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Dear Mr Merlin

**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 Statement of Essential Facts N0 617 (**SEF**). The purpose of this letter is to respond to various issues raised in the SEF.

For the reasons set out below, it is submitted that the only option open to the Anti-Dumping Commission (**ADC**) is to recommend that the dumping duties applying to steel pallet racking on goods exported from Malaysia and China (**AD Measures**) be terminated. This is primarily because the ADC has not obtained evidence to satisfy the Minister that the expiry of the AD Measures would lead to, or would be likely to lead to a continuation or reoccurrence of the dumping and material injury that the AD Measures were intended to prevent. Our reasons for this view are set out below.

**1. Legislative test**

The only circumstance where the ADC can recommend the continuation of the AD Measures is set out in section 269ZH(2) of the *Customs Act 1901* (**Act**). That section provides:

*“The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.”*

In *Siam Polyethylene Co. Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838, Justice Rares stated “I am satisfied that the word “likely” in s.269ZHF(2) should be interpreted as meaning more probably than not”.

In ADRP Report No. 156 the review panel stated the following regarding section 269ZHF(2):

*“It should also be reiterated that it is generally accepted that the ‘likely’ test established under s 269ZHF(2) is interpreted to mean ‘more probable than not’, and that a decision to continue measures must be based upon ‘a foundation of positive evidence’. Such a decision should only be made, ‘if the evidence demonstrates the dumping would be probable if the duty were terminated and not simply if the evidence suggests that such a result may be possible or plausible.’ Interpreting s 269ZHF(2) of the Act in accordance with these principles mean that the*



*Commissioner must not recommend the continuation of the measures unless there is positive evidence to demonstrate that the recurrence of dumping is likely or probable.”*

(footnotes omitted).

There is no positive evidence on which the ADC can demonstrate that the recurrence of dumping is likely or probably.

## 2. Dumping margin in respect of Chinese exports

### a. Evidence of dumping based on a flawed original investigation

The AD Measures in respect of China were not calculated in accordance with World Trade Organisation (WTO) requirements. In the original investigation the ADC found that a particular market situation impacted the cost of an input (steel) into the production of Chinese steel pallet racking. The ADC held on page 42 of the report for Investigation 441:

*“The Commissioner considers that the GOC influences in the Chinese steel industry have created a ‘market situation’ in the steel pallet racking market, such that sales of steel pallet racking in China are not suitable for determining normal value under subsection 269TAC(1).”*

Before disregarding the use of actual domestic sale prices as the normal value, the ADC did not assess the effect of the particular market situation on those Chinese domestic prices in relation to the effect on the export price of steel pallet racking. In doing so, the ADC disregarded domestic sales of Chinese steel pallet racking without properly determining that such sales “did not permit a proper comparison”.

This was the same approach adopted by the ADC in respect investigation 341 concerning A4 copy paper exported from Indonesia that was the subject of WTO review DS529 Australia – Anti-Dumping Measure on A4 Copy Paper (**A4 Paper Case**).

In the A4 Paper Case the WTO Panel held:

*“7.89 We find that Australia did not examine whether domestic sales permitted a proper comparison between the domestic prices found to be affected by the decreased cost of pulp with the export prices for which the pulp cost was presumably equally decreased, despite assertions in the underlying proceeding which called for such an examination. In reviewing the ADC’s determination ... we conclude that the ADC was obligated to undertake the necessary additional examination to determine whether, because of the particular market situation, the domestic sales of the individual exporters do not permit a proper comparison of the domestic prices and the export prices.*

#### **7.2.4.5 Conclusion in respect of “permit a proper comparison”**

*On the basis of the above findings, we determine that the ADC’s disregard of Indah Kiat’s and Pindo Deli’s domestic sales (and consequently of their domestic prices) as the basis for normal value was inconsistent with the requirement to examine whether sales in the exporting country’s market do not “permit a proper comparison” because of “the particular market situation” in Article 2.2 of the Anti-Dumping Agreement. Specifically, where a particular market situation was found to affect domestic market sales prices solely as a result of a decreased cost for an input that was used identically to produce merchandise for the domestic and export markets, the investigating authority was obligated to assess the effect of the particular market situation on the domestic price in relation to the effect on the export price when determining whether domestic prices permitted a proper comparison with those export prices.*

#### **7.2.5 Conclusion**



*For the reasons elaborated above ... find that Australia's measure is inconsistent with Article 2.2, first sentence, of the Anti-Dumping Agreement because the ADC disregarded domestic sales of A4 copy paper of Indah Kiat and Pindo Deli as the basis for determining normal value without properly determining that such sales did "not permit a proper comparison".*

There can be no doubt that the approach taken by the ADC in respect of Chinese domestic sales considered in Investigation 441 suffered from the same inconsistency with Article 2.2 of the WTO Anti-Dumping Agreement (Implementation of Article VII of GATT) (**Dumping Agreement**).

In the circumstances, there is an absence of a dumping margin in respect of Chinese steel pallet racking in that was determined in accordance with either the Dumping Agreement or the current practices of the ADC.

This is crucial as the alleged finding of dumping in Investigation 441 is the primary evidence relied upon by the ADC to demonstrate that the removal of the AD Measures would result in the occurrence, or reoccurrence of dumping in respect of Chinese exports.

A finding that dumping in the future is likely or probably cannot be made if the foundation of the finding is a historic non-compliant finding of dumping.

The ADC has made the choice not to review dumping margins in the current continuation inquiry. Had it done so it would have had the opportunity to correct the non-WTO compliant approach it adopted in Investigation 441. Having elected not to review dumping margins, the ADC is now left solely with a dumping margin calculated in a non-compliant manner to justify the continuance of the AD Measures in respect of China. A dumping margin calculated in a non-compliant manner cannot be the basis for the finding of likely or probable future dumping.

#### **b. Absence of contemporary positive evidence of dumping**

The ADC has elected not to gather any evidence as to whether there has been dumping of Chinese exports over the past 5 years. In the absence of undertaking this task, there is no positive evidence of whether the alleged dumping would continue if the AD Measures were removed.

Even if the original dumping margins in Investigation 441 were validly determined, those margins suffer from being based on sales and exports in the period 1 October 2016 to 30 September 2017. Sales 6-7 years ago cannot provide any reliable evidence of what is, or what is not, probably in 2024 and onwards. In electing not to calculate updated dumping margins, the ADC denied itself positive evidence upon which to base its recommendation to continue the AD Measures.

The time difference is especially relevant given the manner in which the historic Chinese dumping margins were calculated. In Investigation 441 the ADC essentially constructed Chinese normal values by substituting the exporter's actual hot rolled coil (**HRC**) input cost with an input cost based on a HRC benchmark. In Investigation 441 the HRC benchmark was based on HRC purchase prices by certain Korean and Taiwanese companies as adjusted by the ADC. The difference between the actual Chinese HRC purchase price (**Chinese HRC Price**) and the HRC Benchmark was a key factor in the calculation of the Chinese dumping margin.

Both the Chinese HRC Price and the HRC Benchmark will have changed since September 2017. If the Chinese HRC Price has increased, relative to the HRC Benchmark, the dumping margin will very likely have been reduced and it may in fact be negative. However, the ADC has undertaken no analysis of the current Chinese HRC Price and how it would compare with any proposed benchmark HRC price.

As the Chinese normal values in Investigation 441 were constructed, to have any confidence of future dumping, the ADC needed to review the factors that went into the construction. It is not sufficient to look at factors such as supplier capacity and demand as those were not the factors that contributed to the



original Chinese dumping margin. The original dumping margin was a legal construction, not an outcome of market forces.

The ADC has engaged in the purely speculative reasoning that as it found dumping in the past, those same factors will be present and support a finding of dumping in the future. This is not positive evidence that makes the likelihood of future dumping probable.

### c. Reference to dumping duty assessments and reviews

In the SEF the ADC has referenced the absence of duty assessments or applications for review as supporting a claim that existing dumping margins are accurate. This reasoning is flawed and does not consider the more likely reasons that applications for duty assessment or reviews would not be made.

In respect of Chinese exports, the primary reason for the absence of reviews or assessments is that the cost of such an application is outweighed by the likely benefit. This is a reflection of low export volumes rather than the anticipated dumping margin calculation.

In respect of a duty assessment, the volume of Chinese exports over the past 5 years does not justify the cost of a duty assessment. This is especially so given that duty assessments are lodged by the importer and that the noted small volume of imports of Chinese originating goods would be spread across a variety of importers. That is, the benefits of a duty assessment would be limited to the duty paid on imports by a particular importer.

On top of this, the importer may not have access to the information needed to successfully lodge a duty assessment.

Lastly, there is a low level of knowledge of the availability of the dumping assessment process amongst importers. This will especially be the case with importers of steel pallet racking who are not importers of goods that have been traditionally subject to dumping duty (such as commodity aluminium and steel products).

In terms of seeking a review, our client sought this outcome during this continuation inquiry and the ADC has elected not to review duty rates. It is disappointing that the ADC would make it so difficult to obtain a review of dumping duty rates and then use a failure to seek a review as evidence that the current levels of dumping duty are accepted or accurate.

Seeking a review is a costly, inefficient and lengthy process. The absence of review applications are indicative of these factors.

In any event, the legislative test requires **positive evidence**. Drawing implications from the absence of assessments/reviews is not positive evidence. The reasoning is that because X didn't happen, it must prove Y. This is negative speculative evidence. It should not be considered by the ADC or the Minister.

If the ADC wished to rely on an absence of reviews/assessments as proving that dumping margins were accurate, it could have sought confirmation of this assumption from importers. The ADC received at least 3 importer questionnaires and had the opportunity to contact those importers to verify its assumption. It elected not to do this.

### d. Only evidence that exports are likely, not that dumping is likely

Section 6.7 of the SEF sets out the ADC's evidence as to whether dumping will continue or recur. In that section that ADC refers to 3 points:

- a) Dumping margins determined in the original investigation;
- b) The absence of applications for an assessment or review of dumping margins; and



- c) Measures placed on pallet racking in other jurisdictions.

Above we have addressed the historic dumping margins and the absence of applications for an assessment or review of dumping margins. It is acknowledged that other jurisdictions have imposed dumping duties or increased tariffs on certain Chinese products. However, the actions of other countries is not positive evidence of dumping or the likelihood of dumping. For instance, the USA and Australia treat China very differently under their respective anti-dumping regimes.

Even if Australia is a more attractive export market, all that fact supports is that exports from China may be likely. That does not provide any evidence that exports at dumped prices are likely.

The ADC reasoning is based on a premise that a dumping margin would be driven by Chinese exporters seeking to sell goods at competitive prices in Australia. However, the ADC is well aware that the key determinate of any dumping margin will be the difference between the amount the Chinese exporter paid for HRC and the HRC benchmark determined by the ADC. Without reviewing Chinese HRC prices or determining a HRC benchmark we do not understand how the ADC can have any confidence or make any predictions as to likely future dumping, regardless of its views on a likely export price or volume of exports.

The ADC's dumping analysis continually follows a pattern of setting out that Chinese exporters are likely to export to Australia and then, without any evidence, proceeding as if it is fact that those exports will be dumped. The ADC effectively equates the export of steel pallet racking from China as the export of steel pallet racking from China at dumped prices. The ADC cannot equate the exports of goods, with the dumping of goods, without positive evidence to support this.

### 3. Failure of ADC to take into account all relevant information

In making its recommendation in the SEF, it is contended that the ADC has failed to take into account all relevant information.

The ADC states that it only received responses to the importer questionnaire from 2 entities. The ADC did not include CH Racking Australia Pty Ltd (**CHR**) in this list. CHR lodged sections A – C of the importer questionnaire on 3 May 2023 and sections D and E on 10 May 2023.

The ADC could have used this information to verify export prices. This information would have assisted the ADC in determining whether Chinese exports were undercutting the pricing of Australian industry.

The ADC also elected to treat the ShangHong exporter questionnaire as deficient. The ADC notes that the ShangHong response to its deficiency report was received on 20 September 2023. This was 40 days prior to the publication of the SEF. The ADC stated that it did not consider the ShangHong response as to do so would have delayed the publication of the SEF.

The ADC had 40 days to review the additional information provided by ShangHong. This time was more than sufficient given the following:

- a) The ADC was not reviewing exporter questionnaires lodged by any other exporters; and
- b) The ADC had received the bulk of the ShangHong information on 5 June 2023 (4 months before the SEF).

The expected timeframe for an ADC dumping investigation allows for approximately 70 days between the receipt of exporter questionnaires and publication of the SEF. Given the ADC normally has 70 days to review multiple full exporter questionnaires before completing an SEF, it is unreasonable for the ADC to claim that 40 days was insufficient to review supplementary information in respect of a single exporter.



The ADC had information available to it which it could have used to determine contemporaneous dumping margins for ShangHong. It is inappropriate for the ADC to refuse to review this information and then claim that its only option is to rely on dumping margins from the original investigation.

#### **4. Material injury**

##### **a. Competition from other markets**

The ADC has not produced positive evidence that the removal of dumping duties on Chinese steel pallet racking would cause injury to the Australian industry. We note in particular figure 2 on page 24 of the SEF. From this figure the following can be seen:

- a) The Australian industry is losing market share to “all other imports” which are not dumped;
- b) The Australian industry has lost significant market share to Malaysian imports despite the presence of dumping duties on these imports;
- c) Even in 2022 when high international freight rates provided protection to the Australian industry, it lost market share “all other countries” and Malaysia.

Rather than being able to thrive in the absence of Chinese imports, the Australian industry have simply lost market share to other countries. The past 4 years have demonstrated that it is not alleged dumping of Chinese goods causing injury. Rather, the loss is properly attributed to imports from other countries.

The ADC has contemporaneous data regarding Chinese export prices. The ADC can use that data to form an objective view as to whether Chinese prices would have undercut the Australian prices. If it makes such a finding, the ADC also needs to consider whether the Chinese prices, or prices from other markets, would have been the lowest. Chinese prices cannot be the cause of the Australian industry loss if prices from other countries would have been undercutting the Chinese prices.

##### **b. Different products**

ShangHong is an exporter of store shelving products that use some components common to steel pallet racking. The products exported by ShangHong are not predominately used for holding pallets loads. Rather, the products are used as store shelving designed to hold retail goods at a unit (and not pallet) level.

The products produced by ShangHong are produced to unique customer requirements including colour, configuration and ability to incorporate product specific accessories, beams and shelves.

The ShangHong products are not substitutable for standard steel pallet racking. The ShangHong products do not have identical or comparable end uses to racking designed to predominately hold pallets. The Australian industry goods are designed for warehouse storage of pallets. The ShangHong goods are designed for retail storage of products at a unit level. Storage of pallets is incidental.

In section 4.3.1 of the SEF the ADC states that:

*“The end use of pallet racking components is to combine them to form a selective pallet racking system, or structure, that enables pallets to be stored vertically. Components can also be assembled into narrow aisle, drive-in racking, or mobile racking. End users are comprised of any business that requires this type of storage system, including industrial warehousing, retail back of house, mining, manufacturing, and government customers.”*

The end users of ShangHong products are retail stores and the goods are used at the front of store. It is clear that exports by ShangHong /Yuhua to Australia will not cause any injury to the



Australian industry. Put simply, ShangHong / Yuhua and the Australian industry are not competitors and sell goods to different markets.

To the extent that the Chinese export market comprises of goods produced by ShangHong, the export of those goods cannot cause loss to the Australian market.

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For the reasons set out above, the ADC should recommend to the Minister that he not secure the continuation of dumping duties on steel pallet racking exported from China.

Yours faithfully

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