EUROPEAN COMMISSION
Directorate-General for Trade

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

NON-CONFIDENTIAL

Brussels, 12 July 2022

INITIATION OF AN ANTI-DUMPING INVESTIGATION ON IMPORTS OF AMMONIUM NITRATE (AN) ORIGINATING IN OR EXPORTED FROM CHILE, LITHUANIA AND VIETNAM

Submission by the European Commission regarding the initiation of the investigation (Consideration report No. 605)

On 8 June 2022, the Australian Anti-dumping commission initiated an anti-dumping investigation concerning imports of Ammonium Nitrate (AN) originating in or exported from Chile, Lithuania and Vietnam.

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[1] and after having analysed the non-confidential version of the Consideration report No. 605 and the industry application, the Commission would like to raise the following issues:

I. INSUFFICIENT EVIDENCE

At the outset, it is recalled that, in order to be compatible with the WTO rules and jurisprudence, an investigation can only be initiated if there is sufficient evidence of **dumping, injury and a causal link** between the dumped imports and the alleged injury.

However, neither the application nor the Consideration report No. 605 issued by the investigating authority gives any evidence-based assessment of dumping or injury. Furthermore, no causality analysis is provided that would indicate the link between the allegedly dumped imports and the injury.

Thus, as the application is non-compliant with the fundamental WTO Anti-dumping agreement ('ADA') provisions of Article 5.2, **the investigation should not have been initiated at all.**

[1] *Notice of Initiation No. 2022/050 of 8 June 2022*

It is recalled that the *Panel in Morocco – Definitive AD Measures on Exercise Books (Tunisia)* set out the **legal requirements** of Article 5.2 of the Anti-Dumping Agreement concerning the evidence and information that must be included in a complaint as follows:

Article 5.2 of the Anti-Dumping Agreement consists of a 'chapeau' and four subparagraphs that describe the 'information' that must be included in the written application submitted by the domestic industry or on its behalf to initiate an investigation (the complaint). The chapeau states that a complaint:
*[S]hall **include evidence of (a) dumping, (b) injury** within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and **(c) a causal link** between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. [..]*

Meanwhile, the chapeau provides that 'evidence of dumping' must 'substantiate' the normal value, export price and adjustments submitted by the applicant. The definition of the word 'étayer' ('substantiate') states that this verb means '[s]outenir quelque chose par des arguments, des preuves, le fonder, l'établir ou en être la base, la preuve' ('to support something with arguments, evidence, to determine it, to establish it or to be grounds for, proof of it'), while the word 'preuve' ('evidence') is defined as an '[é]lément matériel ... qui démontre, établit, prouve la vérité ou la réalité d'une situation de fait ou de droit' (a 'material element ... that demonstrates, establishes, proves the truth or reality of a de facto or de jure situation'). This word choice indicates that the information provided in support of the complaint must have some probative value. With regard to dumping, the applicant must provide evidence that permits the actual normal value, export price and value of any adjustments to be established for the period identified in the complaint. A normal value and export price not substantiated 'by relevant evidence' would be 'insufficient' to meet the requirements of Article 5.2."

II. CONFIDENTIALITY

Article 6.5.1 of 'ADA' states that a **non-confidential summary** should be provided for any confidential information.

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'**[2].*

However, the non-confidential versions of the application and the Consideration report No. 605 issued by the Anti-dumping commission are highly deficient in this regard, as the information is redacted or missing altogether and therefore, does not allow for a **reasonable understanding** of the substance. Thus, interested parties cannot exercise their **rights of defence**.

[2] *Appellate Body, EC-Fasteners (China)*

In particular, the essential data of prices and their development, the calculations of the normal value, the calculations of dumping margins and the development of other relevant economic indicators are not disclosed. It is underlined that the investigating authority shall require the applicants to furnish a meaningful non-confidential summary thereof.

Besides the insufficient disclosures, the limited and inconsistent information in the application and the Consideration report further raises questions as to the correctness and reliability of the dumping allegation, in particular, against Lithuania.

The missing elements preclude interested parties to properly exercise their rights of defence and therefore it is requested that the investigating authority provides 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.**[3]"*

III. PERIOD OF INVESTIGATION

The choice of a period of investigation ('POI') is of crucial importance in an anti-dumping investigative process. In this sense, it is encouraging that the investigating authority acted in line with the provision of paragraph *1(a) of the Recommendation of the WTO Committee on Anti-Dumping Practices* dated 5 May 2000, by moving the POI closer to the initiation date. It is however regrettable that the paragraph 1(d) of the same recommendations has been disregarded.

The investigating authority indicated that the new POI is set to cover the period 1 April 2021 to 31 March 2022, taking into consideration that[4]:

(a) "the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable"

[…]

(d) "In all cases the investigating authorities should set and make known in advance to interested parties the periods of time covered by the data collection and may also set dates certain for completing collection and/or submission of data. If such dates are set, they should be made known to interested parties."

The adjustment of the POI would require a collection and the presentation of new data, including the first quarter of 2022, **providing all interested parties with a full opportunity for the defence of their interest.**

Since no such data has been provided, the interested parties cannot properly exercise their rights of defence and therefore, it is requested that the investigating authority provides the necessary information as soon as possible.

[3] *Panel Report, Mexico –Steel Pipes and Tubes*
[4] *Anti-Dumping Agreement – Article 2 (Practice)*

IV. INJURY

It is reiterated that any trade defence investigation disturbs trade flows and therefore investigating authorities should not initiate such investigations lightly, but only in cases were all the relevant WTO criteria are fulfilled.

According to Article 3.1 of the WTO Anti-dumping Agreement (ADA) *"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.*

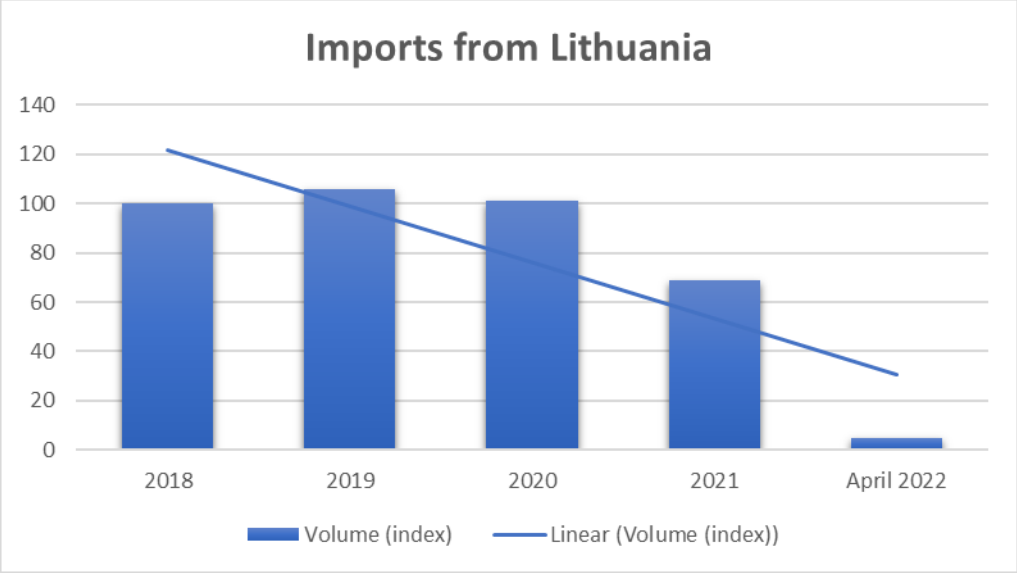
Import volumes

Article 3.2 of "ADA" emphasises the relevance of a significant increase in dumped imports, either absolute or relative to domestic production or consumption.

With regard to the volume analysis, it is noted that the applicants have provided different data for the same years (Table A-9.1 *versus* Table B-1.5), further raising questions as to the purpose and legality of the dumping and injury allegations.
Nevertheless, and despite the inconsistent data provided by the applicants, it can be concluded that imports from the subject countries have **decreased by 15%** in 2021, compared to the base year. **The imports from Lithuania decreased by 30%** in 2021.

Thus, the applicants' claim *[…to the commencement of imports from Chile, Lithuania and Vietnam in 2018, increasing further between 2019 and 2021]* is clearly conflicting with the data provided in their application.

In the absence of consistent and reliable data provided by the domestic industry, and in light of missing information on the evolution of the volume of the allegedly dumped imports in the Consideration report No.605, Eurostat data shows a similar pattern of **decreasing imports of AN from Lithuania.**



Source: Eurostat

Therefore, it is difficult to argue that the domestic industry is suffering material injury due to imports. Should the investigating authority address the import volumes, the analysis would clearly show that there is no volume effect; in fact, **total imports of the product under investigation decreased by almost 70% in 2021,** compared to 2018.

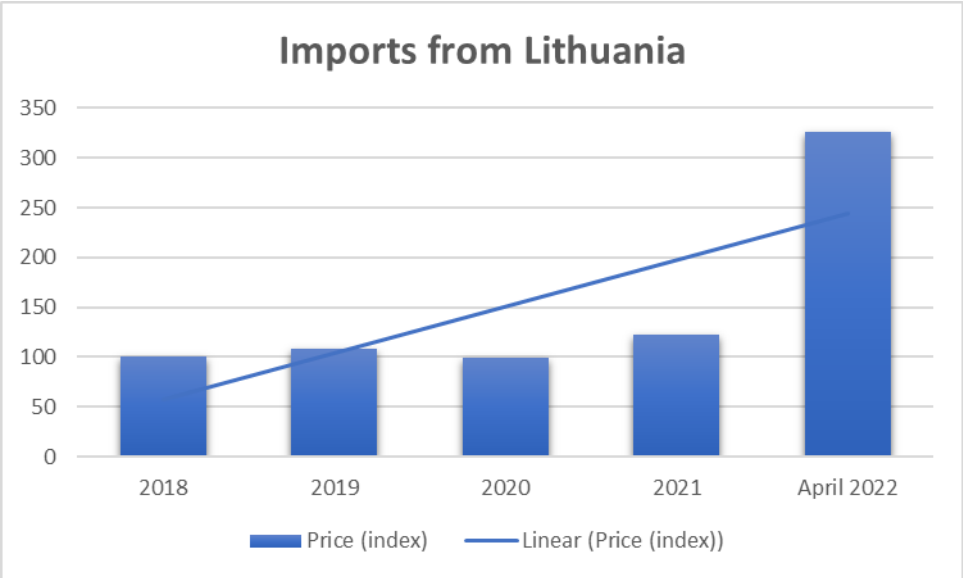
If the Australian industry is experiencing any injury, it could not have been caused by the imports, certainly not by imports from Lithuania, which were declining throughout the injury period.

Effect on prices

Concerning the *effect of dumped imports on prices*, Article 3.2 WTO ADA further requires the consideration whether (*i) there has been a significant price undercutt*ing or *(ii) whether the effect of such imports is otherwise to depress prices to a significant degree* or (*iii) prevent price increases which otherwise would have occurred, to a significant degree*.

The applicants, however, have not provided any data nor evidence on the subject goods' import prices, but clearly, it is not sufficient to allege the effect of imports on prices. According to Article 3 WTO ADA and the established jurisprudence[5] there has to be an ***objective examination based on positive evidence*** and the investigating authority must properly support the claim whether the dumped imports were having a negative effect on the prices of the domestic industry[6]. No data nor evidence has been provided in Consideration report No. 605 regarding the subject goods' prices or costs.

In the absence of any information on import prices in the application, on the basis of Eurostat data, the export prices of Lithuania were stable throughout the injury period and have increased in the POI.



Source: Eurostat

[5] *Appellate Body Report, US – Hot-Rolled Steel*
[6] *Panel Report, Guatemala – Cement II*

This may indicate that imports from Lithuania should be decumulated for the purpose of the injury analysis. Thus, the investigating authority must undertake and present to the interested parties a dynamic **assessment of volume and price developments and trends** for the subject countries individually.

Situation of the domestic industry

Article 3.4 of the WTO ADA lists a number of factors that need to be analysed in order to show injury to the domestic industry, such as a decline in sales and profits; decline in market share, productivity, and capacity utilisation; negative effect on cash flow, inventories, and employment.

The domestic industry alleges lost revenue, negative impact on financial performance and employment, negative results with regards to the return on investments but no further details have been provided. Nevertheless, based on the information available in the application, the injury picture of the domestic industry remains unclear.

- The **sales** of the applicants decreased by **negligible 0,1 index points**, on the account of sales of other Australian producers that have increased their sales by 77,1 index points;
- the applicants' **production** remained stable;
- the **selling price** has increased (+5,1 index points);
- profits have decreased, which is most probably due to inefficiency on the part of the applicants.

However, throughout the application, the domestic industry only offers, as evidence, the Investigation 473 of June 2018, declaring that the impact of the significant increase of exports from Chile, Lithuania and Vietnam (due to measures being imposed on exports from China, Sweden and Thailand) prevented the growth of the Australian industry.

The Consideration report No. 605 does not deliver much more information on the domestic industry situation, it shows however that:

- the Australian industry **sales** volume has been stable throughout the injury period and has **increased in 2021**;
- the Australian industry has consistently held **the largest market share**, and that has been increasing since 2018 (**close to 100% in 2021**);
- the **revenue per unit has been increasing** since the base year (2018).

As explained above (II Confidentiality), the information regarding the various injury indicators has been kept confidential and it is thus **difficult to draw any meaningful conclusion** regarding the actual situation of the domestic industry and it is also challenging to assess the **materiality of injury, if any at all.**

Therefore, during the remainder of the investigation, the Anti-dumping commission needs to conduct a proper injury analysis and verify and assess further all information provided by the domestic industry and as determined by the *Panel in EC - Bedlinen*[7] *"each of the fifteen*

[7] *Panel Report, EC –Bed Linen,paras. 6.154-6.159. See also Panel Reports, Mexico–Corn Syrup, para. 7.128; Egypt –SteelRebar, para. 7.36.*

factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigative authorities in each case in examining the impact of the dumped imports on the domestic industry concerned."

All this information should **allow a sound judgement of the state of the domestic industry and should be shared with interested parties as soon as possible.**

V. THREAT OF MATERIAL INJURY

The applicants claim that the allegedly dumped imports from Chile, Lithuania and Vietnam also threaten to cause material injury to the Australian industry.

Regarding a threat of material injury determination, it is recalled that according to Article 3.7 of the WTO ADA*, "A determination of a threat of material injury shall be **based on facts and not merely on allegation**, **conjecture or remote possibility**. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent[8]".*

Moreover, Article 3.7 mentions some factors that also need to be considered in making a determination of threat of material injury, such as a significant rate of increase of dumped imports, sufficiently freely disposable capacity of the exporters or an imminent substantial increase of it, significant depressing or suppressing effect of imports on domestic prices and inventories of the product under investigation.

So far, however, the application does not contain any evidence pointing to any **change of circumstances** referred to in the WTO ADA. To mention some examples, it has not been demonstrated that imports will increase from now on, causing injury. It is recalled that **imports actually decreased** over the period analysed. Likewise, the applicants did not illustrate any aggressive and unfair pricing or excess capacity that could likely cause foreseeable material injury to the domestic industry.

The allegations made by the domestic industry are far from the reality and additionally indicate how inaccurate and flawed the application is, when claiming that "*the exporters in each nominated country possess the ability to readily export large break-bulk shipments (as demonstrated by past volumes from each of the four countries)."* It is to be noted, that the unsubstantiated allegations in this investigation are made against three countries, namely Chile, Lithuania, and Vietnam.

Finally, it is recalled that, according to Article 3.8 of the WTO ADA, *"With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care."*

VI. CAUSAL LINK – OTHER FACTORS

[8] *One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.*

As indicated above, Article 5.2 of the WTO ADA contains the requirements for the contents of the application. It **must** include evidence on dumping, injury and the **causal link between the two; simple assertion is not sufficient.**

Unfortunately, no evidence regarding a causal link was given by the applicants or presented in the Consideration report No.605.

The applicants did not provide relevant information on other factors that may have had an impact on the situation of the domestic industry. Once again, the only focus is on the Investigation 473 against China, Sweden and Thailand.

Based on the above, it appears that the application was not complete and therefore **not compliant with the WTO ADA** and established jurisprudence in particular as the *Panel in Guatemala – Cement II* agreed that ***"statements of conclusion unsubstantiated by facts do not constitute evidence of the type required by Article 5.2"***[9]

It is reiterated, that, if the domestic industry had experienced any difficulties caused by other factors, such as COVID-19 pandemic (during 2020 and 2021), these are factors unrelated to imports and may not be used to justify the initiation of the investigation, let alone the imposition of measures.

Trade remedies should not be used to mitigate the impact of any market disruptions other than unfair trade practices.

VII. CONCLUSION

The comments provided should be taken into careful consideration in the course of the investigation:

- The applicants make excessive use of confidentiality, thus depriving the parties of their rights of defence. The Anti-dumping commission should correct this irregularity and provide meaningful non-confidential summaries of the information provided in confidence to the parties.
- The information and evidence provided regarding dumping is insufficient to justify the initiation of an investigation.
- The domestic industry does not seem to be suffering any material injury caused by allegedly dumped imports. In any event, the allegedly dumped imports decreased significantly and can thus not be the cause of any injury.
- Regarding the threat of injury allegations, the complainant has not submitted any evidence pointing to any change of circumstances referred to in the WTO ADA (Article 3.7).
- Evidence and information regarding causal link is missing.

The Commission trusts that the investigating authority will thoroughly examine the points raised above and terminate the investigation. Any other course of action will not be in compliance with WTO rules and obligations.

[9] *PanelReport, Guatemala –Cement II*