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ANTI-DUMPING INVESTIGATION REGARDING IMPORTS OF AMMONIUM NITRATE FROM SWEDEN (AND CHINA AND THAILAND)

Written submission of the European Commission concerning the Statement of Essential Facts

On 25 February 2019, the Australian Anti-Dumping Commission (ADC) published the Statement of Essential Facts NO. 473 (SEF) by which it is proposing to recommend the imposition of definitive anti-dumping duties on ammonium nitrate exported to Australia from Sweden, *inter alia*.

Following an in depth analysis of the SEF, there are a number of issues that require a reconsideration of the approach taken by the ADC in this case.

Indeed, the injury and causality analysis made by the investigating authorities presents considerable weaknesses, which are incompatible with WTO standards. The main elements are described below.

1. DUMPING

The ADC is proposing to recommend the imposition of a duty of 51,1% on imports of the Swedish company Yara AB and a duty of 61,3% on imports of the uncooperative and other Swedish exporters (combination -fixed and variable- duty method).

Regarding the dumping calculation, it seems that the ADC has rejected a series of adjustments to the export price and the normal value claimed by the Swedish exporter.

In this regard, the Australian authorities should pay due attention to all the arguments and evidence presented by the Swedish company, in particular concerning quality differences and differences in level of trade. (e.g. it appears that also on the Swedish domestic market certain sales are made on the basis of long term contracts). All these elements need to be taken appropriately into account and reflected through the necessary adjustments, in order to ensure a *fair comparison* as provided for by Article 2.4 of the WTO anti-dumping Agreement ('ADA').

2. INJURY

2.1 Definition of the domestic industry

Article 4.1 of the WTO ADA provides that:

(ii) "in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market [...] . In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market."

The ADC explains its approach to assess the economic condition of the Australian industry as follows: "Given that the applicants are situated in and supply different regions and markets in Australia, the Commission has assessed the injury indicators separately for each applicant, and also for the Australian industry as a whole (...). The Commission considers that it is possible in such circumstances that injury to the Australian industry occurring in one region (i.e. to one of the industry members) could constitute material injury to the whole industry"⁶² ¹

However, the ADC has not demonstrated any of the required criteria, i.e. that the markets are indeed isolated, nor that there is a concentration of dumped imports into such an isolated market.

2.2 Injury assessment

According to article 3.1 of the WTO ADA, a determination of injury "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".

- *Volume of dumped imports*

The Australian industry claims that it suffers injury in the form of reduced market share.

Concerning the assessment of the volume of dumped imports, article 3.2 of the WTO ADA determines that "the investigation authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing member".

In relative **terms to consumption**, the volume of allegedly dumped imports represented a mere **3,1% of market share** during the investigation period and out of this volume, one third was imported by one domestic producer (Yara). Moreover, the increase of imports from the

¹ SEF No. 473 Page 49. - Note 62 refers to the Australia's Ministerial Direction on Material injury 2012, 27 April.

investigated countries is mostly replacing imports from other origins. These other imports decreased their market share by 2,6 percentage points between 2014/15 and 2017/18.

Thus, the market share of the **allegedly dumped imports has increased by 0,4 percentage points** (from 2,7% to 3,1%) in the four years covered by the investigation² and by 0,8 percentage points in the dumping investigation period³. Moreover, the domestic industry has increased its market share during the injury period, from 91,7% to 94% and benefitted from a growing market.

Clearly, an increase of imports of 0,4 percentage points cannot be considered as *significant* in terms of the WTO ADA, and surely no injury can be caused to the domestic industry by such minor volumes. Additionally, as disclosed in the SEF (page 54), once the import volumes of the domestic industry are taken into account, the above market share figures further improve for the domestic industry, making the above variations even less significant.

In this regard it is also noted that no analysis was provided regarding imports into any “*competitive market*”, which would show that there was indeed a concentration of dumped imports into an isolated market.

Based on the low amounts and the insignificant increase of the investigated imports, both, during the injury and dumping investigation periods, **the ADC should have rejected the complaint and not have initiated the investigation.**

- *Effect of dumped imports on prices*

As regards price effects, the ADC found that overall, prices decreased from 2014-15 and recovered in 2017-18 but not to the levels of 2014-15. It also found that the weighted average costs decreased as well but less than prices, thus indicating price suppression. No figures were provided in this respect.

However, the individual analysis per company shows that any alleged price depression at national level is mainly motivated by Orica. The price levels of the other two complainants either remained stable during the injury period (QNP) or increased (CSBP). Price suppression is suffered by Orica and QNP (last period), but not by CSBP. However, the problems experienced by Orica are caused by different factors (as explained in the SEF).

In this context, the ADC alleges that the domestic prices during the investigation period are based on long term contracts that had been negotiated before the alleged increase of imports and thus any price depression or suppression is not reflected therein. Therefore, the ADC analysed prices of contracts negotiated during or after the investigation period to demonstrate lost sales or revenue foregone.

Altogether, the ADC analysed 13 contracts of which 6 were rejected. On the basis of 2 of the remaining 6, the ADC concluded that “*dumped imports directly displaced these volumes*”

² Injury investigation period: 1 Apr. 2014-31 Mar. 2015 and 1 Apr. 2017-31 Mar. 2018

³ 1 Apr. 2017-31 Mar. 2018

causing injury to the Australian industry during the investigation period and subsequent to the investigation period (SEF point 9.3).

However, these two examples actually refer to negotiations and allegedly lost contracts during the investigation period. Thus, any lost sales must already be reflected in the injury analysis. But the injury analysis shows, that production, sales and market share of the domestic industry increased (please see below).

Therefore, in view of the above, the analysis and use of the information of the contracts is inconclusive and biased. It mixes prices of current and future deliveries and compares prices of future domestic sales, with adjusted un-dumped prices based on dumping margins of imports during the investigation period. Furthermore, no indication is provided if these examples of contracts are in any way representative, i.e. what volumes they cover. It is recalled, that the contracts provided by Orica, the only company experiencing difficulties, have all been rejected by the ADC, which is a further clear indication that Orica is not suffering any injury due to dumped imports.

As regards undercutting, apparently, on the basis of the data available during the investigation period, there is no undercutting. On the basis of the renegotiated prices of the contracts, the ADC alleges that the un-dumped price would on average be 4,8% lower than the unsuppressed price of the domestic industry. This shows that even in the absence of dumping, the domestic industry's prices are not competitive.

In any event, and as already mentioned above, according to Article 3.2 “[...] *the investigating authorities shall consider whether there has been a significant increase in dumped imports...*”, which is clearly not the case here.

- *Impact of dumped imports on the situation of the domestic industry*

The situation of the domestic industry is rather positive during the injury period. The domestic production has increased by more than 3%, sales have increased by 5%, the market share has grown from 91,7% to 94%. Revenues increase during the injury period for CSBP (+23%) and remain stable for QNP.

Regarding profit and profitability, the ADC finds that the levels at the end of the period are lower than those at the beginning of the period but gives no figures to show the level of profitability. In any event, the industry remains profitable throughout the period analysed.

The ADC also analysed the injury trends individually. The picture varies among the three companies. The situation of Orica appears to be the most difficult one, but Orica was having problems since before the alleged increase of imports. QNP is experiencing difficulties in certain factors at the end of the analysed period and CSCP is doing very well (+74% profit).

Thus, any negative developments in the injury picture of the domestic industry are driven by Orica. However, Orica's difficulties are not related to dumped imports but due the closure of half of the capacity in one of its plants, following a decrease in demand of ammonium nitrate in Queensland, as explained in the SEF.

In view of the above, the domestic industry overall is not suffering material injury in terms of Article 3.4 of the ADA. The difficulties experienced by one company of the domestic industry

are not due to dumped imports but to **other factors**. In any event, an increase of 0,4% of market share of imports cannot be the cause of any injury.

4. CAUSALITY

Pursuant to Article 3.5 WTO ADA, "*The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports*".

The ADC found that "*a number of factors combined to provide an environment that led to a general decline in prices in the ammonium nitrate market. However, the Commissioner found injury to the Australian industry, particularly injury in the form of price depression, caused by dumping*"⁴.

However, and contrary to this statement, it is underlined that other factors than dumped imports, were assessed by the ADC but were not taken adequately into account in its analysis, in particular:

- the impact of the **domestic industry's own imports**;
- the effect of the **excess capacity** of the domestic producers on prices;
- the impact of increased regional **competition amongst domestic producers**;
- finally, and most importantly, the **inability of the domestic producers to supply the entire Australian market**, which make imports necessary for the mining industry.

In fact, based on the ADC's own assessment of these factors, the only objective conclusion should have been that **factors other than dumped imports** caused injury (if any) to the domestic industry.

4. CONCLUSION

In view of the above elements, the imposition of definitive anti-dumping measures in this case would clearly be in breach of WTO rules, in particular:

- there is **no significant increase of imports** in terms of Article 3.2 of the ADA;
- the domestic injury is **not suffering material injury** in terms of Article 3.4 of the ADA;
- the injury analysis is biased (e.g. the existence of isolated markets has not been demonstrated; actual data from the investigation period is mixed with data from contracts for future deliveries);
- any injury, *quod none*, is clearly due to **other factors**.

In view of the above, the Commission urges the ADC to change its recommendations and to terminate this investigation without further delay. Any other course of action would clearly be in breach of WTO rules.

⁴ SEF No 473. Section 9.1.