



ANTIDUMPING & SUBSIDIES COMMISSION

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STATEMENT OF REASONS

KINGSTON, JAMAICA
Sunday, February 3, 2002

REF. No. AD-01-2001

IN THE MATTER OF a complaint, pursuant to sections 22 and 23 of the Customs Duties (Dumping and Subsidies) Act, 1999, submitted by Antilles Chemical Company LLC, to the Anti-Dumping and Subsidies Commission.

AND IN THE MATTER OF the Preliminary Determination of a case by the Antidumping and Subsidies Commission, pursuant to section 27 of the Customs Duties (Dumping and Subsidies) Act, 1999

RESPECTING the dumping in Jamaica of certain Inorganic Fertilisers, originating in or exported from the Dominican Republic.

I. SUMMARY

On November 5, 2001, the Commission initiated an investigation pursuant to section 22 of the Customs Duties (Dumping and Subsidies) Act, 1999 (hereinafter known as "the Act") into the alleged injurious dumping into Jamaica of inorganic fertiliser originating in or exported from the Dominican Republic.

The investigation was initiated in response to a complaint filed by Antilles Chemical Company LLC of Kingston, Jamaica.

As a result of the preliminary investigation, the Commission is satisfied that the goods under consideration have been dumped, that the estimated margin of dumping of 22.09 per cent is not *de minimis*, that the volume of dumped goods is not negligible and that the dumping has caused and is likely to cause material injury to the domestic industry. Accordingly, the Commission has made an Affirmative Preliminary Determination in accordance with section 27 of the Customs Duties (Dumping and Subsidies) Act and has decided to impose provisional duties in the amount of 22.09 percent effective February 3, 2002.

The Commission has also made an affirmative preliminary determination concerning the imposition of definitive anti-dumping duties retroactively to the date of initiation, November 5, 2001.

II. THE PARTIES TO THE INVESTIGATION

The Complainant is Antilles Chemical Company Limited, hereinafter referred to as “ACC” or “the Complainant” with offices located at 96 Marcus Garvey Drive, Kingston. ACC is a wholly owned subsidiary of CFG Ltd., a Delaware Corporation located in the U.S.A. On June 21, 2000 CFG acquired all the outstanding shares of capital stock of ACC (as well as two other companies).

The Importer is Agri-Chemicals (Jamaica) Limited, with offices located at 9 Marescaux Road, Kingston 5.

The Exporter is Premium Fertilizer Limited (Dominican Republic), with address at Suite 4A Avenue Abraham Lincoln. ESQ. Jose Amado Soler, Santo Domingo, Dominican Republic and mailing address at 247 S.W. 8th Street, Box 212 Miami, Florida 33130, U.S.A.

The Producer is Fertilizantes Santo Domingo C por A (FERSAN), with offices located at Avenue John F. Kennedy. ESQ. Central Edificio FERSAN Santo Domingo, Dominican Republic.

Other Parties are Premium Fertilizer (Jamaica) Limited hereinafter referred to as “PREMIUM (JA)” with offices at 2 1/4 Windward Road, Kingston 16; and All Island Jamaica Cane Farmers Association, hereinafter referred to as “AIJCFA,” with offices located at 4 North Avenue, Kingston Gardens, Kingston 4.

III. BACKGROUND

On May 3, 2001 ACC submitted an affidavit alleging that finished bagged fertilizer originating in the Dominican Republic was dumped, subsidized or both. The affidavit also claimed that the alleged dumping or subsidizing of the good has caused, is causing and/or is likely to cause material injury to the Complainant. The affidavit did not set forth in detail the facts that supported the allegations and thus, in a letter to ACC dated May 21, 2001, the Commission pointed out this deficiency and sought to have it rectified.

On July 16th, 2001, ACC delivered responses (dated July 11, 2001) to the Commission’s questionnaire, which consisted of narrative responses to the questions and supporting documentation. In this submission, it alleged that the goods under consideration were inorganic fertilizer blends made from various combinations of Nitrogen, Phosphate and Potash, Urea and Sulphate of Ammonia. ACC’s July 11 submission required clarification and thus on August 13, 2001 the Commission requested additional information. This information was received in part on September 12, 2001, and on October 5, 2001 the remainder was received.

By letter dated October 19, 2001, the Commission notified ACC that the complaint was properly documented and the government of the Dominican Republic that a complaint had been filed.

On November 5, 2001, the Commission initiated an investigation pursuant to section 22 of the Customs Duties (Dumping and Subsidies) Act, 1999 (hereinafter known as “the Act”) into the dumping of inorganic fertiliser originating in or exported from the Dominican Republic. The following day, in furtherance of its investigation the Commission forwarded questionnaires to the Producer, the Exporter, the Complainant and the Importer. The Commission has received responses to the questionnaires from all the parties and has also received rebuttals to those responses from the Complainant.

Based on the review of the responses received, the Commission has forwarded supplemental questionnaires to the Producer and the Exporter and requested that AIJCFA complete the Importer’s questionnaire. All parties to the investigation have been informed that their responses to the supplemental questionnaires would not be considered in the making of the Preliminary Determination, however, they would be considered in the making of the Final Determination. The parties were reminded of the Commission’s ability to utilise “facts available” pursuant to sections 4(6) and 10 of the Act. (Please refer to detailed discussion on Facts Available in section IX of this document).

IV. SCOPE OF THE INVESTIGATION

For the purpose of this investigation the Commission defines the scope of the investigation as:

Inorganic Fertiliser made from various combinations of the fertilizing elements: Nitrogen (N), Phosphorus (P) and Potassium (K), originating in or exported from the Dominican Republic.

The narrative definition above represents the scope of the investigation, notwithstanding the tariff classifications below. The scope of the investigation includes, but is not limited to, the following tariff classifications:

3102.1000.0	Urea, whether or not in aqueous solution
3102.2100.0	Ammonium Sulphate
3105.2000.0	Mineral or chemical fertiliser containing the three fertilising elements: nitrogen, phosphorus and potassium
3105.5000.0	Mineral or chemical fertilisers containing the two fertilising elements: nitrogen and phosphorus
3105.6000.0	Mineral or chemical fertilisers containing the two fertilising elements: phosphorus and potassium
3105.9000.0	Other

It should be noted that in some instances these tariff classifications represent the title of the subheading and the Commission intends that the scope of the investigation will include all goods that fall within each subheading unless otherwise specified.

At the initiation of this investigation, the Commission accepted the definition of the scope of the investigation submitted by the Complainant, and as such the investigation included the fertilisers, Urea and Sulphate of Ammonia.¹ The Commission, however, did not include the tariff classification codes for Urea and Sulphate of Ammonia in its original submission because the Customs C-78 entry forms from which the tariff classification codes were derived only made reference to 3105.9000.0 wherever they included the importation of 46.0.0 and 21.0.0 (the formulae for Urea and Sulphate of Ammonia). The Commission sought guidance from the Customs Tariff Act and The Customs Tariff (Revision) (Amendment) Resolution 1999, which states in the notes on Chapter 31 that “For the purposes of heading No.31.05, the term ‘other fertilisers’ applies only to products of a kind used as fertilisers and containing, as an essential constituent, at least one of the fertilising elements nitrogen, phosphorus or potassium.” Finished bagged Urea and Sulphate of Ammonia may also be classified under headings 3102.10 and 3102.21 respectively, and thus these tariff classifications have been included at this stage of the investigation.

The Exporter submits that the goods, Urea and Sulphate of Ammonia ought not to be considered part of the subject goods under investigation as they fall under tariff classification codes outside of the scope of the investigation as defined by the Commission, and the formulae of these products disclose that they are not in fact blends, as they are composed of only one component. The products Urea and Sulphate of Ammonia are thus considered by the fertiliser industry to be “straights”. The Exporter requests confirmation that the inclusion of reference to 46.0.0 and 21.0.0 (the formulae of the products, Urea and Sulphate of Ammonia) are not considered blends under the scope of this investigation.²

The Commission submits that the scope of the investigation has never been limited to blends, in fact the subject of the investigation is Inorganic Fertilisers. The previous discussion concerning the tariff classification explains the absence of the appropriate HS codes relating to Urea and Sulphate of Ammonia in the explanation of the scope in the Statement of Reasons. However, the Commission is of the view that upon consideration of the totality of the circumstances, the Commission’s intent to include the products Urea and Sulphate of Ammonia within the scope of the investigation is clear. Firstly, the narrative concerning scope refers solely to Inorganic Fertiliser, not blends as the Exporter suggests, and thus Urea and Sulphate of Ammonia fall squarely within the scope of the investigation. Secondly, the Commission explicitly stated that the scope included the goods under consideration defined by the Complainant (which referred to Urea and Sulphate of Ammonia).³ Thirdly, the formulae for Urea and Sulphate of Ammonia were included in the examples of NPK fertilisers in the Statement of Reasons.⁴ Finally, the

¹ See Statement of Reasons, Ref. no AD-01-2001 dated November 5, 2001, sections entitled “Background” and “Goods under Consideration.” The Commission states that the Complainant in its submission alleged that the goods under consideration were “inorganic fertiliser blends, Urea and Sulphate of Ammonia made from various combinations of Nitrogen, Phosphate and Potash” and that “the scope of the investigation includes the goods under consideration defined by the Complainant.”

² Fersan and Premium joint submission, received December 18, 2001 (Public version), Response to Particulars of Complaint on behalf of the Jamaican producer of NPK Fertilisers, paragraph 3.11.

³ Statement of Reasons, Ref. no AD-01-2001 dated November 5, 2001, section entitled “Goods under Consideration.”

⁴ Statement of Reasons, Ref. no AD-01-2001 dated November 5, 2001, page 4, section entitled “The Production Process.”

Commission's request for information concerning Urea and Sulphate of Ammonia in its questionnaires to interested parties, unequivocally, supports the Commission's intent to include Urea and Sulphate of Ammonia within the scope of this investigation.

A. GOODS UNDER CONSIDERATION

The scope of the investigation encompasses the "goods under consideration", inorganic fertilisers originating in or exported from the Dominican Republic, which is inclusive of both, blends and what is referred to in the industry as "straights", for example, Urea and Sulphate of Ammonia.

The imported goods appear to have been manufactured specifically for the export market and are identical to the formulae normally sold by the Complainant in Jamaica.

B. PHYSICAL CHARACTERISTICS AND USE

Inorganic fertilisers are made from raw materials containing nutrients that have normally been transformed into a more plant-available form by industrial processing. They supplement the existing nutrients within the soil, in order to provide the balanced supply of essential nutrients that plants need to grow well. The industry recommends that fertiliser applications should be calculated on a "site specific" basis using soil analysis, and taking into account not only the specific plants and expected yield but also the type of soil in which the plants are grown (including their nutrient status) and previous planting history.

The blends of fertiliser that have been imported correspond to the particular needs of Jamaican farmers in light of crops they grow and other uses made of their land. Consequently, the goods under consideration, Inorganic (NPK) Fertilisers, are used to provide plant nutrients for the growth of, among other things, sugar cane, vegetable and root crops, coffee, banana, coconut, citrus, pineapple and pasture.

The goods are transported, shipped, and packaged in 50kg bags.

V. LIKE GOODS

Section 2 of the Act defines like goods, in relation to any other goods, as goods which are identical in all respects with those other goods, or in the absence of identical goods as aforesaid, goods for which the uses and other characteristics closely resemble those of the other goods.

The Commission was satisfied on initiation of this investigation that the "Inorganic Fertilisers produced by the domestic industry made from various combinations of the following elements: Nitrogen Phosphate and Potash, competes [sic] with, can be substituted for, and has [sic] the same manufacturing process, distribution methods, end use, quality and performance characteristics as the goods under consideration."⁵ The Producer/Exporter submits that all NPK blends worldwide are considered like goods because of the nature of the uses of fertilisers and thus all comparable NPK fertiliser blends produced in the Dominican Republic for the home

⁵ Statement of Reasons, Ref. no AD-01-2001 dated November 5, 2001, page 4, section entitled "Like Goods."

market can be considered like goods.⁶ It follows then that the parties, the Producer/Exporter and the Complainant, as well as the Commission are convinced that the NPK blends exported from the Dominican Republic and the goods produced by the local industry are like goods.

The Producer/Exporter takes issue with the inclusion of the “straights” in the scope of the investigation and indicates that the “straights” are distinct from the goods under consideration.⁷ The Commission does not accept the Exporter’s submission, in this regard, and reiterates its rationale for the conclusion that the “straights” are like goods to those goods produced by the domestic industry. Urea and Sulphate of Ammonia, are inorganic fertilisers which have similar end uses, distribution methods, chemical characteristics and packaging to the domestically produced good and could thus be considered like goods to those produced in Jamaica.

The “straights” form part of the goods under consideration and are therefore considered as like goods to the domestically produced goods and thus fall properly within the scope of this investigation.

VI. PERIODS OF INVESTIGATION

The period of investigation (POI) is the timeframe selected for which imports into Jamaica will be assessed to determine the degree to which importations from the named countries have been dumped and the effects and impact of the dumping.

The POI for dumping commences one year prior to the date of initiation, that is November 1, 2000 through October 31, 2001 and includes all importation of the goods under consideration from the Dominican Republic made during this period.

The POI for the injury analysis commences three years prior to the date of initiation, that is November 1, 1998 through October 31, 2001.

VII. THE DOMESTIC INDUSTRY

The Complainant is the sole producer of Inorganic Fertiliser in Jamaica and thus its production accounts for 100 per cent of the like goods produced in Jamaica.

There have been no significant changes to the structure of the Jamaican industry since the Commission initiated its investigation. However, the Producer/Exporter has made the Commission aware of its plans to establish a fertiliser producing plant in Jamaica. The Producer/Exporter submits that plant production should commence in early 2002.

⁶Fersan and Premium joint submission, received December 18, 2001(Public version), Response to Particulars of Complaint on behalf of the Jamaican producer of NPK Fertilisers, paragraph 3.6 and 3.7.

⁷ Please see section IV of this document concerning the Commission’s discussion about its inclusion of the “straights” in the scope of the investigation at initiation.

VIII. THE JAMAICAN MARKET

The Commission's estimate of the size of the Jamaican market prior to importation of the goods under consideration was based on information provided by the Complainant in its original submission, as well as public statistical information, actual Customs entry forms and information obtained from the Exporter.

The Commission found that the size of the market has remained relatively unchanged over the period 1996 to 2000. Prior to March 2001 there were no imports from the Dominican Republic. However, imports from that country for the 11 months since March 2001 now average 8 times the average annual importation of similar products for the three years prior to this date. The goods under consideration currently account for approximately 18.5 per cent of the average market size⁸. The domestic producer's share of the market currently stands at 78.2 per cent, relative to an average of 98 per cent of the market in previous years.

In some instances the Commission has used estimates of actual figures which have been based on averages to ensure that all data comparisons are made similar time periods. The Commission has found that any variations are insignificant.

IX. USE OF FACTS AVAILABLE

In section 4(6) and section 10 of the Customs Duties (Dumping and Subsidies) Act 1999, the Commission is given the discretion to use facts available in making its finding.

Section 4(6) of the Act states that:

The Commission may require the importer of any goods or such other person as the Commission considers appropriate, to state within such time as the Commission shall specify such facts concerning the goods and their history as it may think necessary to determine whether the goods are being dumped or subsidized and if such information is not furnished to its satisfaction, the Commission may make a finding as to such facts on the basis of the information available to it. (Emphasis added).

Section 4(6) gives broad discretion to the Commission for making a finding as to facts on the basis of the facts available to it, in relation to the goods and their history. For the use of available facts pursuant to section 4(6), the threshold is that information has not been furnished to the Commission's satisfaction. In this section, the Act contemplates that the Commission will turn to facts on the record other than those provided as responses to the relevant question and base its finding on those facts.

Unlike section 10 of the Act, section 4(6) does not direct the Commission to have regard to Annex II of the Anti-dumping Agreement in making its determination on the basis of facts available. Consequently, how the available facts should be used, pursuant to section 4(6), is not expressly confined to the manner outlined in Annex II of the Anti-Dumping Agreement.

⁸ Percentages calculated for the October to September financial year.

Section 10 of the Customs Duties (Dumping and Subsidies) Act states that:

Where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, the Commission may make such determination as it thinks appropriate on the basis of the facts available and, for the purposes of this subsection, the Commission shall have regard to the provisions of Annex II of the Anti-dumping Agreement.

Section 10 deals essentially with parties that are uncooperative throughout the investigation process. The Commission's discretion in making determinations on the basis of the available facts must be exercised with regard to and in the manner provided for in Annex II.

Annex II sets forth certain considerations that the authority should take into account and a simple procedure that it should follow before making its determination on the basis of facts available, specifically the authority should give notice of its intention not to accept the information presented and thereafter give the presenter of said information the opportunity to cure the defect. Annex II sets forth rights and responsibilities on the part of both the authority and the parties when the authority must resort to using "facts available", which effectively injects additional elements of transparency and fairness in the investigation process.

The Commission has relied on section 4(6) as it is most applicable to this investigation. The Commission has ensured that in doing so it has complied with Annex II, notwithstanding the fact that the Act does not make this a requirement when exercising its discretion pursuant to section 4(6).

X. EVIDENCE OF DUMPING

Dumping occurs when the normal value of the goods exceeds the export price of the goods shipped to Jamaica. This investigation relates to the injurious dumping into Jamaica of certain Inorganic Fertilisers, originating in or exported from the Dominican Republic.

The normal value of the goods is the price at which like goods are sold in the ordinary course of trade for domestic consumption in the exporting country. The export price of goods shipped to Jamaica is generally the transaction price to the importer in Jamaica. Both prices are adjusted for any costs, charges and expenses that would affect price comparability, as these become available. Estimates of the normal value and export price are discussed below.

In conducting the investigation, the Commission requested the Exporter, Importer and Producer to provide sales and cost information necessary to determine normal value and export prices of the goods. This analysis reflects on the conclusions reached at initiation and seeks to establish the effect of the information submitted subsequently by the afore-mentioned parties at the Commission's request.

A. NORMAL VALUE

At initiation, the Complainant alleged that normal values for the goods under consideration were unavailable because the blends sold in the Dominican Republic market for domestic consumption were not identical to the blends produced for export to Jamaica. Thus, the Complainant estimated constructed normal values based on estimated cost of production, with reasonable amounts for administrative and selling expenses and profit. The Producer/Exporter submitted that the foreign like goods (those sold on the Dominican Republic's domestic market) are identical to the goods under consideration (those exported to Jamaica).⁹ The Producer/Exporter matched each of the exported goods with a good produced for consumption in the Dominican Republic thus the construction of normal values was no longer required.

In reviewing the sales and cost information provided by the Producer/Exporter, the Commission found that the details provided related to a select number of invoices, representing only 13.5 per cent of the Producer's total sales for the period, and not all the invoices for the complete period. In fact, the Producer was asked to submit details of all sales over the period of investigation and not sample sales as this could skew the results and affect the Commission's findings. Thus, given the insufficiency of the data provided, the Commission relied on section 4(6) of the Act and sought to use other information available in the record to establish a reasonable weighted average gross selling price in the Dominican Republic. In deriving the normal value, the Commission relied on the information available in the Producer's audited financial reports, as opposed to the more detailed but incomplete data concerning sales. The Commission has requested that the Producer provide the complete sales and cost information in the manner requested for consideration at the final investigation phase.

B. EXPORT PRICE

The Commission has derived the weighted average FOB price from information provided in Custom's documentation and corroborated it with a Report on Jamaican market sales submitted by the Producer/Exporter. With no other information available, the Commission has used the weighted average FOB price as the export price for the dumping margin calculations.

C. ISSUES OF PRICE COMPARABILITY

To ensure price comparability, the Commission makes adjustments, where appropriate, to base prices for normal value and export price to account for differences that may arise between countries due to variations in quantities, level of trade, physical characteristics, and any other differences demonstrated to affect price comparability.

(i) NORMAL VALUE ADJUSTMENTS

Transportation - The Producer/Exporter made a claim for an adjustment for transportation. However, transportation costs are not included in the gross selling price and represents an

⁹ Fersan and Premium joint submission, received December 18, 2001(Public version), Response to Particulars of Complaint on behalf of the Jamaican producer of NPK Fertilisers, paragraph 3.5.

additional charge when the Producer delivers the goods. Given these facts, the Commission did not accept the Producer's claim for an adjustment for transportation.

Warehousing – The Producer/Exporter stated that distributors and end users buy from the warehouse; however, large purchasers like those in Jamaica buy from the plant. The Producer/Exporter then proceeded to make a claim for adjustments based on warehousing costs. In light of the Producer's statement and given the fact that the Commission is relying on information that does not allow a distinction to be made between sales from either channels of distribution, the Commission did not accept the Producer's claim for an adjustment for warehousing costs, in its calculation of the estimated dumping margin, at this stage of the investigation.

Discounts – The Producer/Exporter makes a claim for an adjustment to be made for discounts, which would normally be taken out of the base price in order to arrive at the net price for normal value calculations. However, from the Producer's submission, it appears to the Commission that discounts have already been taken from the figures submitted for gross selling prices. In addition, in the Producer's financial statements, upon which the Commission relies for the Normal Value calculation, the Producer has included a separate line for discounts and returns, it is from these statements that the Commission would have had to determine the amount of the adjustment to be made for discounts. Because this line item also includes returns and represents discounts for products other than fertiliser, the Commission is unable to determine what the true discount levels are, hence gross selling prices have been used until sufficiently detailed information is received from the Producer, in order to determine the true amount for this adjustment.

Differences in physical characteristics- The Producer has indicated that the blends sold to Jamaica are in fact similar to blends sold in the Dominican Republic. The criteria used to determine their similarity is the ratio of the nutrients contained in each blend. The Commission verified that the ratios between the blends exported to Jamaica and those produced in the Dominican Republic were sufficiently similar. In addition, the Commission verified that the difference in costs between the blends sold to Jamaica and those sold in the Dominican Republic (1.85 per cent on average) was not significant enough to justify any adjustment for differences in physical characteristics. In fact all interested parties agree that blends produced for export are similar to those produced for local consumption.

(ii) EXPORT PRICE ADJUSTMENTS

The Importer, in its submission, noted that PREMIUM (JA) was involved in the clearance and movement of the goods under consideration from the Jamaican port. If this is true it will have significant implications for the final price paid by the Importer, which will take into consideration any further benefit accruing to the Importer, or its client, AIJCFA. In fact, an adjustment will have to be made to the export price in order to arrive at an actual export price (i.e. a price for the goods solely). The Commission has requested that further information on the additional monies paid by PREMIUM (JA) once the goods have landed in Jamaica be provided. The responses to the Commission's request will be taken into consideration at the Final Determination.

D. ESTIMATED MARGINS OF DUMPING

The margin of dumping refers to the differential between the normal value and the export price expressed as a percentage of the export price. The dumping margin was estimated by comparing the weighted average normal value, garnered from the Producer's audited financial statements, to the weighted average export price, garnered from the Customs C-78 entry forms. No adjustments for price comparability were made at this time. The estimated dumping margin is 22.09 per cent.

XI. EVIDENCE OF INJURY

The Complainant has alleged that the goods under consideration have been and are being dumped and that such dumping has caused, is causing and/or is likely to cause material injury to the Complainant. In support of the Complainant's allegations, the Commission has found conclusive evidence of negative volume effects, price suppression, loss of market share, increase in raw material inventory, and a decline in: profit and return on investment, productivity and wages, and output and capacity utilization.

A. VOLUME EFFECTS

Volume effects refer to changes in the pattern of imports of the goods under consideration, relative to such variables as Jamaican consumption or production of the domestic like good and relative to past import volumes.

For the period March to May 2001 imports of the goods under consideration increased significantly relative to imports of similar goods, there being no imports prior to the March 2001 introduction of this product unto the Jamaican market. As at May 2001 import penetration was at the level of at least 27.37 per cent. For June to October 2001 there have been additional imports and so too for November 2001 to January 2002. Import penetration as at January 2002 represents 30.24 per cent relative to total market volume.

B. PRICE EFFECTS

Price effects is the term that refers to changes in the level of prices in absolute and relative terms, that are the direct result of the introduction of dumped imports into the Jamaican market. As will be seen below, price effects are evaluated based on changes relative to previous levels, the competition's price or the domestic industry's unit cost of production.

(i) PRICE DEPRESSION

Price depression is the reduction in the domestic industry's selling price and can be assessed on the basis of percentage changes in prices or trends in the levels of prices before and during the period of dumping. The rate of change of these prices would give an indication of the severity of the impact of the dumping, as it relates to price.

The Commission found no conclusive evidence of price depression notwithstanding the fact that the Complainant's prices were marginally lower on average than the goods under consideration throughout the period of dumping.

(ii) PRICE UNDERCUTTING

Price undercutting refers to instances where the goods under consideration sell for prices below the domestic like good.

The Commission's analysis of information from the Complainant and the Exporter's prices indicate that price undercutting took place between January and March 2001. In May 2001, the Complainant's prices were actually lower than the Exporter's prices, notwithstanding an increase relative to March. Although requested by the Commission, the Exporter did not provide prices after May 2001 and thus the Commission is unable to establish if there has been any further direct undercutting of the Complainant's prices, by the goods under consideration.

(iii) PRICE SUPPRESSION

Price suppression is experienced when the domestic industry's margin between cost of production and selling price cannot be maintained.

The introduction of competition in March 2001 effectively placed a ceiling on fertilizer prices that, the Complainant could not prudently rise above. The Complainant alleged that it was prevented from increasing its prices over the period October to May 2001, to completely offset the full effect of the increase in raw material prices relative to the previous year. As a result, the margin between the Complainant's cost of production and its average selling price was reduced by 16.5 per cent over the period October to May 2001 relative to the similar period of 2000.

Due to reductions in the prices for Urea and Diammonium Phosphate (raw materials for the production of inorganic fertilisers) after May 2001, total raw material costs for the period October to September 2001 have declined relative to their levels for the similar period of 2000. However, because of the reduction in volumes sold, per unit costs have actually increased, and in conjunction with the decline in average selling prices, price suppression has increased to 39.05 per cent.

C. LOSS IN MARKET SHARE

The Commission's analysis at the initiation of this investigation indicated that the Complainant sold approximately 24.9 per cent less over the period October 2000 to May 2001, than it did for the similar period of 2000. For the full year to September 2001 the loss in market share stood at 25.5 per cent, relative to the similar period of 2000.

D. INCREASE IN RAW MATERIAL INVENTORY

Upon the introduction of the Dominican Republic's fertiliser to the Jamaican market, the Complainant's inventory levels showed a marked increase over previous levels. However, its

inventory levels, since July 2001, have been trending downwards. The evidence suggests that this reflects adjustments made by the Complainant in its production and purchasing decisions, in light of the reduction in demand for its product.

E. PROFIT EFFECTS AND RETURN ON INVESTMENT

At initiation, the Commission was satisfied that the Complainant's profitability for the period, October to May 2001 had declined relative to the same period in the previous year; sales had declined proportionally to the decline in the volume of production; and Return on Investment (ROI) had declined in 2001 relative to 2000. For the purpose of the Preliminary Determination the Commission focused on quantifying the effect for the full year October 2000 to September 2001 against the similar prior year period. The audited financial reports show a worsening in all the major line items after May 2001. It is significant that the sales have been reduced over the prior year and net profit before finance charges is down. This converts to a reduction in ROI over the period.

F. PRODUCTIVITY AND WAGES

Productivity refers to the number of units produced per unit of the resources employed in its production. In other words, it is the total output relative to the number of resources employed. The Complainant indicated that it did not recall its nine (9) casual workers as is usually required in the peak season, but maintained its ordinary work force on an eight-hour single shift basis up to May 2001. Average production per worker for the period October 2000 to May 2001 has declined as compared with the similar period in the previous year, representing a 24.7 per cent decline in productivity.

The Complainant's submission subsequent to the initiation of this investigation indicated that the normal work force has been reduced by one (1) since May of 2001. The total productive work force at the end of the financial year September 2001 was 24 workers down from 25 in May and 30 in 2000. Consequently, wages have fallen with production as the number of hours worked has declined.

G. OUTPUT AND CAPACITY UTILIZATION

Capacity is defined as the maximum level of production that an establishment may reasonably expect to attain under normal operating conditions, including normal levels of downtime and the number of shifts of hours of plant operation in accordance with that attained in the past five years. The Commission has found that for the year ended September 2001, the Complainant was operating at just over 100 per cent capacity and attaining similarly high levels of production, while for the similar period ending September 2001 the total capacity and production declined to under 80 per cent. The decline in output and productivity coincides with the alleged dumping of the goods under consideration.

XII. CAUSAL LINK

It is crucial that it be demonstrated that the negative impact on or injury to the industry is as a result of the effects of dumping. The Commission examined all known factors other than the dumped imports, which at the same time could be negatively affecting the domestic industry. The factors identified are: a decline in agriculture and the devaluation of the Jamaican dollar. These were found to have had a negative impact on the industry, between 1997 and 2000. However, for the period January to May 2001, these factors have been ruled out as the cause for the sharp declines in the performance of the domestic industry. The Complainant's performance in 2001 deteriorated significantly relative to 2000, even when the Commission abstracted exchange risk and agricultural shocks.

Other relevant factors that could negatively impact on the domestic industry are changes in the pattern of consumption and contractions in demand.¹⁰ However, it has been demonstrated that these factors have occurred as a result of the dumped imports on the Jamaican market. The Commission concludes that the dumped imports are the principal factor causing material injury to the Jamaican market.

XIII. THREAT OF MATERIAL INJURY

In accordance with Regulation 13 of the Act, a determination of threat of injury shall only be made where a particular market situation is likely to develop into material injury, and is clearly foreseen and imminent.

At initiation the Commission expressed the view that there was a reasonable indication that allegedly dumped imports were imminent and that unless action was taken, material injury would likely occur. The evidence of further injury post-initiation supports this assessment. The Commission is convinced based on the evidence on the record that there is still a likelihood of substantially increased imports of the allegedly dumped goods into Jamaica. The Commission is also convinced that the Producer/Exporter enjoys excess capacity and that in the Dominican Republic there is the potential for product shifting where production facilities that can be used to produce the goods under consideration are currently being used to produce other goods.

Therefore from the documentary evidence, the Commission has concluded that the Producer/Exporter has an incentive to import dumped goods, and that unless action is taken, material injury will occur.

XIV. IMPOSITION OF PROVISIONAL DUTIES

As a consequence of the foregoing, the Commission deems it necessary to impose provisional measures as of the date of the affirmative Preliminary Determination in order to prevent further injury being caused to the domestic industry during the remainder of the investigation.

¹⁰ Customs Duties (Dumping and Subsidies) Regulations, 2000, section 12 (7) and Article 3.5 of the WTO Antidumping Agreement .

Pursuant to section 15 of the Customs Duties (Dumping and Subsidies) Act, provisional duties in the amount of 22.09 percent shall be imposed on dumped goods that are the same description as any goods to which the Preliminary Determination applies. Duties shall take effect on February 3, 2002 and shall remain in effect for a period not exceeding four months, terminating on the day on which the Commission does any of the following: accepts an undertaking, suspends or terminates the investigation or makes a Final Determination. The Importer shall pay provisional duties on all goods released between the effective dates of the provisional duty. Payment may take the form of actual payment or the posting of a security, in the form prescribed by Jamaica Customs, in an amount or to a value not greater than the estimated margin of dumping.

XV. RETROACTIVE IMPOSITION OF ANTI-DUMPING DUTIES

Section 13 of the Customs Duties (Dumping and Subsidies) Act and Article 10.6 of the WTO Anti-Dumping Agreement sets forth a two-prong test for the imposition of duties on goods that were released during the period of ninety days preceding the day on which the Commission makes a Preliminary Determination. This is known as the retroactive imposition of duties. Both the WTO Agreement and the Act require the finding of: a history of injurious dumping in relation to the goods that are like the ones that are the subject of the investigation or that the importer knew or should have known that the exporter practices dumping that would cause injury. Either of the foregoing represents the first prong. The above finding must be coupled with the second prong. Pursuant to section 13 of the Act: significant importation, which causes material injury, and in order to prevent recurrence of the injury it appears necessary to the Commission that duty be assessed on the imported goods. And pursuant to section 10.6 of the WTO Anti-Dumping Agreement: a finding that injury is caused by massive dumped imports in a relatively short period of time which in light of the timing and the volume of the dumped imports is likely to seriously undermine the remedial effect of the definitive antidumping duty to be applied.

The Commission finds that while there is no history of dumping in relation to like goods to the goods under consideration, the importer should have known that the exporter practices dumping. The Commission bases this finding on the following grounds: A sufficiently sophisticated importer should have been put on notice once he/she is able to obtain an export price that is significantly below that of the normal value. In this case, the estimated margin of dumping is 22.09 per cent. Further, the investigation revealed an association between the Importer, the Exporter and the Producer. One of the shareholders in and the Managing Director of the Importer is also a shareholder in and Director of PREMIUM (JA); a company established by the Exporter, to accept payment in Jamaica for shipments exported from the Dominican Republic. Additionally, the majority shareholder in PREMIUM (JA) is also a Director of PREMIUM (DR). In the Staff's view, the association between the Importer and Exporter, established by common Directors, should give the Importer constructive notice of the actions of the Exporter.

Further, the Commission is satisfied that aggregated post-initiation shipments have increased significantly when compared to a similar time period before initiation. For November 2001 to January 2002 imports totalled 3,900 MT as compared to 1,850 MT for the three (3) months prior

to initiation (August 2001 to October 2001) an increase of 110.8 per cent. This increase, when coupled with the indicators for significant imports (such as volume and value of the goods under consideration and production, seasonal trends and the timing of importations, share of consumption of the goods under consideration, the nature and size of the industry) leads to the conclusion that the importations have in fact been significant. As a result of post-initiation importation, further injury has in fact been sustained by the domestic industry, manifested in the displacement of industry sales and hence a decline in its profitability as evidenced in the injury factors examined in this document. In order to remedy the injury being caused by the imports post-initiation, the Commission finds it necessary to impose retroactive anti-dumping duties on goods that entered Jamaica 90 days prior to the imposition of provisional measures, pursuant to section 13 of the Act.

The Commission is satisfied that the dumped imports, over the six-month period from August 2001 to January 2002, that is, the period pre- and post-initiation, constitute massive importation as it represents 10.7% of the total market supply for 2001; that further injury has been caused by these imports; and that due to the timing and volume of the imports, preparation for the peak season January to June for sugar cane customers (the industry's major customer) could be devastating to the viability of the domestic industry as evidenced by the analysis of nature and size of the industry. The Commission is satisfied that allowing such a large volume of dumped imports to enter the market, at a peak period for fertilizer demand may irreparably harm the domestic industry and may render it unable to maintain its competitiveness in the market, and is therefore likely to seriously undermine the remedial effect of the application of definitive/final antidumping duties. The imposition of final anti-dumping duties in three months, at the Final Determination may not be able to adequately remedy the injury caused to the domestic industry by the imports, which entered Jamaica between November 2001 and January 2002. Thus, the Commission is satisfied that the facts presented meet the standards set forth in Article 10.6 of the WTO Anti-Dumping Agreement and section 13 of the Act.

In light of the foregoing, the Commission has made an affirmative preliminary determination recommending the retroactive application of duties to goods released after the date of initiation of this investigation to the date of the Preliminary Determination.

The Commission will request that the Jamaica Customs put in place whatever measures as may be necessary to collect antidumping duties retroactively, such as the posting of security or prepayment, in the amount of the estimated preliminary dumping margin for goods that have entered the country since November 5, 2001. Therefore, if the Commission finds at the Final Determination, that retroactive application is necessary, this measure will preserve the Commission's ability through Jamaica Customs to collect duties retroactively.

XVI. DECISION

Pursuant to section 27 of the Customs Duties (Dumping and Subsidies) Act, the Commission has made an affirmative Preliminary Determination in respect of the dumping in Jamaica of certain Inorganic Fertilisers originating in, or exported from the Dominican Republic and finds that the goods under consideration have been dumped and the dumping of the goods under consideration

has caused and is likely to cause material injury to the domestic industry. Material injury to the domestic industry has been reflected in price suppression, negative volume effects and a decline in: market share, profit, return on investment, sales, productivity and wages, and output and capacity utilization.

Pursuant to Section 15 of the Customs Duties (Dumping and Subsidies) Act, the Commission has decided to impose a provisional duty in the amount of 22.09% on all goods that are the same description as those to which the Preliminary Determination applies, effective February 3, 2002 and terminating on the date the Commission, accepts an undertaking, suspends or terminates the investigation or makes a Final Determination. At the Commission's request Jamaica Customs will collect a provisional duty on all goods imported into Jamaica that are the same description as those to which the Preliminary Determination applies, which are released after February 3, 2002.

Additionally, pursuant to section 13 of the Customs Duties (Dumping and Subsidies) Act, the Commission has made an affirmative preliminary determination concerning the imposition of definitive anti-dumping duties retroactively to the date of initiation, November 5, 2001. At the Commission's request Jamaica Customs will put in place whatever measures are necessary in order to collect anti-dumping duties on all goods that are the same description as those to which the Preliminary Determination applies, which are released by Jamaica Customs after November 5, 2001. The Commission invites all importers concerned to comment on the issue of retroactive application of duties before its Final Determination in this matter.

COMMISSIONERS SITTING:

Mrs Beverly Morgan
Chairman

Dr. Cecil Goodridge
Commissioner

Ms. Sandra Shirley
Commissioner

Dr. David Wildish
Commissioner

FUTURE ACTION

The Anti-Dumping and Subsidies Commission will make a Final Determination in this matter within 90 days from the date of the Preliminary Determination in this investigation.

Where at anytime before the making of a Final Determination in an investigation relating to the dumping or subsidising of goods, the Commission is satisfied in respect of some or all of those goods that there is insufficient evidence of dumping to justify proceeding with the investigation in relation thereto; or the margin of dumping is *de minimis* or that the volume of dumped imports, actual or potential, or the injury is negligible; or that the evidence does not disclose a reasonable indication that the dumping or subsidising thereof has caused, or is likely to cause material injury; the Commission shall cause the investigation to be terminated with respect to those goods. The Commission shall cause notice of such a termination to be published in the Jamaica Gazette and a daily newspaper.

In the event of a Final Determination of dumping and injury by the Commission, the goods under consideration would be subject to an anti-dumping duty which may be equal to the margin of dumping, or, as the case may require such lesser amount as is considered adequate compensation for the injury.

RETROACTIVE DUTY

At the Final Determination, an antidumping duty may be imposed retroactively on goods under consideration that were imported into Jamaica in the period starting on the day the investigation was initiated, if the Commission makes a finding of material injury.

INFORMATION

Interested parties are invited to file written submissions presenting facts, arguments and evidence that they feel are relevant to the alleged dumping or injury. Written submissions should be forwarded to the attention of the officer identified below. To be given consideration in this phase of the investigation, the Commission should receive all information within 30 days of the date of the Preliminary Determination.

Any information submitted to the Commission by interested parties concerning this investigation is deemed to be public information unless clearly marked confidential. Where the submission by an interested party is confidential, a non-confidential version of the submission (which summarizes the information in the confidential submission) must be provided at the same time. This non-confidential version will be made available to other parties and the public upon request.

This Statement of Reasons along with the Notice of Preliminary Determination of this investigation has been provided to interested parties of these proceedings. A copy may be obtained for a nominal fee upon request, for this and for any further information, please contact the Commission as follows:

Mail: Anti-Dumping and Subsidies Commission
24 Trafalgar Road, Kingston 10 or
P.O. Box 494, Kingston 5.

Attention: Sara-Ruth Allen, General Manager

Telephone: (876) 920 7006 or (876) 968 7970