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COMMENTS BY THE EUROPEAN COMMISSION
ON THE PRELIMINARY AFFIRMATIVE DETERMINATION
IN THE ANTI-DUMPING INVESTIGATION CONCERNING IMPORTS OF AMMONIUM NITRATE FROM SWEDEN (AND CHINA AND THAILAND)

On 24 October 2018, the Investigating Authority released its Preliminary Affirmative Determination by means of Notice No. 2018/166 ('the Preliminary Affirmative Determination')

Swedish exporting producer YARA AB cooperated in the investigation.

For what concerns exporters from Sweden, the Preliminary Affirmative Determination found the following dumping margins:

- YARA AB: 51.8%
- All other exporters from Sweden: 61.3%

The European Commission herewith respectfully presents its Comments on the Preliminary Affirmative Determination of the above proceeding.

I. RIGHTS OF PARTIES TO A MEANINGFUL INFORMATION

The European Commission considers that the information provided by the Investigating Authority in its Preliminary Affirmative Determination is totally insufficient to allow parties to have a proper understanding of the situation at stake, and therefore to be in a position to properly exercise their rights of defence.

In fact, the whole Notice No. 2018/166 (Preliminary Affirmative Determination) does not contain any single table. One would normally expect the Investigating Authority to release tables with data showing the developments of import volumes, market shares and injury indicators.

The European Commission fails to understand the issue of confidentiality, given that there are three complainants. If data confidentiality is an issue in the case at hand, then the Investigating Authority should explain why, and provide interested parties with a meaningful summary of such information in the form of data ranges, and trends.

The European Commission respectfully draws the attention of the Investigating Authority that, pursuant to Article 6.5.1 of the WTO Anti-Dumping Agreement ('WTO ADA'):

> "*{T}he authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided*."

In *Mexico – Steel Pipes and Tubes*, 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."*[1]

In *Guatemala – Cement II*, the Panel also clarified that this obligation not only applies to non-confidential summaries of confidential information, but also to statements of reasons why summarization - exceptionally - is not possible.[2]

The Appellate Body confirmed both the obligation to provide non-confidential summaries[3] and the fact that this obligation may only be dispensed with under exceptional circumstances.[4]

In the Preliminary Affirmative Determination of the present case, the Investigating Authority failed to comply with its obligations under Article 6.5.1 of the WTO ADA, since no statements of the reasons why – exceptionally - summarization is not possible, are available.

In the present case, all information regarding imports, demand and all injury indicators have been kept confidential without any explanation. It is therefore impossible for interested parties to assess the situation of imports and of the domestic industry.

The European Commission thus requests that the Investigating Authority makes available to interested parties meaningful non-confidential findings or statements of the reasons why – exceptionally – summarization of the data provided in confidence is not possible, as soon as possible.

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[1] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

[2] Panel Report, *Guatemala – Cement II*, para. 8.213.

[3] Appellate Body Report, *EC-Fasteners (China)*, para 544: "In sum, Article 6.5.1 imposes an obligation on the investigating authorities to ensure that sufficiently detailed non-confidential summaries are submitted to permit a reasonable understanding of the substance of the confidential information; and, in exceptional circumstances, to ensure that parties provide a statement appropriately explaining the reasons why particular pieces of confidential information are not susceptible of summary."

[4] Appellate Body Report, *EC-Fasteners (China)*, para 544: "Article 6.5.1 requires a party to identify the exceptional circumstances and provide a statement explaining the reasons why summarization is not possible. For its part, the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information's substance is possible" (emphasis added).

II. INCOMPLETE INJURY DETERMINATION

Article 3.4 of the WTO ADA provides that:

- *"The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."*

Under Sections 8.6 and 8.7 of the Preliminary Affirmative Determination, the Investigating Authority establishes a finding of material injury based exclusively on price depression and reduced profits, while rightly acknowledging that the vast majority of other (WTO mandatory) injury indicators point to an absence of injury.

Once again, the European Commission regrets that no data concerning any of these injury indicators is disclosed to interested parties.

Going further, the European Commission contends that the absence of a detailed analysis for each of the 15 indicators listed in Article 3.4 ADA is WTO-inconsistent.

Indeed, in *Thailand – Steel* [5], the Panel found that each of the 15 factors listed in Article 3.4 WTO ADA must be considered by the Investigating Authority. The Appellate Body upheld the Panel's finding in *Thailand – Steel* [6].

III. PRICE INJURY AND PROFITABILITY

In its own admission, the finding of material injury by the Investigating Authority rests exclusively with two injury indicators, namely price and profitability. The European Commission regrets to observe that the evidence put forward by the Investigating Authority is not convincing.

Pursuant to Article 3.2 of WTO ADA:

"With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member,[…]"

The **price injury determination** is mainly based on anecdotal evidence of lost sales. Could the Investigating Authority be more precise and explain how many of these examples were brought forward by the complainants, and whether these examples are representative of a genuine pattern?

[5] Panel Report, *Thailand – Steel* paras. 7.216-256

[6] Appellate Body Report, *Thailand – Steel* paras. 121-128

The Investigating Authority further claims that import prices of the three investigated countries are lower than prices from any other origin and in particular Russia. According to Article 3.2 WTO ADA, what actually matters is whether import prices from the three investigated countries undercut Australian domestic industry prices. Could the Investigating Authority be more affirmative and more precise, and in particular provide interested parties with a proper **undercutting margin calculation**?

Similarly, the Investigating Authority finds that the **profitability** of domestic producers decreased from 2015-16. However, in doing so, the Investigating Authority provides no information on the level of profit as a percentage of turnover. Based on the limited information disclosed, interested parties are not in a position to forge an opinion whether the domestic industry is materially injured at all. At a minimum, the European Commission considers that the Investigation Authority should disclose indexes and ranges concerning profitability.

The European Commission refers again to its aforementioned comment concerning the rights of parties to a meaningful information.

IV. OHER FACTORS CAUSING INJURY (IF ANY)

During the dumping investigation period, around [Confidential information – less than 30.000 tonnes] of the Product Concerned were imported from Sweden into Australia. This constitutes a mere [Confidential information – less than 2%] of the Australian market during the investigation period. Furthermore, given that the domestic producers have a combined production capacity of [Confidential information – between 2 and 3 million tonnes], this dilutes the impact of Sweden imports to negligible baseline levels.

The applicants claim that they have suffered injury in the form of reduced production and sales volumes. This claim is self-serving given that the Australian Ammonium Nitrate industry is amongst the largest domestic importers of the Product Concerned. This is illustrated by [Confidential information – one complainant importing between 30.000 and 40.000 tonnes] from Indonesia and [Confidential information – the mother company of one other complainant importing between 10.000 and 20.000 tonnes] from China (i.e. one of the three investigated countries).

Is it legitimate to import the Product Concerned from one of the investigated countries and then complain that imports have taken away production and sales volumes? The European Commission is of the view that this behaviour amounts to **self-inflicted injury**.

The European Commission calls on the Investigating Authority to carefully examine this situation, conduct a proper causality analysis and not to attribute any drop in domestic production or sales volumes to imports from Sweden, when these volumes have been imported by the domestic industry itself.

V. LESSER DUTY RULE

Under Section 9 (Unsuppressed price and non-injurious price) of the Preliminary Affirmative Determination, the Investigating Authority notes:

"The Commission will continue to assess data received during the course of the investigation to determine an appropriate Unsuppressed selling price."

Indeed, Subsection 8(5B) of Customs Tariff (Anti-Dumping) Act 1975 provides that:

"If:

(a) the Minister is required to perform the function under subsection (5) in respect of goods the subject of a notice under subsection 269TG(1) or (2) of the Customs Act; and

(b) the non-injurious price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice is less than the normal value of goods of that kind as so ascertained, or last so ascertained;

the Minister must, in performing that function, have regard to the desirability of specifying a method such that the sum of the following does not exceed that non-injurious price:

(c) the export price of goods of that kind as so ascertained or last so ascertained;

(d) the interim dumping duty payable on the goods the subject of the notice.

Like Australia's, the EU anti-dumping legislation contains provisions for the application of the lesser duty rule. However, unlike Australia, the EU calculates both a dumping margin and an injury margin at the stage of Preliminary determination, and applies the lesser duty rule from that stage of the investigation.

The Commission indeed invites the Investigating Authority to complete its assessment and calculate as soon as possible a non-injurious price for exports from Sweden, and to apply the lesser duty rule as per the above-mentioned provision.

VI. CONCLUSION

The Commission invites the Investigating Authority to thoroughly review its findings, which undoubtedly will lead to the conclusion that this investigation should be terminated with respect to Swedish products, in the light of the below:

- the rights of parties to a meaningful information have been denied with no justification;
- the absence of a detailed analysis for each of the 15 indicators listed in Article 3.4 ADA is WTO-incompliant;
- the evidence put forward by the Investigating Authority regarding price and profitability is not convincing;
- the issue of self-imports should be looked at;
- should the Investigating Authority conclude that measures are warranted, *quod non*, the Investigating Authority should swiftly complete a non-injurious price for exports from Sweden, and apply the lesser duty rule as mandated by the Australian domestic legislation.