28 July 2023

Ms Renee Whitington
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Investigations Branch
Anti-Dumping Commission

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Dear Ms Whitington

Consideration Inquiry 617 – Steel Pallet Racking

As you are aware, we act for Zhejiang ShangHong Shelf Co., Ltd (**ShangHong**) and Yuhua Trading (HK) Limited's (**Yuhua**). We refer to Anti-Dumping Notice No 2023/043 (**ADN**). The ADN set out the Anti-Dumping Commission's (**ADC**) intention to not determine new variable factors as part of Consideration Inquiry 617 (**Inquiry**). The reasons given by the ADC were:

- The 3 entities that provided exporter questionnaires within the legislated time period, combined, represent less than 10% of import of the goods by value during the inquiry period; and
- Schaefer Malaysia provided its exporter questionnaires 26 days outside the legislated period (**ADC Reasons**).

We do not consider that any of the above reasons should prevent the ADC from determining new variable factors for ShangHong. Rather, given the information held by the ADC, we consider that the only reasonable decision is for it to determine new variable factors for ShangHong. Our reasons for this are set out below.

The ADC has separately requested additional information from ShangHong in relation to its exporter questionnaire. This is a separate issue and will be addressed separately. This letter addresses the above ADC Reasons. We appreciate that even if the ADC agrees with the reasoning in this submission, it may elect not to set new variable factors for ShangHong if it considers that the ShangHong exporter questionnaire is incomplete.

While submissions are made in respect of the setting of new variable factors, the submissions should not be taken as a concession by ShangHong that the dumping duties should continue. It is the position of ShangHong that it has not exported goods at dumped prices and would not do so if the dumping duties were discontinued.

Desirability of reviewing the variable factors

In carrying out its functions, it is important for the ADC to comply with Australia's obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (**Agreement**). Article 11.1 of the Agreement provides that that:

"An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."

The ADC, and by extensions, Australia, cannot comply with this obligation if it is aware that the variable factors for an exporter have changed and the current dumping measures are greater than what is necessary to counteract any dumping.

The ADC has an exporter questionnaire completed by ShangHong for the continuation inquiry period and an importer questionnaire completed by its subsidiary for the same period. These documents were completed at the ADC's request. Following the completion of these documents, the ADC is now in a position to review the variable factors relating to exports of the goods under consideration by ShangHong.

Having reviewed the variable factors, it is a breach of the Convention for the ADC to impose dumping duties that are in excess of the duties necessary to counteract any dumping.

Arguments as to volume

The ADC has claimed that the volume of exports covered by the submitted exporter questionnaires are less than 10% of the value of imports by value during the inquiry period. This point is of little relevance given that the ADC has the power to vary the variable factors for only a single exporter.

The information provided by ShangHong represents 100% of the exports of goods by ShangHong to Australia of the goods under consideration during the inquiry period.

We do not understand any legal or policy reason why ShangHong's ability to obtain a new variable factors is dependant on the volume of goods exported by it as a percentage of Australian imports.

The entire anti-dumping system is premised on the ability of individual traders to obtain an accurate dumping margin for their exports/imports. This is evident in the ability of exporters to obtain reviews under division 5 of Part XVB of the *Customs Act 1901* (**Act**) and importers to obtain an assessments of dumping duty under division 4 of Part XVB of the Act. Neither of these rights are linked to the volume of goods exported or imported.

Further, section 269ZHF(a)(iii) of the Act, which permits the setting of different variable factors, makes clear that that variation can apply to a particular exporter or exporters generally. Given that the legislator empowered the Commissioner to report on a single exporter, it is clear that there is no legislative intention that the power in section 269ZHF(a)(iii) of the Act be limited to any particular volume of exports/imports.

As the ADN refers to both Malaysian and Chinese exporters, we presume that the reference to "10% of imports" is a reference to imports from both Malaysia and China. We strongly expect that ShangHong's exports from China represent far more than 10% of the Australian imports of Chinese originating goods. Given the high dumping duty rate applying to Chinese exports, we expect that there would be almost no exports from China (other than the goods exported by our client). Rather, the vast majority of exports of the goods under consideration will have been from Malaysia.

The ADC, ABF or Australian industry may speculate as to undeclared Chinese exports of steel pallet racking. However, unless there is actual evidence of this occurring during the inquiry period, such speculation should be ignored. The Act is very clear that dumping duty decisions should not be based on speculation or conjecture.

While we do not consider that volume is relevant to section 269ZHF(a)(iii) of the Act, to the extent that it is, ShangHong exports a significant volume of the Chinese exports of the goods under consideration.

Lastly, the suggestion that a volume of "less than 10% of imports" is not sufficient to justify the setting of new variable factors is inconsistent with how particular volumes of imports are treated by Australia's anti-dumping system. As the ADC would be well aware, imports from a single country in excess of 3% of Australia's total imports (and multiple countries in excess of 7% of Australia's total imports) is sufficient to exceed the test of "negligible volume of dumped goods" (section 269TDA of the Act).

It is inconsistent for the ADC to accept a volume above 3% of imports to justify imposing dumping duties but then claim a volume of "less than 10% of imports" is too negligible to justify setting new variable factors. While section 269TDA of the Act is not dealing with setting new variable factors, it is good guidance on what volume of imports should be considered to be negligible.

Contemporaneous variable factors

As set out above, the Agreement only permits Australia to impose dumping duties to the extent necessary to address any dumping. The variable factors proposed by the ADC were based on variable factors from the original investigation. This covered the period October 2016 – September 2017.

While there have been other occasions where the ADC has conducted continuation inquiries and not varied the variable factors, in most cases there had been a relatively recent review conducted by the ADC. In these inquiries, the decision not to set new variable factors did not prevent any dumping margins being based on contemporary information.

While the ADC may prefer to have current verified information from all major exporters before setting new variable factors, the absence of this does not justify imposing dumping duties based on information that is nearly 7 years old. This is especially the case for ShangHong who has made exports during the inquiry period and provided the ADC with information regarding these exports.

Consistency with past continuation inquiries

While each inquiry is different, it is rare for the ADC to request the completion of exporter questionnaires, and then on receipt of a questionnaire, not adjust the variable factors for that exporter. This usually only happens where there has been a recent review, the information provided was deficient or there is some other reason why the ADC does not believe that the new variable factors would reflect actual dumping margins for that exporter.

Conversely, there have been instances where the ADC has set new variable factors even where there have been no exporter questionnaires lodged by entity that exported goods to Australia during the inquiry period. For example we note:

- Continuation inquiry 524 where new variable factors were set despite there only being the one incomplete exporter questioned lodged;
- Continuation inquiry 565 where new variable factors were set for exporters that had not exported to Australia during the inquiry period and where the ADC did not receive any exporter questionnaires from exporters that had exported to Australia during the inquiry period; and
- Continuation inquiry 568 where new variable factors were set without any exporter questionnaires having been lodged.

For the reasons set out above, if the dumping notice is continued, ShangHong submits that it is the correct and reasonable approach for the ADC to consider the information provided by ShangHong and set new the variable factors for ShangHong.

Yours faithfully
CGT Law

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