, both in terms of exports and domestic sales. How does the Commission justify this approach with Articles 2.1 & 2.2 of the WTO Anti-Dumping Agreement?

What is the "*like product*" having regard to the definition of "*like goods*" in section 269T(1) of the *Customs Act 1901*? What are the characteristics of the power transformers being exported to Australia and what "*characteristics*" of domestic sales of power transformers by CTC "*closely resemble*" those of such exports? This does not seem to have been addressed.

This would seem necessary to determine which domestic sales by CTC are "*relevant*" for the purposes of comparison with exports of power transformers by CTC. A weighted average dumping margin that fails to make a "*fair comparison*" between domestic sales of power transformers in China with export sales of power transformers on power transformer-by-power transformer fails to make a "*fair comparison*" and is in breach of relevant domestic and international legal requirements.

Has such an analysis been undertaken?

If the Commission is of a different view, please provide details.

4. CTC verification visit report – profit margin

The "*profit margin*" for the constructed normal value appears to be based on the profit margins achieved by a number of cooperative exporters.

This would seem to be based on Regulation 45(b) of the Customs (International Obligations) Regulations 2015. Why has this approach been adopted? It is apparent that CTC did not make profits on the sale of the same category of goods in the Chinese domestic market during the investigation period due to prevailing market conditions. This would have been verified by the verification team. There is no legal requirement that it make profits on domestic sales. it is a commercial decision for the companies concerned and not a matter for government regulation.

Consequently, profit margins in the constructed normal value should have been based on Regulation 45(a), that is, no profit. This would be consistent not only with Regulation 45(a) but also the Commission's guidelines in its Dumping and Subsidy Manual (see pages 48 to 50). Adding a profit in the calculated normal value would simply be to create an artificial dumping margin while ignoring the competitive market conditions in the country of export.

The fact that in the circumstances of CTC no profit should be added, that aside what is unclear are who are those cooperative exporters and, more specifically, what power transformers were those profit margins based upon (e.g. distribution transformers, small power transformers, large power transformers, etc.), what were the volumes of power transformers supplied by those cooperative exporters in the Chinese domestic market, on what terms and conditions and what adjustments were made to ensure a "*fair comparison*" with the power transformers exported to Australia by CTC?

It is unclear from the CTC verification visit report that "*an amount for profit based on the weighted average of the verified actual amounts realised by cooperating exporters from the sale of like goods in the ordinary course of trade in the domestic market*" were actually comparable to the power transformers exported to Australia, on what terms and conditions they were supplied into the Chinese market or why a "*weighted average*" was actually relevant to CTC's exports of power transformers to Australia. It would be useful if the Commission could clarify this.

While Regulation 45(3)(c) of the *Customs (International Obligations) Regulations 2015* does permit the calculation of a weighted average profit based on other cooperative exporters realised on the sale of like goods in the country of export, have adjustments been made in accordance with section 269TAC(9) of the *Customs Act 1901* and Article 2.4 of the *WTO Anti-Dumping Agreement* to ensure that that the normal value, including profits, is properly comparable with the export price and, if not, why not?

Price comparability involves not only differences in physical specifications, CTMS but also other factors affecting profit comparability, which profits form part of the price of each power transformer supplied in export sales and domestically.

In this Context, the Commission's attention is drawn to the WTO Panel's views expressed in *Egypt – Steel Rebar* and *US – Softwood Lumber V* and WTO Appellate Body's decision in *US – Hot-Rolled Steel*. For example, in *Egypt – Steel Rebar* the Panel stated that:

> *"[W]e do not think that the construction of a normal value under Article 2.2 precludes consideration of the making of various adjustments as between that normal value and the export price with which it is to be compared. A constructed normal value is, in effect, a notional price, 'built up' by adding costs of production, administrative, selling and other costs, and a profit. In any given case, such a built-up price might or might not reflect credit costs. Thus, what might be necessary to take into account by way of due allowance in a particular investigation in order to comply with the obligation to ensure a fair comparison under Article 2.4 cannot be limited by the simplistic characterisation of a normal value as being one arrived at by way of a construction under Article 2.2*". (at para 7.388)

Identification of who were the cooperative exporters on which the weighted average profit margin was based, the power transformers on which such calculations were based and similar matters would not seem to be confidential and, in any event, a non-confidential summary should have been prepared and included in the CTC verification visit report so that CTC could respond to it. Why has none of this been done by the Commission?

Also, the calculation of a weighted average profit seems to be fundamentally flawed as a simple average of any profit for any particular co-operating exporter fails to take into account the following groups of variables:

(i) Voltage ratings – as WTC itself has pointed out in their most recent submission, the relevant transmission voltages in Australia are 66kV, 110kV, 132kV, 220kV, 275kV, 330kV and 500kV. As you move through these voltage levels either relating to material costs, testing requirements differ according to standards or transport and this impacts on prices and profits;

(ii) Power Ratings –the goods under consideration envisages a 10MVA or above, i.e. this could be from 10MVA to 1000MVA;

(iii) Customer Specifications – there are a myriad of differing customer requirements both on the technical front (e.g. special tests, particular requirements etc.) and on the commercial/legal front. Again, these customer requirements impact on pricing and profits, each being unique to the power transformer being supplied

All of the above groups of variables are changing and the question is - how then can a simple weighted average of profit or costs be representative of these changing inputs. It is just an average that fails to take into account the unique supply of each power transformer in either the export or domestic market?

5. Other issues

The Commission's attention is drawn to our submission of 25 June 2019. None of the questions raised in that submission have been responded to. Why not? Would the Commission please respond to the questions raised in that submission.

If you have any queries, please let me know.

Kind regards

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