



EUROPEAN COMMISSION

Directorate-General for Trade

Directorate H - Trade Defence

**NON-CONFIDENTIAL**

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**COMMENTS BY THE EUROPEAN COMMISSION**  
**ON THE STATEMENT OF ESSENTIAL FACTS**  
**IN THE ANTI-DUMPING INVESTIGATION CONCERNING IMPORTS OF A4 COPY PAPER FROM,**  
**INTER ALIA, AUSTRIA, FINLAND AND THE SLOVAK REPUBLIC**

On 21 May 2018, the Australian Anti-Dumping Commission ('AADC') imposed interim anti-dumping measures in respect of A4 Copy Paper ('the product concerned') imported from Finland, Korea, Russia and Slovakia.

On 19 November 2018, AADC released its Statement of Essential Facts concerning the above investigation ('SEF 463').

Austrian exporting producer Mondi Neusiedler GmbH cooperated in the investigation.

Slovak exporting producer Mondi SCP a.s. cooperated in the investigation.

No Finnish exporting producer cooperated in the investigation.

SEF 463 found the following dumping margins:

- Mondi Neusiedler GmbH (Austria): negligible
- All other exporters (Austria): negligible
- Mondi SCP a.s. (Slovak Republic): 5.8%
- All other exporters (Slovak Republic): 14.6%
- Uncooperative and all other exporters (Finland): 16.3%

The European Commission herewith respectfully presents its Comments on SEF 463.

## I. RIGHTS OF DEFENSE OF THE PARTIES

The information provided by the ADDC is 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.

This is a recurring issue in ADDC disclosure documents, and the European Commission calls on the ADDC to thoroughly re-assess its disclosure policy, in light of best practices by other jurisdictions.

In fact, the whole SEF 463 does not contain any single table. One would normally expect tables with data showing the developments of import volumes, market shares and injury indicators.

The European Commission respectfully draws the attention of the ADDC 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."<sup>1</sup>

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.<sup>2</sup>

In the present case, all information regarding imports, demand and all injury indicators are kept confidential without any explanation. It is therefore impossible for interested parties to assess with a good degree of accuracy the developments of imports and the situation of the domestic industry.

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

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<sup>1</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

<sup>2</sup> Panel Report, *Guatemala – Cement II*, para. 8.213.

## II. KEY FINDINGS OF THE INJURY INVESTIGATION

The Australian industry producing the product concerned consists of one single producer (company Australian Paper, a subsidiary of Nippon Paper Industries Co. Ltd). Australian Paper is the complainant in the present case.

From 1993 to 2004, anti-dumping duties were in place concerning imports from Brazil, Finland, Germany, Indonesia, South Africa and the USA.

Since 2016, anti-dumping duties are in place concerning imports from Brazil, China, Indonesia and Thailand ('INV 341').

In the case at hand, the ADDC finds that the Australian industry has experienced injury in the form of price suppression, and decreased profitability, but that the Australian industry has not experienced injury in the form of lost sales volume and loss of market share.

However, no information has been provided on a number of other, WTO-mandatory, injury indicators.

Indeed, 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.”*

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*<sup>3</sup>, 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*<sup>4</sup>.

Under Section 5.3.1 of SEF 463, the ADDC finds that, from 2014 to 2017, a substantial contraction of the Australian market occurred. At the same time, a consolidation of the Australian domestic industry happened, leaving the complainant (company Australian Paper) the sole domestic producer.

Section 8.2.2 of SEF 463 shows that the Australian domestic industry gained rapidly substantial market shares, rising from around 40% in 2014 to around 80% in 2017.

Imports from countries subject to measures under INV 341 lost substantial market shares to stand at around 10% in 2017.

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<sup>3</sup> Panel Report, *Thailand – Steel* paras. 7.216-256

<sup>4</sup> Appellate Body Report, *Thailand – Steel* paras. 121-128

Imports from Finland, Korea, Russia and Slovakia grew from virtually nothing in 2016 to around 10% market share in 2017, and replaced a portion of the dumped imports from Brazil, China, Indonesia and Thailand after measures under INV 341 were imposed.

Based on Eurostat data, Finland exported around 7.700 tonnes to Australia in 2017 and Slovakia exported around 2.100 tonnes in 2017.

In other words, given that the domestic industry consists of one single producer, that the market share of this single producer rose from around 40% to around 80% in 3 years, and that AD duties are imposed on virtually all imports already, any imposition of duties on the subject countries is bound to restrict competition even further.

Although, the notion of Public interest does not exist in the Australian anti-dumping legislation, the ADDC should take into account the negative consequences of further restricting competition for users and consumers, in particular, limited choice of supply and increasing prices.

The ADDC found that dumping by Austrian exporters was negligible, that Slovak exporters committed to a minimum export price, with the consequence that imports from Slovakia dropped to virtually nothing since September 2017, and that imports from Finland stabilized at around 2-3% market share in 2017-2018 (Figure 15).

The ADDC concludes overall that dumped goods from the subject countries **did not cause material injury** to the Australian industry during the investigation period.

### III. THREAT OF MATERIAL INJURY

ADDC finds that dumped goods did not cause material injury, but finds the existence of a threat of material injury. The European Commission contests this latter finding.

Indeed, articles 3.7 and 3.8 WTO ADA provide that:

- 3.7 *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.<sup>5</sup> In making a determination regarding the existence of a threat of material injury, the authorities should consider, inter alia, such factors as:*
- (i) *a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;*
- (ii) *sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;*
- (iii) *whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and*
- (iv) *inventories of the product being investigated.*

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<sup>5</sup> 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.

- *No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.*
- 3.8 *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.*

In addition, WTO jurisprudence further elaborated that, not only the ‘*totality of factors*’ must be analysed by the investigating authority, but also the line of reasoning must be ‘*objective and unbiased*’. Also, a threat of injury determination requires ‘*special care*’ from the investigating authority.

In *U.S. - Lumber ITC Investigation*<sup>6</sup>, the Panel found, "*in light of the totality of the factors considered and the reasoning in the USITC's determination, we cannot conclude that the finding of a likely imminent substantial increase in imports is one which could have been reached by an objective and unbiased investigating authority*"; as a result, Panel concluded that the ITC's determination is "*not consistent*" with WTO ADA Article 3.7.

Further on, in *U.S. - Lumber ITC Investigation*<sup>7</sup>, the Panel considered the phrase "*special care*" to mean that "*a degree of attention over and above that required of investigating authorities in all antidumping and countervailing duty injury cases is required in the context of cases involving threat of material injury*".

In view of the above WTO requirements, the analysis carried out by the ADDC regarding a threat of injury is insufficient in the SEF 463.

First, as regards imports, it is true that imports from Finland, Korea, Russia and Slovakia grew from virtually nothing in 2016 to around 10% market share in 2017, and replaced approximately one third of imports from countries covered by INV 341. Countries covered by INV 341 retained in 2017 around one third of their previous sales, and the Australian producer gained the remaining one third.

However, in order to predict future likely developments of imports, one should pay careful attention to the most recent import developments, i.e. 2018, and not only 2017.

The European Commission recalls that the investigation was initiated in March 2018 and that provisional measures were imposed in May 2018.

Figure 15 of SEF 463 provides a quarterly outlook of the development of imports under investigation in 2017 and 2018. Figure 15 shows that imports from Slovakia dropped to virtually nothing since September 2017, as Slovak exporters committed to a minimum export price.

Figure 15 also shows that quarterly shipments from Finland peaked in September 2017 (i.e. before the initiation of the investigation), and then declined in the four following quarters for which data is available, i.e. already before the initiation of the investigation and before the imposition of provisional measures.

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<sup>6</sup> Panel Report, *U.S. - Lumber ITC Investigation*, paras. 7.61-96

<sup>7</sup> Panel Report, *U.S. - Lumber ITC Investigation*, paras. 7.29-37

Finally, it is recalled that dumping and injury by imports from Austria was found negligible by the ADDC.

The question that the ADDC must address in an *objective and unbiased* way is whether the above-described import developments point to the *likelihood of substantially increased imports in the immediate future*.

Second, not all the factors listed under Article 3.7 WTO ADA have been properly analyzed by the ADDC. In particular, SEF 463 is silent about *production capacities and inventories* available for export in Slovakia and Finland.

Third, the ADDC's demonstration of an imminent threat of injury rests on a projection (see Section 10.6.2 and Figure 16 of SEF 463) which itself relies on a number of questionable assumptions.

In view of the above, the ADDC's demonstration of a threat of material injury is non-compliant with Articles 3.7 and 3.8 WTO ADA.

#### IV. CONCLUSION

The Commission invites the ADDC to thoroughly review its findings, which undoubtedly will lead to the conclusion that this investigation should be terminated with respect to Finnish and Slovak imports, in the light of the below:

- yet again, information provided by ADDC is insufficient to allow parties to have a proper understanding of the situation at stake, and therefore prevents parties to properly exercise their right of defence;
- even though the European Commission welcomes the conclusion that dumped goods from the subject countries did not cause material injury to the Australian industry, the absence of a detailed analysis for each of the 15 indicators listed in Article 3.4 WTO ADA is WTO-incompliant;
- the ADDC's demonstration of a threat of material injury is non-compliant with Articles 3.7 and 3.8 WTO ADA;
- finally, the negative consequences of further restricting the market for users and consumers, need to be taken into account.