PUBLIC VERSION

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Director Operations 3
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

Dumping investigation – precision pipe and tube exported from Korea

Dear Director,

This submission is made by DITH Australia Pty Ltd (Duferco) in response to the Anti-Dumping Commission's (the Commission) Statement of Essential Facts Report No. 550 (SEF550) published on 2 March 2015.

Material injury assessment

At the outset, Duferco wishes to express its concern with the lack of proper analysis and reasoning contained in SEF 550 report to support the Commission's preliminary findings. In terms of the material injury assessment, Duferco considers that SEF550 falls well short of the standard expected from a lengthy investigation process. In particular, Duferco is concerned with the Commission's scant causality analysis and reasoning linking subject imports from Korea to alleged injury.

In order to publish a dumping duty notice, subsections 269TG(1) and (2) of the Act requires the Minister to be satisfied that the subject goods are dumped, and that as a result of the dumped goods "*…material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered*".

Subsection 269TAE(1) of the Act sets out a non-exhaustive list of matters that the Minister may have regard to in assessing and determining whether material injury to the Australian industry is being caused by dumped exports. Determinations under subsection 269TAE(1) are subject to subsections 269TAE(2A) and (2AA) of the Act. Subsection 269TAE(2A) of the Act requires that injury caused by factors other than dumping not be attributed to the dumped goods, whilst subsection 269TAE(2AA) of the Act requires that the material injury determination "*must be based on facts and not merely on allegations, conjecture or remote possibilities*".

This provision is reflected in Article 3.1 of the WTO Anti-Dumping Agreement (ADA) which states:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the

> dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

Duferco contends that the material injury analysis and assessment in SEF550 is flawed as it is not based on affirmative or credible evidence which provides a reliable link between the subject exports and the Australian industry's alleged injury.

As an importer, Duferco has some degree of visibility of selling prices by Australian importers and/or the Australian industry into the Australian market. It is also understood that the Commission was provided with relevant and verified sales information by a number of importers which would have allowed for a more detailed comparative analysis and assessment of the effects of subject imports from each of the investigated countries. Instead, the Commission's preliminary analysis is plainly inadequate for isolating the impact from non-dumped subject exports and properly identifying the volume and price effects attributable to subject imports from Korea.

Subsection 269TAE(2A) of the Act requires that the Minister must consider whether any injury '*is being caused or threatened by a factor other than the exportation of those goods such as: (a) the volume and prices of imported like goods that are not dumped*'. The obligation to ensure non-attribution is found in Article 3.5 of the ADA and has been interpreted by the Appellate Body in *US – Hot rolled steel*[15], which ruled:

> *The non-attribution language in Article 3.5 of the Anti-Dumping Agreement applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry at the same time. In order that investigating authorities, applying Article 3.5, are able to ensure. that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties. We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.*

The Appellate Body added[16]:

> *[A]lthough this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury*

> *ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.*

Further, the Commission's own guidelines[1] make clear

> *As injury caused by other factors cannot be attributed to dumped or subsidised imports, the Commission considers the influence of other factors when assessing whether there is a causal link between the injury to the Australian industry and the presence of dumped and/or subsidised imports in the market.*
>
> *Such other factors may include, but are not limited to:*
>
> - *the volume and prices of imports that are not dumped or subsidised;*
>
> *…*
>
> *The Commission will also consider the implications of undumped/unsubsidised goods sold at lower prices than the dumped/subsidised goods in the marketplace. In considering the effect of the undumped/unsubsidised goods in the market, the Commission may have regard to:*
>
> - *customer preferences (i.e. factors other than price such as quality considerations);*
> - *the market share of the goods;*
> - *whether prices have been lowered to compete with the dumped/subsidised product;*
> - *like goods sourced from a country with low costs/prices which the dumped/ subsidised source cannot match, but which compete on some other basis.*

SEF550 clearly does not identify, separate and distinguish the injurious effects of the subject imports from Korea, from other causal factors such as the non-dumped subject imports from Taiwan and Vietnam. First, the Commission has deliberately merged the injurious effects of non-dumped imports from Taiwan and Vietnam into the broader category of non-subject countries, despite those imports being specifically investigated.

It is also inappropriate to lump imports from Taiwan and Vietnam into the non-subject countries when the applicant itself made direct claims and provided supporting evidence in its application[2] that the imports from Taiwan and Vietnam had caused material injury in their own right. Given that the applicant has submitted evidence of the injurious effects of those non-dumped imports, it is incumbent on the Commission to properly investigate those claims, regardless of whether those imports are dumped or non-dumped.

It is worth noting that the Commission references the price undercutting evidence contained in the application with regards to imports from Korea and China in assessing causation, but makes no effort to turn their minds to the price undercutting evidence with regards to imports from Taiwan and Vietnam. This highlights the lack of objective examination of known injurious effects of other factors, and the need to isolate those effects from Korean imports.

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[1] Dumping and Subsidy Manual, page 129.

[2] Refer to price undercutting analysis at section A-9.2 of the application.

More precisely and by way of example of the flawed approach, the market share chart at figure 9 of SEF550 shows imports from China and Korea decreasing sharply from 2017 through to 2019. The hidden volume of the non-dumped injurious imports from Taiwan and Vietnam prevents the reader from understanding as to whether import substitution has occurred and the combined import volumes from Taiwan and Vietnam have increased sharply over that same period. This is despite the Commission's confirmation that '*Wholesalers, distributors and re-sellers can more readily change suppliers, either through shifting to importers or between themselves.*'

Importantly, it is worth noting the chart at figure 19 of SEF550, which confirms that Korean imports were an even smaller fraction of the total import volume of dumped imports, which provides further doubt about the injurious effects of Korean imports.

Finally, the three examples referenced at section 9.6 as evidence of volume related injury make no mention of Korean imports. The SEF is required to provide interested parties with sufficient information to properly respond to the preliminary findings and defend their interests. As the Commission does not identify the source country, it cannot be assumed that these were from Korea. The Commission itself confirms that in the case of example 5, *'… no specific sources were identified. However, as Orrcon is the only domestic producer of the goods, it is apparent that the goods not sourced from Orrcon were subsequently sourced from imports.*' The statement provides a further example of injury being attributed to subject imports from Korea when in fact they may have been sourced from non-dumped imports from Taiwan and/or Vietnam.

Likewise, examples 6 and 7 merely confirm that sales volumes by the applicant were vulnerable to import prices, which presumably would have included import prices from Taiwan and Vietnam. No information in that evidence provides any link to Korean imports.

In the case of price effects, SEF550 provides no understanding of the price relativities between non-dumped and injurious imports from Taiwan and Vietnam, and corresponding prices of the Australian industry and Korean imports. The chart at figure 19 omits corresponding imports prices of non-dumped subject goods from Taiwan and Vietnam. This is despite the claim by the applicant that import prices from those subject countries were substantially undercutting local prices in the Australian market.

The omission of non-dumped import prices from Taiwan and Vietnam raises the following questions which have clearly not been addressed or considered.

1. Were prices from Taiwan and Vietnam the cheapest in the market, and therefore the price setters for the broader Australian market? If so, were the price injury examples submitted by the applicant merely reflecting the strong price competition from the non-dumped and injurious sources?
2. Were import prices for non-dumped subject goods from Taiwan and Vietnam undercutting imports from Korea? If so, is it reasonable to consider Korean imports to themselves be non-injurious?
3. If import prices for non-dumped subject goods from Taiwan and Vietnam were undercutting imports from Korea, is it reasonable to consider that Korean FOB export prices were greater than corresponding export prices from Taiwan and Vietnam? If so,

again this would cause the Commission to question whether Korean export prices are themselves non-injurious.

By failing to undertake the above comparative analysis of prices in the market, the Commission has effectively attributed all of the price effects experienced by the Australian industry during the investigation period, to dumped exports. This confirms a lack of proper assessment and consideration of the impact of non-dumped imports.

It is also worth noting that the Commission would already have access to all of the verified information to undertake the required analysis. In the case of Korean imports, it is noted that the Commission was provided sales and purchase information from Duferco. A comparison of Duferco's selling and purchase prices, against those imports sourced from Taiwan and Vietnam, would confirm that Korean imports were higher than equivalent FOB export prices and selling prices into the Australian market. In that case, the Commission must consider whether Korean exports are non-injurious.