EUROPEAN COMMISSION
Directorate-General for Trade

Directorate G - Trade Defence
**Investigations IV. Relations with third Countries for Trade Defence Matters**

NON-CONFIDENTIAL

Brussels, 10 October 2023

**ANTI-DUMPING INVESTIGATION ON IMPORTS OF RAILWAY WHEELS ORIGINATING IN OR EXPORTED FROM CHINA AND FRANCE**

# Submission by the European Commission regarding the initiation of the Expiry Review (Continuation inquiry No 632)

On 16 July 2019, the Australian Minister for Industry, Science and Technology imposed anti-dumping measures on railway wheels from China and France. The measures were imposed following the Report No 466, issued by the Australian Anti-Dumping Commission[1].

Following an application of the domestic industry, Australia initiated on 14 August 2023 a continuation enquiry - an expiry review - into these measures.

The European Commission ('the Commission') would like to thank the Australian authorities for the opportunity to present its comments in the framework of the above-mentioned proceeding. These comments are without prejudice to further submissions at further stages of the procedure.

With reference to the Notice of Initiation and after having analysed the non-confidential version of the application, the Commission would like to raise the following issues:

## 1. PROCEDURAL ISSUES AND INSUFFICIENT EVIDENCE

At the outset, it is recalled that according to Article 11.1 of the WTO Antidumping Agreement ('ADA') "*an antidumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury*" (emphasis added).

The ***Panel in US –DRAMS*** described the requirement in Article 11.1 whereby antidumping duties "*shall remain in force only as long as and to the extent necessary"* **to counteract injurious dumping, as "*a general necessity requirement*",** stating that:

*"[We] note that the necessity of the measure is a function of certain objective conditions being in place, i.e. whether circumstances require continued imposition of the anti-dumping*

[1] Report No 466 Certain Railway Wheels – China and France, 1 March 2019

*duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of* ***positive evidence*** *that circumstances demand it. In other words,* ***the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.***[2] *"*

Thus, the Commission would like to express its disappointment about the initiation of this investigation against France, as there **have been no exports of railway wheels to Australia from France** since the imposition of measures in 2019. In fact, as indicated in the written submission filed by MG-Valdunes[3], *"MG-Valdunes has made no sales in Australia in the period from February 2018 until 30/06/2023."*

In this context, it is further recalled that the continuation of antidumping duties is only justified if there is dumping, and the domestic industry is suffering injury or if there is a likelihood of recurrence of dumping and/or injury.

In the absence of imports from France, it is difficult to understand which evidence on injurious dumping from France the applicant is presenting in this investigation. In this regard, the applicant is stating that *"it is considered prudent that Comsteel also seek the continuation of exports to Australia from France even though there has been no exports from the Valdunes facility since the measures were imposed […]export volumes from France have evaporated following the then Minister's decision to impose measures (perhaps due to the higher interim dumping duties applicable on exports from France viz-a-viz China)."*

It is reiterated that the **purpose of anti-dumping measures is to mitigate unfair trade practices** and not to shield the sole producer of the product under investigation simply because it is prudent. In addition, any investigation must be based on positive evidence and not on the sole producer's assumptions and unsubstantiated opinion.

Furthermore, it is recalled that according to Article 11.4 of the WTO Anti-dumping Agreement ('ADA') *"the provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article [...]"*

Therefore, "*whenever information is treated as confidential, transparency and due process concerns will necessarily arise because such treatment entails the withholding of information from other parties to an investigation. Due process requires that* ***interested parties have a right to see the evidence*** *submitted or gathered in an investigation and have* ***an adequate opportunity for the defence of their interests.*** *As the Appellate Body in EC –Fasteners (China) has stated, '****that opportunity must be meaningful in terms of a party's ability to defend itself****'.*
*Articles 6.5 and 6.5.1 accommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is submitted on a confidential basis and upon 'good cause' shown, but* ***establishing an alternative method for communicating its content so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance*** *of the confidential information, and* ***to defend their interests****. As the Panel found, 'Article 6.5.1 serves to balance the goal of ensuring that the availability of confidential treatment does not undermine the transparency of the investigative process'.*[4] *In respect of information*

[2] *Panel Report, US –DRAMS,* para. 6.41 and para. 6.42.
[3] 632 - Railway wheels - Exporter Questionnaire – France, 21 September 2023
[4] *Panel Report, EC – Fasteners (China)*, para. 7.515

*treated as confidential under Article 6.5, Article 6.5.1* ***obliges the investigating authority to require that a non-confidential summary of the information be furnished****, and to* ***ensure that the summary contains 'sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence'****. The sufficiency of the summary provided will therefore depend on the confidential information at issue, but it* ***must permit a reasonable understanding*** *of the substance of the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests.*
*Article 6.5.1 contemplates that in 'exceptional circumstances' confidential information may not be 'susceptible of summary'. In such exceptional circumstances, a party may indicate that it is not able to furnish a non-confidential summary of the information submitted in confidence, but it is nevertheless required to provide a* ***'statement of the reasons why summarization is not possible'.*** *Article 6.5.1 relieves a party of its duty to provide a non-confidential summary of information submitted in confidence only if doing so 'is not possible'. It is not enough for a party simply to claim that providing a summary would be burdensome or costly. Summarization of information will not be possible where no alternative method of presenting that information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence.*[5]*"*

However, the non-confidential version submitted by the applicant is highly deficient in this regard, as no evidence has been provided nor disclosed in the complaint to allow for a **reasonable understanding** of the substance. This concerns evidence regarding import volumes and prices as well as any data relating to the situation of the domestic industry.

The missing elements preclude interested parties from properly exercising their rights of defence and therefore the investigating authority is requested to provide summaries of the information provided in confidence, e.g. in the form of indexes or ranges and that they are **made available on the public file as soon as possible,** as established in *Mexico – Steel Pipes and Tubes*, where the Panel clearly stated that *it is "****paramount for an investigating authority to ensure that the conditions in these provisions [i.e. Articles 6.5 and 6.5.1] are fulfilled.***[6]*"*

## 2. LIKELIHOOD OF RECURRENCE OF DUMPING AND INJURY

As explained under **1. Procedural issues and insufficient evidence**, excessive confidentiality prevents interested parties from an objective analysis.

Expiry reviews are complex investigations as they involve a prospective analysis based on positive evidence. In the present case, the applicant is justifying its request for an extension of anti-dumping duties based on cautiousness and unsubstantiated allegations. Indeed, it is difficult to comprehend that due to non-existent imports from France, Comstel continues to experience injury.

[5] *Appellate Body Report, EC – Fasteners (China)*, paras. 541-544
[6] *Panel Report, Mexico –Steel Pipes and Tubes*, para. 7.380.

According to Article 11.3 of the WTO ADA *"Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review."*

It is underlined that the applicant has **not provided any analysis nor evidence that would indicate a likelihood of continuation or recurrence of dumping or injury.**

***Likely import volumes and prices***

As regards **import volumes**, and as mentioned above, **no analysis is available** regarding import trends, either in absolute terms or relative to production or consumption in Australia, since the imposition of the anti-dumping duties on railway wheels. The applicant states that *"Railway wheels exported from China and France have continued following the imposition of measures in July 2019. The following Table 3 details the imports by calendar year from 2019 to the present."* Nevertheless, the mentioned table has been redacted and **no factual information has been provided** to support the applicant's claim. What's more, the applicant also declares that there were no imports from France since the imposition of measures and **does not deliver any analysis of the likely import volumes in case measures would lapse**.

In the absence of imports from France, the analysis should focus on elements such as **available capacity** in the exporting country, established sales channels, French **export price behaviour to other markets**, any particular attractiveness of the Australian market. An analysis of such elements would allow to assess whether it is likely that injurious dumping would recur, if measures were to lapse.

However, such analysis is inexistent. The information provided on dumping margins and constructed normal values for railway wheels from China and France are only referring to 2017 calculations and the Anti-Dumping Commission Report No. 466 issued in 2019.

Concerning the **effect of the imports on prices**, the applicant alleges, that in 2023 it continues to experience price undercutting by the dumped imports and that the effect of imports is preventing a price increase. In any event, since there were no imports from France, any price undercutting or price suppression cannot stem from French imports.

Moreover, **the application does not provide any evidence** to show that there is dumping or price undercutting in the investigation period (1 July 2022 to 30 June 2023) or that price undercutting would recur if measures were allowed to lapse.

Furthermore, the applicant was not able to evaluate any **changes in the market conditions** that might lead to recurrence of dumping or injury from the subject countries. As a matter of fact, the applicant confirms that it is not aware of whether France (or China) has excess capacity to supply the Australian market if the measures would expire on 16 July 2024.

***Situation of the domestic industry***

Similarly**, no data nor evidence** has been provided regarding the **situation of the domestic industry.** The applicant claims material injury based on the 2017 investigation and Report No 466, but there is no information on the current state of Comsteel. As explained above, all numeric information regarding the various injury indicators has been kept confidential and it is thus **not possible to draw any meaningful conclusion** regarding the actual situation of the domestic industry.

In this context, it is recalled that according to WTO jurisprudence, a **likelihood analysis has to be based on positive evidence**:

The ***Panel in US – Corrosion-Resistant Steel Sunset Review*** underlined the importance of the need for sufficient positive evidence on which to base the likelihood determination:

*"The requirement to make a 'determination' concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient* ***factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."***[7]

In this regard, the initiation of this investigation merely on the alleged need for the continued imposition of the duty is highly questionable. In fact, **all the key elements to analyse whether dumping or injury would be likely to continue or recur if duties were removed are missing**.

Consequently, the application made by Comsteel is based solely on allegations unsubstantiated by facts. Throughout the application, Comsteel offers Report No 466 as evidence; however, what has been found or established **five years ago may not be true any longer** and **cannot be used as a basis for the current review**.

## 3. CONCLUSION

As demonstrated above, the criteria to prolong the antidumping measures regarding imports from France for another five years are not met; moreover, given the **significant shortcomings of the application, this review should never have been initiated**:

- The applicant has **not presented any evidence** on import volumes or prices and their development;
- The application does not contain any information regarding relevant economic factors describing the situation of the domestic industry;
- There have been **no imports from France** since 2018;

[7] *Panel Report, US – Corrosion-Resistant Steel Sunset Review*, para. 7.271. The Appellate Body agreed with this view. *Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review*, para. 114.

- The application does not contain any **analysis of likelihood of recurrence of dumping or injury;**
- The applicant's claims for **confidentiality are excessive**, thus depriving the parties of their rights of defence;
- The **application is not compliant with WTO** rules and jurisprudence.

Therefore, this **review investigation should be terminated without further delay**. Any other course of action would be in breach of WTO rules.