

## OFFICIAL USE and PUBLIC RECORD VERSION

2 September 2019

Director, Investigations 2  
Anti-Dumping Commission  
GPO Box 2013  
CANBERRA ACT 2601

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Dear Director

### Statement of Essential Facts – Continuation Inquiry 505 - Hot rolled structural steel sections from Japan, Korea, Taiwan and Thailand

1. As you are aware, I am the authorised representative for Tung Ho Steel Enterprise Corporation ("THS").
2. We submit that the Statement of Essential Facts Continuation Inquiry 505 ("SEF") recommendation of the continuation of measures in relation THS, will result in a decision that is not correct or preferable, as follows.

#### ***The measures should not be continued in relation to THS***

3. Extract from Dumping and Subsidy Manual<sup>1</sup> (**emphasis added**)

*Under section 269ZHF(2), the Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless **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** (and/or subsidisation) and the material injury that the anti-dumping measures are intended to prevent.*

*If the Minister decides to continue the anti-dumping measures, the Minister may determine that:*

- *the notice continues in force after the specified expiry day; or*
  - *the notice continues in force after the specified expiry date but that, after that day, **the notice ceases to apply in relation to a particular exporter** or to a particular kind of goods; or*
  - *the notice continues in force after the specified day but that, after that day, the notice has effect, in relation to a particular exporter or to exporters generally, as if the Minister had fixed different specified variable factors in relation to an exporter or to exporters generally.*
4. We submit the Commissioner cannot be satisfied the expiration of the measures (in relation to THS) would lead to, or would likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury (by THS) that the anti-dumping measures are intended to prevent.

<sup>1</sup> Dumping and Subsidy Manual page 174



5. We submit the contrary would apply, due to the measures recommended in SEF for other exporters. Business acumen would evoke THS (likewise Liberty Steel) to be in a position to charge a higher competitive price to Australia, further exceeding normal value in Taiwan and increasing negative dumping margin verified in the review of measures No 345 and No 499.
6. This is supported by observations made by the Commission in SEF as follows: -
  - a. *strong demand for HRS in Australia makes it an attractive destination for exporters*<sup>2</sup>
  - b. *at full capacity, the Australian industry cannot supply the entire Australian HRS market, and therefore exports of HRS to Australia from Japan, Korea, Taiwan and Thailand are likely to continue*<sup>3</sup>

#### **Non-dumping of goods by THS since measures imposed on 20 November 2014**

7. Firstly, we note the following statement in SEF (**emphasis added**): -
  - a. *The Commission has found that Tung Ho and TS Steel **did not** export HRS from Taiwan at dumped prices over the inquiry period.*<sup>4</sup>
8. Further to the above, not only has the Commission verified THS has not been dumping during the investigation period of Review No 499 of 1 January 2018 to 31 December 2018 (dumping margin negative 1.6%) the Commission has verified THS has not been dumping during the following periods: -
  - 1 January 2015 to 31 December 2015, Review 345, dumping margin negative 8.4%;
  - 20 November 2016 to 19 May 2017, Duty Assessment Number 0112, total interim duty refund;
  - 20 May 2016 to 19 November 2016, Duty Assessment Number 0091, total interim duty refund;
  - 20 November 2015 to 19 May 2016, Duty Assessment Number 0078, total interim duty refund;
  - 20 May 2015 to 19 November 2015, Duty Assessment Number 0067, total interim duty refund;
  - 20 November 2014 to 19 May 2015, Duty Assessment Number 0056, total interim duty refund; and
  - 20 May 2014 to 19 November 2015, Duty Assessment Number 0047, total interim duty refund.
9. Therefore, during the period of 20 May 2014 to 31 December 2018 (55.35 months, 4.61 years), THS has been verified by the Commission, of not selling goods at dumped prices to Australia, for 48 months or 4 years of that period. The balance period of 20 May 2017 to 31 December 2017 didn't require verification as no interim duty was payable, as export price exceeded floor price.

#### **Likelihood of recurrence of dumping by THS**

10. THS have systems in place to ensure no accidentally dumping occurs, as demonstrated by the above history.
11. While we understand the likelihood determination is prospective in nature, the above history of non-dumping by THS should also be included in an assessment of the likelihood of dumping recurring, as identified in WTO Appellate Body Report in the *United States – Corrosion carbon steel products from Japan* as follows: -

*The likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated.*<sup>5</sup>

<sup>2</sup> SEFContinuation Inquiry 505 – Page 47

<sup>3</sup> SEFContinuation Inquiry 505 – Page 47

<sup>4</sup> SEFContinuation Inquiry 505 – Page 40

<sup>5</sup> United States - Corrosion carbon steel products from Japan. AB, para 105



12. However, the AB then emphasised the obligation of the authorities to conduct a rigorous analysis (**emphasis added**): -<sup>6</sup>

*This language in Article 11.3 makes clear that it envisages a process combining both investigatory and adjudicatory aspects. In other words, Article 11.3 **assigns an active rather than a passive decision-making role to the authorities**. The words ‘review’ and ‘determine’ in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word ‘likely’ in Article 11.3, **an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such a result might be possible or plausible.***<sup>7</sup>

*... the mandatory rule in Article 11.3 applies in addition to, and irrespective of, the obligations set out in the first two paragraphs of Article 11. This also suggests to us that **authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply**. In addition, our view of the exacting nature of the obligations imposed on authorities under Article 11.3 is supported by a consideration of the implications of initiating a sunset review. The last sentence of Article 11.3 allows the relevant duty to continue while the review is under-way, and Article 11.4 contemplates that the review process may take up to one year. These provisions create an additional exception to the requirement that anti-dumping duties will be terminated after five years, permitting a Member to maintain the duty for the period during which the review is ongoing, regardless of the outcome of that review. **This, too, suggests that the drafters of the ADA saw the sunset review as a rigorous process that can take up to one year, involving a number of procedural steps, and requiring an appropriate degree of diligence on the part of the national authorities.***<sup>8</sup>

13. In *United States – Oil country tubular goods*, the question also arose whether the existence of a dumping margin from the *original* investigation can be interpreted to mean that dumping continued over the life of the measure. The panel considered that it could not: -<sup>9</sup>

*Exporters subject to the measure might have changed their export or home market prices, or, their cost of production might have changed. Thus, if an investigating authority relies upon the existence of dumping over the life of the measure as part of its sunset determination, it has to have an adequate factual basis for so concluding. This can be, inter alia, a determination made as part of a duty assessment process carried out under Article 9 of the Agreement, or a review under Article 11.2. In our view however, the original determination of dumping by itself cannot represent a sufficient factual basis for concluding that dumping continued during the life of the measure, let alone representing an adequate factual basis to conclude that dumping is likely to continue or recur after the expiry of the order. The purpose of a sunset review is to examine whether the facts continue to justify the imposition of an anti-dumping measure. The USDOC, however, did not engage in that inquiry because it simply relied on the existence of the dumping margin from the original investigation.*<sup>10</sup>

14. The above is relevant given the original measure was a near de minimis rate of 2.1% and subsequent duty assessment refunds together with Review No 345 and Review No 499.

<sup>6</sup> Edwin Vermust “The WTO Anti-Dumping Agreement” Page 196

<sup>7</sup> United States - Corrosion carbon steel products from Japan. AB, para 111

<sup>8</sup> United States - Corrosion carbon steel products from Japan. AB, para 113

<sup>9</sup> Edwin Vermust “The WTO Anti-Dumping Agreement” Page 201

<sup>10</sup> United States – Oil country tubular goods from Argentina, Panel, para 7.219



15. As outlined above in paragraph 3 of this submission, with an extract from Dumping and Subsidy manual, and repeated in SEF 505: -

*Under subsection 269ZHF(2), 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 anti-dumping measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury that the anti-dumping measures are intended to prevent.<sup>11</sup>*

16. The Commission then makes the following statement in SEF 505 (**emphasis added**): -

*Based on the Commission's analysis of the available evidence, it considers that if the anti-dumping measures expire, it is likely that dumping of HRS from Japan, Korea, Taiwan and Thailand will continue **and that dumping of HRS by Tung Ho Steel Enterprise Corporation (Tung Ho) and TS Steel Co Ltd (TS Steel) from Taiwan will recur.**<sup>12</sup>*

17. However, there appears no evidence to support such an assessment, together with other statements in SEF 505.

18. The Commission also found: -

*The Commission has found that Tung Ho has limited capacity to increase HRS production. The Commission is not aware of plans to increase capacity of HRS production in Taiwan.<sup>13</sup>*

19. The Commission then states: -

*The Commission has found that, apart from Hyundai, there is little excess capacity for verified exporters of HRS. However, the Commission has found that exports of HRS to Australia have been at dumped prices from exporters from all the countries subject to this review.<sup>14</sup>*

20. But, neglects to mention that THS was found not to be dumping in Review No 499, together with during the period of 20 May 2014 to 31 December 2018 (55.35 months, 4.61 years), THS has been verified by the Commission, of not selling goods at dumped prices to Australia, for 48 months or 4 years of that period.

21. We consider the Commission has not conducted sufficient degree of diligence to establish evidence for the exception (namely, the continuation of the duty) can apply.

### **Distortions in steel markets**

22. SEF 505 notes, In its application, Liberty Steel stated: -

Overcapacity in world steel markets has triggered an unprecedented number of global trade defence mechanisms including the United States' (US) Section 232 tariffs, the European Union's (EU) steel safeguard and Turkey's steel safeguard actions. These actions are affecting export markets for all countries, including those the subject of this application. It is expected that displaced export volumes will increasingly focus on open markets, making Australia an attractive destination for excess capacity of HRS, particularly in the absence of continued effective measures.<sup>15</sup>

23. Also, footnote 28 of SEF 505, the Commission states: -

*Note that general discussion here and in material referred to on distortions in steel markets may be in reference to the production of crude steel in general. That is, it may also include*

<sup>11</sup> SEFContinuation Inquiry 505 – Page 2

<sup>12</sup> SEFContinuation Inquiry 505 – Page 2

<sup>13</sup> SEFContinuation Inquiry 505 – Page 28

<sup>14</sup> SEFContinuation Inquiry 505 – Page 28

<sup>15</sup> SEFContinuation Inquiry 505 – Page 28-29



*discussion on the distortions in markets of products such as flat products that are not the subject of this inquiry. However, the Commission understands that long products, a major part of which is HRS, are a significant proportion of all steel that is made and, as such, any verifiable or reliable discussion of distortions in steel markets is relevant to this inquiry.<sup>16</sup>*

24. Also: -

*In its 2016 Steel and Aluminium report, the Commission noted that in recent years there has been growth in the imposition of trade measures on steel by countries in several regions including North America, Asia and the European Union.*

*The Commission notes in this inquiry that there are also trade measures in various countries that have been implemented in retaliation to the 25 per cent tariff on steel imposed by the United States of America (USA) on 8 March 2018 under Presidential Proclamation.<sup>17</sup>*

25. However, all the above appear to contradict the following Commission analysis: -

*The Commission has analysed the World Trade Organization (WTO) database and has found that as at 31 December 2018, the only anti-dumping measures in place against exports of HRS from Japan, Korea, Taiwan and Thailand were those that have been imposed by Australia.<sup>18</sup>*

26. Together with the following: -

*In the Commissioner's Note: The Potential For Trade Diversion In Steel and Aluminium, and Subsequent Impacts,<sup>29</sup> the Commissioner noted that the Commission had engaged an external consultant, Cadence Economics, to conduct economic modelling on the likely trade diversion and subsequent impacts tariffs of 25 per cent for steel and 10 per cent for aluminium for all countries except Canada and Mexico, imposed by the USA and scheduled to come into effect on 22 March 2018. In it, the Commissioner stated:*

*Cadence's modelling suggests that the overall impact on the level of imports of steel and aluminium are essentially immaterial. The analysis also showed minimal economy-wide impacts.*

*The Commissioner also stated:*

*There is no evidence before me that the economy-wide impacts as a result of the US tariffs will be significant. However, limitations on time and data meant that the analysis was not conducted at product level, where impacts could be somewhat different.*

*...*

*I consciously did not include existing or potential retaliatory measures in this analysis. It would go beyond my remit to examine practices not directly relating to dumping and subsidisation. Further, it would be difficult to craft a static retaliation scenario to model in the current dynamic circumstances.*

*The Commission considers that on the basis of the evidence available, it is not able to definitively conclude what impact that the measures imposed by the USA on steel, or of any consequent retaliatory measures, have had on the Australian HRS market. The Commission considers that it is likely that any changes in levels of imports of HRS are mainly attributable to conditions and market drivers that are*

<sup>16</sup> SEFContinuation Inquiry 505 – Page 28

<sup>17</sup> SEFContinuation Inquiry 505 – Page 29

<sup>18</sup> SEFContinuation Inquiry 505 – Page 29



*specific to the Australian HRS market.<sup>19</sup>*

27. We are concerned regarding the lack of evidence to support any distortion in world steel markets, and/or any impact on the likelihood of THS to recommence dumping.

**Maintenance of distribution links**

28. We fail to see how THS maintaining distribution links to facilitate importation of un-dumped goods during four years is evidence of dumping recurring.

**Likelihood of continuation or recurrence of dumping**

29. SEF 505 states the following (**emphasis added**): -

*The Commission's approach has been to examine the claims made and **evidence** applying to each exporting country subject to this inquiry.<sup>20</sup>*

30. In its application, Liberty Steel stated, among other claims: -

*resulted in an alteration of the form of measures from ad valorem to a floor price for Tung Ho which rendered the measures ineffective and allowed Tung Ho to increase export volumes when international prices increased; and*

*Liberty Steel has stated that this indicates that exporters of HRS from Taiwan are prepared to export HRS at dumped prices if measures are ineffective or discontinued.<sup>21</sup>*

31. How can Liberty Steel claim that measures have been rendered ineffective when the Commission has verified THS exports of HRS to Australia were not dumped, including while a floor price has been in place.

32. The Commission makes the following statement in SEF 505: -

*Exports of HRS to Australia from Taiwan fell in the year after measures were first imposed in 2014 and have increased every year thereafter. Since the notice was altered in respect of Tung Ho in October 2016, its exports continued to increase at a relatively significant rate.<sup>22</sup>*

33. Again, verified by the Commission as not dumped.

34. The Commission made a further assessment in SEF 505 as follows: -

*The Commission considers that in order to do so in a market such as the Australian HRS market, which can be described as a price sensitive one and, as such, one with a high degree of price elasticity, Tung Ho would be required to maintain its export prices at current levels relative to other imports.*

*The Commission has analysed details of Tung Ho's verified export sales data and has found that there is a strong negative correlation between price and export quantity. That is, when price falls, exports increase and vice versa. This supports a finding that the Australian HRS market can be described as a price sensitive one. It follows that in order to increase exports, Tung Ho must decrease its prices. The Commission has found in Review 499 that over the review period there is a small differential between Tung Ho's export price and normal value. As such, a small reduction in export prices relative to Tung Ho's domestic prices would result in dumping.<sup>23</sup>*

35. This assessment is illogical, as previously stated in this submission, the contrary will apply, as the majority of sources of HRS produced to Australian Standard from other countries will now be subject

<sup>19</sup> SEFContinuation Inquiry 505 – Page 29

<sup>20</sup> SEFContinuation Inquiry 505 – Page 30

<sup>21</sup> SEFContinuation Inquiry 505 – Page 32

<sup>22</sup> SEFContinuation Inquiry 505 – Page 33

<sup>23</sup> SEFContinuation Inquiry 505 – Page 33



to measures, together with Liberty Steel's lack of capacity to service Australian market demand, prices will only rise from limited non-dumped sources. Also, there is no evidence provided or relied on by the Commission, THS pricing follows CTMS plus profit on both domestic and export markets.

### Price

36. The Commission found the following in SEF 505: -

*In respect of Tung Ho, the Commission has found price undercutting during the inquiry period between 1.59 per cent and 5.71 per cent.<sup>24</sup>*

37. THS pricing is based on CTMS plus profit and is re-assessed regularly. If there has been price undercutting, this has been with un-dumped goods as verified by the Commission and demonstrates that THS is a more efficient producer of HRS than Liberty Steel. Besides, price undercutting will also occur due to the domestic price premium charged by Liberty Steel and verified by the Commission, together with Liberty Steel distribution and inland transport costs compared to inland transport costs of imported goods from an Australian port likely to be located in a more efficient location for logistics purposes.

38. Concerning Tung Ho and TS Steel the Commission found the following: -

*The Commission also considers that:*

- *the increasing volumes of HRS from Taiwan;*
- *the price undercutting observed in respect of HRS imported from Taiwan and sourced from Tung Ho;*
- *the high degree of price elasticity in the Australian HRS market; and*
- *the import price competition to which Liberty Steel is subject.*

*would likely result in Liberty Steel achieving reduced selling prices should the measures on Tung Ho and TS Steel expire. Consequently, price suppression and the resulting impact on revenue and profits are likely to worsen if the measures on HRS exported to Australia from Taiwan by Tung Ho and TS Steel expire.<sup>25</sup>*

39. We agree with all the above statements, except bullet point 4, there will now be lack of import price competition to which Liberty Steel is subject. Also, why should THS be penalised for exporting increased volumes of HRS to Australia at prices not dumped?

### SEF Summary and Conclusion

40. The Commission found in SEF 505 (**emphasis added**): -

- *exports of HRS to Australia from Japan, Korea, Taiwan (**except** for Feng Hsin, **Tung Ho** and TS Steel) and Thailand were at dumped prices with preliminary dumping margins found in Review 499 ranging from 5.0 per cent to 12.3 per cent;*
- a. Exports from THS were not dumped during Review No 499, but also during previous Review No 345 and six duty assessments over a period from 20 November 2014 to 19 May 2017.
    - *exports of HRS to Australia have continued to occur at high volumes, especially from Korea and Taiwan;*
  - b. Exports volumes of HRS from THS to Australia have continued at high volumes, however at un-dumped prices, as verified by the Commission.
    - *strong demand for HRS in Australia makes it an attractive destination for exporters;*
  - c. Yes, there is strong demand, as Liberty Steel cannot meet Australian Market demand.
    - *exporters of HRS to Australia from Japan, Korea, Taiwan and Thailand have*

<sup>24</sup> SEFContinuation Inquiry 505 – Page 39

<sup>25</sup> SEFContinuation Inquiry 505 – Page 40



*maintained distribution networks in Australia*

- d. THS have maintained distribution networks, to facilitate the export of HRS at un-dumped prices.
  - *at full capacity, the Australian industry cannot supply the entire Australian HRS market, and therefore exports of HRS to Australia from Japan, Korea, Taiwan and Thailand are likely to continue; and*
- e. Again, the reason why there is strong demand for imported HRS to the Australian market, and why un-dumped exports should be permitted to continue.
  - *excess production capacity of HRS producers in China is expected to continue to place pressure on steel producers worldwide to continue to seek other markets including Australia.*
- f. There is no evidence or link to imported un-dumped HRS to Australia to China's expected excess production capacity.

### **Submission Summary and Conclusion**

41. During the period of 20 May 2014 to 31 December 2018 (55.35 months, 4.61 years), THS has been verified by the Commission, of not selling goods at dumped prices to Australia, for 48 months or 4 years of that period.
42. The Commission has not conducted sufficient degree of diligence to establish evidence for the exception (namely, the continuation of the duty) can apply.
43. While the original measure was a near de minimis rate of 2.1%, this should not lead to an assessment of likely recurrence of dumping and subsequent duty assessment refunds together with Review No 345 and Review No 499, should be taken into account.
44. Under section 269ZHF(2), the Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless **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** (and/or subsidisation) and the material injury that the anti-dumping measures are intended to prevent.
45. The Commissioner should recommend the notice ceases to apply in relation to a particular exporter, being THS.
46. Should you require any further information concerning this submission, please contact the writer.

Yours faithfully



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