



## ANTIDUMPING & SUBSIDIES COMMISSION

24 Trafalgar Road ~ Kingston 10 ~ OR ~P.O. Box 494 ~ Kingston 5 ~Jamaica

Phone; 968-7970, 920-1493/7006, 929-7973 ~ Fax: 926-4622

Email: [antidump@cwjamaica.com](mailto:antidump@cwjamaica.com)

# STATEMENT OF REASONS

**KINGSTON, JAMAICA**

**REF. No. AD-01-2001**

**Saturday, May 4, 2002**

*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 **Final Determination** by the Antidumping and Subsidies Commission, pursuant to section 30 of the Customs Duties (Dumping and Subsidies) Act, 1999

*IN RESPECT OF* 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.

The Commission made an affirmative Preliminary Determination on February 3<sup>rd</sup>, 2002, that the goods under consideration had been dumped and had caused and were likely to cause material injury to the domestic industry, and that the evidence supported the imposition of retroactive duties at the Final Determination. The Commission found that neither the estimated margin of dumping, nor the volumes of dumped goods imported was de minimis, and instructed that provisional duties in the amount of 22.09 per cent should be imposed.

As a result of the final investigation, the Commission is satisfied that the goods under consideration have been dumped, that the margin of dumping is not de minimis, that the volume of dumped goods is not negligible and that the dumping has caused material injury to the domestic industry. Accordingly, the Commission has made an Affirmative Final Determination in accordance with section 30 of the Act and has decided, pursuant to section 11 of the Act, to impose a definitive anti-dumping duty in an amount less than the margin of dumping, that is, in the amount of 15.61 per cent on goods which are the same description as those to which the Final Determination applies, effective May 4, 2002.

The Commission has also made a Final Determination concerning the imposition of a definitive anti-dumping duty of 15.61 per cent (less than the margin of dumping) retroactively on goods of the same description to which this Determination applies that were released from Jamaica Customs between the dates of Initiation, November 5, 2001 and the Preliminary Determination, February 3, 2002.

## II. THE PARTIES TO THE INVESTIGATION

**The Complainant** is Antilles Chemical Company Limited, also referred to as “ACC,” 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 Importers** are Agri-Chemicals (Jamaica) Limited, also referred to as “Agri-Chemicals,” with offices located at 9 Marescaux Road, Kingston 5<sup>1</sup> and All Island Jamaica Cane Farmers Association, also referred to as “AIJCFA,” with offices located at 4 North Avenue, Kingston Gardens, Kingston 4.<sup>2</sup>

**The Exporters**<sup>3</sup> are Premium Fertiliser Limited (Dominican Republic), also referred to as “PREMIUM (DR),” with address at Suite 4A Avenue Abraham Lincoln. ESQ. Jose Amado

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<sup>1</sup> Customs documentation reflects that Agri-Chemicals is the consignee of the imported goods and, having signed the required import documents, Agri-Chemicals is an importer of the goods under consideration, pursuant to section 2 of the Act.

<sup>2</sup> At this stage of the investigation, the Commission has decided to adjust AIJCFA’s status from “other party” to “importer” based on the evidence on the record. In its March 8, 2002 submission, the AIJCFA states that, in effect, it is the importer of the goods under consideration and that Agri-Chemicals was asked to act on its behalf because AIJCFA did not have a tax compliance certificate which is a pre-requisite for importation. On this basis, the Commission is satisfied that AIJCFA had a beneficial interest in the goods at, or from, the time of the importation until the same were duly delivered out of the charge of Customs officers, and thus pursuant to section 2 of the Act, AIJCFA may also be considered an importer of the goods under consideration.

<sup>3</sup> In their joint submission of December 17, 2001, FERSAN and PREMIUM (DR) stated that Premium Fertilisers Limited (Dominican Republic) is the exporting arm of FERSAN and a subsidiary thereof. The submission also informed that the understanding was that all payments for the product exported to Jamaica were to be made to PREMIUM (DR). However, PREMIUM (DR) claims that it was forced to incorporate a company in Jamaica to accept local payments on its behalf. AIJCFA in its submission of March 8, 2002 confirms that it sends its orders for inorganic fertilisers to PREMIUM (DR) and makes its payments for those goods to PREMIUM (JA) on PREMIUM (DR’s) behalf. It is the Commission’s view that although PREMIUM (DR) and PREMIUM (JA) may be separate legal entities, the evidence on the record indicates that for the purposes of this investigation the two entities should

Soler, Santo Domingo, Dominican Republic and mailing address at 247 S.W. 8<sup>th</sup> Street, Box 212 Miami, Florida 33130, U.S.A. and Premium Fertiliser (Jamaica) Limited, also referred to as “PREMIUM (JA),” with offices at 2 1/4 Windward Road, Kingston 16.

**The Producer** is Fertilizantes Santo Domingo C por A (FERSAN), also referred to as “FERSAN,” with offices located at Avenue John F. Kennedy. ESQ. Central Edificio FERSAN Santo Domingo, Dominican Republic.

### **III. BACKGROUND**

On May 3, 2001 ACC submitted an affidavit alleging that finished bagged fertiliser originating in the Dominican Republic was dumped, subsidised or both. The affidavit also claimed that the alleged dumping or subsidising 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 16<sup>th</sup>, 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 fertiliser 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 its 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, PREMIUM (DR), Agri-Chemicals and the Complainant. The Commission 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 forwarded supplemental questionnaires to FERSAN and PREMIUM and, on the basis of information received, requested that AIJCFA complete the Importer Questionnaire. All parties to the investigation were informed that the responses to the supplemental questionnaires could not be considered in the making of the Preliminary Determination, because it was unlikely that the Commission could

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be seen as one, as essentially they perform two sides of the same transaction. PREMIUM (DR) supplies the goods to the Jamaican market and PREMIUM (JA) collects payment for the goods supplied.

comprehensively review the information and incorporate the relevant elements in the time remaining before the Preliminary Determination. It was made clear, however, that the responses would be considered in the making of the Final Determination. Parties were reminded of the “facts available” clauses as set out in sections 4(6) and 10 of the Act. (Please refer to detailed discussion on Facts Available in section X of this document).

Subsequent to the Preliminary Determination of February 3, 2002, the Commission found it necessary to request further information from FERSAN which it received on April 3, 2002 after a number of written exchanges. The Commission is satisfied that FERSAN has responded to all its requests and that the information provided by the company is sufficient for the analysis required at this stage of the investigation.

On February 11, 2002, the Commission received from Counsel for the AIJCFA the first of many requests for an extension of time to permit its client to respond to the Commission’s questionnaire, transmitted to his client on January 14, 2002. On February 14, 2002 the Commission responded setting a new deadline date of February 20, 2002, for the receipt of responses to the questionnaire. On February 22, 2002 Counsel for AIJCFA wrote to the Commission indicating that he was still receiving instructions and despite his assiduous efforts could not meet the deadline of February 20, 2002, and thus he requested a further extension of time to March 1, 2002. On March 4, 2002, having received no communication from AIJCFA, the Commission wrote to AIJCFA highlighting the importance of meeting timelines and the fact that the Commission had tried to be accommodating to the Association in granting extensions. AIJCFA was also referred to the Act and the sections that empower the Commission to request information in pursuit of its investigation. The Commission underscored the fact that, pursuant to section 4(6) of the Act, if information is not furnished to its satisfaction then the Commission may rely on the facts available from the record. Further, to facilitate the Commission’s receipt of responses, the Commission sought to separate the questions into two categories for general and specific information; the general information due on March 8, 2002 and the specific on March 15, 2002. This resulted in the Commission obtaining the general information on March 8, 2002, which included details of the ownership and shareholding of the Association, the product it sold, as well as its operations in Jamaica, and some of the more specific information concerning the relationship between AIJCFA and FERSAN, PREMIUM and Agri-Chemicals.

Without AIJCFA’s responses to some of the more specific questions, the Commission was able to glean some of the relevant information from the submissions of other interested parties. However, the Commission found that some of the outstanding information requested of AIJCFA, for example AIJCFA’s price lists over the period of investigation, was pertinent to the investigation and attempted to garner the information in a positive and cooperative manner without resorting to compelling the provision of such information by Court Order.<sup>4</sup> The Commission was of the view that every effort should be made to assist in providing required responses. On April 11, 2002 the Commission again wrote to AIJCFA and, on this occasion, indicated its willingness to facilitate by sending its own professional staff to assist in compiling the information from AIJCFA’s records. AIJCFA was given a deadline of Friday April 12, 2002,

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<sup>4</sup> Sections 4(7) and 7 of the Act, gives the Commission the authority to apply to the Court to compel persons who are in possession of information relevant to its investigation to provide that information.

to indicate its willingness to cooperate with the Commission. On April 15, 2002, the Commission contacted Counsel of Record for AIJFCA and on the 16<sup>th</sup> the Commission received a letter from him indicating that he received the Commission's April 11, 2002 letter and that he had no further instructions from his client. The Counsel of Record was therefore not in a position to respond to the Commission's requests for information or the facilitation of a visit to his client's premises. To date, the Commission has been unable to secure some of the pertinent information it requested from AIJFCA.

### **JUDICIAL REVIEW OF THE PRELIMINARY DETERMINATION**

Agri-Chemicals (Jamaica) Limited applied to the Supreme Court of Jamaica for leave to apply for an Order of Certiorari by way of judicial review of the Commission's Preliminary Determination, pursuant to sections 33 and 34 of the Act, on three grounds:

1. that the Commission in determining that its scope of investigation included the fertilisers Urea and Sulphate of Ammonia, acted beyond its jurisdiction, erred in law in making the said determination, and made said determination without regard to the material before it, having regard to the fact that neither Urea and Sulphate of Ammonia is produced by the Complainant;
2. that the Commission in determining that Agri-Chemicals should have known that the exporter practises dumping acted beyond its jurisdiction, erred in law in making said determination, and made said determination in a perverse or capricious manner or without regard to the material before it having regard to:
  - (i) the Commission's finding that there is no history of dumping by the exporter in relation to the like goods produced in Jamaica,
  - (ii) the fact that Agri-Chemical is not associated with the exporter,
  - (iii) the fact that Agri-Chemicals is not a related party to the exporter,
  - (iv) the fact that Agri-Chemical does not have a contractual relationship with the exporter for the purchase of the goods under investigation, nor did it purchase from the exporter the goods which are the subject of the investigation for sale and distribution in Jamaica;
3. As to whether the Commission found "that the importer should have known that the exporter practices dumping and that the dumping would cause material injury."

The Commission attempted to set aside the Order granting leave to apply for judicial review on the grounds that Agri-Chemicals failed to disclose material information or failed to highlight relevant information in its Affidavit or, in the alternative, to clarify the Order which stated that it is "Further ordered that the Commission take no steps to carry out its decision until the hearing of the application for certiorari."

The Court refused the application to set aside the Order granting leave to apply for judicial review but varied the original Order in the following manner:

- (a) Leave be granted to the Applicant, Agri-Chemicals ("the Importer") to apply for an order of certiorari to remove into the Supreme Court and quash the decision of the Respondent made on the 4<sup>th</sup> day of February 2002, by which the Respondent decided

- that the fertilisers Urea and Sulphate of Ammonia were properly included in its scope of anti-dumping investigations of certain products imported by the importer, that the Applicant should have known that the exporter practices dumping, and that retroactive anti-dumping duties be imposed on the goods under investigation imported by the Applicant to November 5, 2001, the date of the initiation of the Respondent's investigation.
- (b) That the Respondent take no other steps to enforce its decisions with respect to the imposition of retroactive or anti-dumping duties in respect of Urea and Sulphate of Ammonia until the hearing of the application for judicial review. It is further recommended that the matter be the subject of an expedited hearing.
  - (c) Nothing in paragraph (b) of this Order shall preclude the Respondent from carrying out its duty to investigate whether a product or products imported by the Applicant is being or has been dumped.

This Order is made on the following terms:

1. That the Notice of Motion be served as soon as possible.
2. A Statement should be filed for the purposes of the Record.
3. Leave to Appeal granted.

The judicial review application was heard before Justice Andrew Rattray between April 9 – 12, 2002. On April 25, 2002 Justice Rattray delivered an oral judgement and indicated that his written reasons were to follow. The Court found that there was no basis on which to disturb the Commission's findings at the Preliminary Determination and thus denied the application for an Order of Certiorari and awarded costs to the Commission.

#### **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 fertilising 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 Other 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

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.<sup>5</sup> 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.” The Commission became aware during the preliminary investigation that finished bagged Urea and Sulphate of Ammonia may also be classified under headings 3102.10 and 3102.21 respectively, and thus these classifications were included at the Preliminary Determination.

The Producer/Exporter<sup>6</sup> submitted 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 Commission submits that Urea and Sulphate of Ammonia fall properly within the scope as defined. The fact that the tariff classification codes for the straights were omitted from the Statement of Reasons at Initiation is not dispositive of the issue; the omission of the tariff codes at Initiation are explained above. It is the Commission’s view that upon consideration of the totality of the circumstances, the Commission’s inclusion of the products Urea and Sulphate of Ammonia within the scope of the investigation since initiation has been clear. The scope of the investigation was never limited to “blends.” Firstly, the narrative concerning scope refers solely to Inorganic Fertiliser, not blends as the Producer/Exporter suggests. 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).<sup>7</sup> Thirdly, the formulae for Urea and Sulphate of Ammonia were included in the examples of NPK fertilisers in the

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<sup>5</sup> 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.”

<sup>6</sup> The term “Producer/Exporter” is used in this document to refer to FERSAN and PREMIUM. These interested parties presented a joint submission to the Commission on December 17, 2001 in which they described their relationship in the following manner: “Premium Fertilisers Limited is the exporting arm of FERSAN and a subsidiary. . .” and “Premium Fertiliser (Jamaica) Limited was incorporated to accept payment in Jamaica for shipments exported.”

<sup>7</sup> Statement of Reasons, Ref. no AD-01-2001 dated November 5, 2001, section entitled “Goods under Consideration.”

Statement of Reasons.<sup>8</sup> Finally, the Commission's request for information concerning Urea and Sulphate of Ammonia in its questionnaires to interested parties and the parties' responses thereto; unequivocally support the Commission's inclusion of Urea and Sulphate of Ammonia within the scope of this investigation.

#### **A. GOODS UNDER CONSIDERATION**

The goods under consideration are the same as those set forth in the scope that originate in or are exported from the Dominican Republic, which includes both the blends and what is referred to in the fertiliser industry as the "straights" Urea and Sulphate of Ammonia.

##### **(I) PHYSICAL CHARACTERISTICS AND USE**

Inorganic fertilisers are made from naturally occurring 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 crop and expected yield but also the type of soil in which the crop is grown (including its nutrient status) and previous cropping history.<sup>9</sup>

The fertiliser that has been imported corresponds to the particular needs of the individual Jamaican farmers in light of crops they grow and other uses made of their land. Consequently, the goods under consideration, inorganic 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 under consideration are transported and shipped to Jamaica, packaged in 50Kg bags.

##### **(II) PRODUCTION PROCESS**

The production process of the goods under consideration entails the following: The bulk raw materials are brought by ocean going vessels to the foreign producer's port facility where they are discharged and via a conveyor system sent to humidity controlled storage bins. From the storage bins the raw materials are brought to the overhead bins of the formulation towers using pay loaders. A product elevator is used to carry materials to the bins, which are at the highest point in the tower; from thereon the flow is by gravity. A computer controls the formulation of each batch to be made. It opens valves to load each material to a weigh station. Once the correct amount of each raw material is achieved, it discharges into a blender, which will mix the components into a homogenous NPK blend (in the processing of the straights, the blending process is omitted). The resulting mixture is then fed into bagging hoppers, which dispense the exact amount of product to a bag that has been placed in the tower opening. Once the bags have been filled with 50 kg of product, they are sewn closed and carried via forklifts in 3-ton pallets to a storage area.

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<sup>8</sup> Statement of Reasons, Ref. no AD-01-2001 dated November 5, 2001, page 4, section entitled "The Production process."

<sup>9</sup> Extracted from the website of the Fertiliser Association of Ireland, [www.fertilizer-assoc.ie](http://www.fertilizer-assoc.ie)



## 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.

In order to establish whether the domestically produced goods are like goods to the goods under consideration a number of characteristics are examined; physical and chemical characteristics, production process, end-use, distribution methods, substitutability and competition and quality and performance characteristics. In this section the Commission shows how the goods under consideration and the domestically produced goods closely resemble each other in uses and other characteristics and thus relative to the goods under consideration the domestically produced goods are considered to be like 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, compete with, can be substituted for, and have the same manufacturing process, distribution methods, end use, quality and performance characteristics as the goods under consideration.<sup>10</sup>

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 can be considered like goods. The Producer/Exporter, the Complainant and the Commission are agreed that the NPK blends exported from the Dominican Republic and the goods produced by the domestic industry are like goods.

The Producer/Exporter has taken issue with the inclusion of the “straights” in the scope of the investigation and indicates that the “straights” are distinct from the subject goods (the goods under consideration). In view of the Producer/Exporter’s objection, the Commission reiterates the rationale for its finding that the “straights” are like goods to the goods under consideration. The imported “straights” Urea and Sulphate of Ammonia are categorized universally as fertilisers.

With regard to physical and chemical characteristics, Urea and Sulphate of Ammonia are the forms of nitrogen most commonly used in the production of blended fertilisers. Thus, the imported Urea and Sulphate of Ammonia (straights) share a common element Nitrogen, that the blended fertilisers produced by the domestic industry contain. Additionally, the evidence on the record reveals that the production process for the domestically produced goods and the goods under consideration is similar.

Urea and Sulphate of Ammonia are sold side by side with blended fertiliser. The evidence on the record supports the fact that AIJCFA plays the same role as distributor for both PREMIUM (JA)

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<sup>10</sup> Statement of Reasons, Ref. no AD-01-2001 dated November 5, 2001, page 4, section entitled “Like Goods.”

and ACC. It receives an order from the customer, it places the order required by the customer with the supplier of the product, instructing the supplier to deliver the fertiliser to the customer or his representative. Therefore the evidence reveals that the goods under consideration and the domestically produced goods are sold through the same distributor to a similar type of customer.

The imported “straights” like the domestically produced goods have the same general end use, as they are both sold as finished goods and are used by a variety of farmers in similar types of cultivation to replace nutrients in the soil.

With regard to substitutability and competition, the Complainant claims that traditionally AIJCFA had purchased all the fertiliser that it required from the Complainant, and that AIJFCA has taken all its customers’ requirements from PREMIUM (DR) since the establishment of that business relationship, with the exception of those grades that PREMIUM (DR) may not have, at the time of the order. There is evidence that ACC’s sales to AIJCFA fell subsequent to the introduction of the imported good into the market. The evidence presented by the Complainant and the Producer/Exporter demonstrated that AIJCFA considered the goods under consideration substitutable for the domestic like good. Additionally, the goods under consideration are directly competitive with the domestic like goods, as AIJFCA purchased the goods under consideration instead of making purchases from the Complainant.

Specifically in relation to the imported “straights”, Urea and Sulphate of Ammonia, these products can give a farmer all the nitrogen he/she requires for his/her crops, but could not provide phosphorus or potassium. In certain scenarios, therefore, a farmer could use a “straight” with some complimentary fertiliser, for example, a blend of phosphorus and potassium or an organic fertiliser, in order to provide the other nutrients he/she requires depending on the condition of the soil and the crops that are grown. Thus, the Commission concludes that the “straights” are not perfectly substitutable for and competitive with the domestically produced goods, however, their relative substitutability and competitiveness is sufficient to support a determination that the imported straights are like goods to the domestically produced blends.

The analysis of like goods thus far has been on the basis of the Urea and Sulphate of Ammonia as finished goods. However, Urea and Sulphate of Ammonia may also be considered as component parts as they are raw materials, which are the primary source of nitrogen used in the making of inorganic fertiliser blends. In other jurisdictions, component parts are usually included within the scope of the investigation as foreign producers could circumvent the application of the anti-dumping law by establishing finishing operations in the importing country and “transferring” the unfinished product to the newly established subsidiary for completion and subsequent resale.

In the instant case, the Producer/Exporter has already declared its intent to set up a production plant in Jamaica before the end of 2002, thus making the aforementioned circumvention scenario possible. The Commission welcomes the establishment of additional production facilities in Jamaica. The Commission would be remiss, however, if it were to overlook the fact that this might be a convenient vehicle for the importation of unfinished dumped product to be completed and traded unfairly. It is the view of the Commission that the absence of expressed circumvention provisions as part of Jamaican legislation at the present time requires its careful

definition of the scope of the investigation. However, in the instant case, the fact that Urea and Sulphate of Ammonia may also be considered component parts to inorganic fertiliser blends forms an additional basis for the inclusion of Urea and Sulphate of Ammonia in the scope of this investigation. If these products are excluded from the scope of the investigation, this may provide a mechanism to the Producer/Exporter through which the application of anti-dumping laws and the Determination of the Commission might be undermined.

In light of the foregoing the Commission finds that the imported “straights,” Urea and Sulphate of Ammonia, are inorganic fertilisers, which have similar end uses, distribution methods, production process, and physical and chemical characteristics to the domestically produced goods. Although not perfectly substitutable for and competitive with the domestically produced blends, their relative substitutability and competitiveness in conjunction with the other characteristics mentioned above are sufficient to support a determination that the imported straights are like goods to the blends domestically produced. Additionally, the “straights,” Urea and Sulphate of Ammonia, are component parts of inorganic fertiliser blends, whose exclusion from the scope of the investigation could result in undermining the application of anti-dumping laws and the Determination of the Commission.

## **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. The goods under consideration were first imported in March 2001 and the imports from that date to January 2002, totalling 10 shipments, have been examined in the dumping analysis.

The POI for the injury analysis commences three years prior to the date of initiation, that is November 1, 1998 through October 31, 2001. For purposes of the Final Determination, the Commission has analysed information provided by the Complaint for the period up to and including February 2002.

## **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.

### **VIII. THE JAMAICAN MARKET**

The size of Jamaica's fertiliser market has remained relatively unchanged over the period 1997 to 2001. ACC is the sole producer of blended inorganic fertiliser in Jamaica, and therefore forms the domestic fertiliser industry. However, ACC has not been the only supplier of fertiliser to the Jamaican market. Typically ACC controlled over 98 per cent of the market and the remaining less than 2 per cent, included imported goods similar to the goods under consideration as well as specialized fertiliser, such as those used on golf courses, mainly from Costa Rica and the United States. In 2001 the structure of the market changed with the introduction of fertiliser from the Dominican Republic as well as significantly increased quantities of fertiliser imported from Costa Rica. In 2001, while the nominal amounts of imports of specialised fertiliser continued at previous levels, the effect of the increased importations of the goods under consideration from the Dominican Republic and goods similar thereto from Costa Rica was to reduce ACC's market share from approximately 98 per cent to approximately 73 per cent.

The majority of ACC's sales between 1997 and 2000 were to the sugar cane industry. The pattern of ACC's production was strongly influenced by sugar cane production patterns. Notably ACC's production was usually highest in the January to March and the April to June quarters. The importations by the AIJCFCA have caused ACC to significantly alter this pattern of production and have resulted in reduced sales levels.

### **IX. ECONOMIC CONDITIONS OF THE DOMESTIC INDUSTRY**

Over the period 1997 to 2000, from an economic standpoint, there were exogenous factors that had an impact on the industry's performance. Among these factors were a decline in agricultural performance and devaluation of the Jamaican dollar.

Indications for 2001 are that agricultural production has shown a real increase of 5.2 percent relative to its 2000 levels.<sup>11</sup> This level of production also represents a 17.1 per cent increase over its 1997 levels. The nominal exchange rate has lost 4.2 per cent of its value in 2001 relative to 2000. Over the period 1997 to 2001 the exchange rate depreciated by 33.2 per cent. Given that the fertiliser industry depends heavily on imported raw material, these depreciations would impact on the industry.

Over the period 1997 to 2000, ACC has maintained a constant level of production and sales, required to satisfy market demand. Over the same period the gross profit margin (gross profit expressed as a percentage of sales), has increased by 6 per cent due mainly to the reductions in the cost of raw material used and consistent operating efficiency. However, the company's performance in 2001 has been such that sales have declined over its 2000 level and as a consequence, in 2001, gross profit declined by 39 per cent relative to 2000. The levels of cash have remained relatively flat over the period indicative of an organization financed heavily by debt. The similarly flat inventory levels reflect constant levels of sales and production for the

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<sup>11</sup> The Planning Institute of Jamaica, Economic and Social Survey 2001.

years 1997 to 2000. However in 2001 the inventory as a percent of sales was higher than previous years.

## **X. 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 findings.

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 in this scenario, 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 other facts on the record and base its findings 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<sup>12</sup> 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.

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.

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<sup>12</sup> The WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO Anti-Dumping Agreement) provides the international framework of rules and obligations concerning the conduct of dumping investigations on which Jamaican legislation is based.

Annex II sets forth certain considerations that the Commission should take into account and the procedure that it should follow before making its determination on the basis of facts available. Specifically the Commission 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. If the information provided to cure the defect is considered not satisfactory by the Commission then the reasons for the rejection of such evidence or information should be given in any published determinations. Annex II sets forth rights and responsibilities on the part of both the Commission and the parties, when the Commission must resort to using “facts available”, and effectively injects additional elements of transparency and fairness in the investigation process.

Where the Commission has resorted to using facts available in the making of this Determination, it has been as a result of the contemplation of the abovementioned sections, and the Commission has ensured that in doing so, it has complied with Annex II of the WTO Anti-Dumping Agreement.

## **XI. 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. The normal value and export price are discussed below.

Throughout the investigation, the Commission requested that FERSAN, PREMIUM (DR), Agri-Chemicals and AIJCFA provide sales and cost and other information necessary to determine normal value and export prices of the goods. This analysis reflects on the conclusions reached at the Preliminary Determination and establishes 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 costs of production, with reasonable amounts for administrative and selling expenses and profit.

At the Preliminary Determination, the Producer/Exporter submitted that the foreign like goods (those sold on the Dominican Republic’s domestic market) were identical to the goods under consideration (those exported to Jamaica), and matched each of the exported goods with a similar good produced for consumption in the Dominican Republic. Thus, the construction of

normal values was not required. The Commission derived the normal value from the information available in the Producer's audited financial statements, as opposed to the more detailed but incomplete sales data and requested that the FERSAN provide complete information on sales, prices and related costs for consideration at the final investigation phase.

For the Final Determination, FERSAN responded to the Commission's request. The Commission relied on information for the period January to June 2001, even though information was provided for a longer period. The reasons for this are as follows:

1. Normal values should be based on transactions in the foreign country that took place on or around the date of sale of the goods under consideration. The first order for fertiliser was placed in January 2001 and therefore information prior to this date would not be relevant; and
2. The information that FERSAN provided for July to November 2001 was not verifiable, and therefore it could not be utilised for the purposes of the analysis. Indications are that inorganic fertiliser prices in the Dominican Republic and export prices to Jamaica have not changed significantly since June 2001.

The normal value is calculated based on the weighted average net selling price of all sales by FERSAN in the Dominican Republic of fertilisers that are similar to those exported to Jamaica (including Urea and Sulphate of Ammonia), for the period January to June 2001.

#### **B. EXPORT PRICE**

At initiation the Complainant submitted export prices for the goods under consideration and these were substantiated by the Customs C-78 entry forms and supporting invoices. For the Preliminary and the Final Determination, the Commission has derived the weighted average FOB price from information provided in Customs' documentation and corroborated it with a Report on Jamaican market sales submitted by the Producer/Exporter.

#### **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, including dissimilarities that arise from the variety of selling conditions in different markets. The Commission uses verifiable information submitted by the interested parties to determine the nature and amount of these adjustments. Adjustments cannot be made where costs and differences in cost do not affect price comparability.

##### **(i) NORMAL VALUE ADJUSTMENTS**

Level of Trade - FERSAN indicates that it sells both to end-users and distributors in the Dominican Republic. FERSAN has submitted gross unit prices, however upon inspection, the Commission found that the prices were in fact net of all costs and charges associated with the

particular sale. The prices submitted do not reflect any variation between sales to end-users and distributors.

Transportation and Discounts - FERSAN has made a claim for an adjustment for transportation and another for discounts. However, the Commission found that the sales prices submitted were in fact net of all costs and charges associated with the particular sale. Thus, neither transportation costs nor discounts were included in the unit prices submitted. Given these facts, the Commission determined that there was no basis on which these adjustments could be made.

Warehousing - FERSAN stated that distributors and end-users buy from the warehouse; however large purchasers like those in Jamaica buy from the plant. FERSAN makes the claim that adjustments should be made for warehousing costs. In light of FERSAN's statement and the fact that the figures submitted by FERSAN were already net of this expense and therefore did not vary because of the channel of distribution, there is no basis on which this adjustment could be made.

Differences in physical characteristics - FERSAN indicated that the fertilisers sold to Jamaica are in fact similar to the fertilisers sold in the Dominican Republic. The criterion used to determine their similarity is the ratio of the nutrients contained in each type of fertiliser. The Commission found that generally the ratios corresponded, the only exception were those fertilisers that contained micronutrients, and these have not been exported to Jamaica. Because of the significant cost difference that micronutrients would add, the Commission has omitted these from its calculations. The difference in average costs between the remaining fertilisers and those sold to Jamaica is 1.85 per cent on average, which is not significant enough to justify an adjustment for differences in physical characteristics. In fact, all interested parties agree that fertilisers produced for export to Jamaica are similar to those produced for local consumption in the Dominican Republic.

Packing - ACC claims that an adjustment is to be made for the difference in packing costs.<sup>13</sup> The Commission has found that when the total cost of production in the Dominican Republic (including bags) is compared to the total cost of production of the fertiliser exported to Jamaica (including bags) the difference is not significant nor can it be solely attributed to a difference in the cost of the bags for export. The Commission has therefore not made an adjustment for packing.

Freight and Insurance- ACC claims that an adjustment should be made for the freight and insurance cost from the Dominican Republic to Jamaica. However, in the same submission, it states that AIJCFAs pay the CIF value for the imports. This would imply that that the Importer undertakes the cost of the freight and insurance. The only basis on which this adjustment could be made is if the Importer did not undertake this cost, and the Exporter or Producer did. Given the fact that there is no evidence to support the fact that AIJCFAs do not pay insurance and freight, the Commission did not make an adjustment on this basis.

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<sup>13</sup> ACC's March 7, 2002 submission- Appendix XXIV.



(ii) **EXPORT PRICE ADJUSTMENTS**

Landed Costs - Agri-Chemicals and AIJCFA, in their submissions, noted that PREMIUM was involved in the clearance and movement of the goods under consideration from the Jamaican port. PREMIUM (DR) confirmed that it incurs a cost for the clearance, movement and storage of the exported goods in Jamaica. Typically, in a CIF transaction title passes to the Importer once the sale has been made, it is therefore unusual that the Exporter provides the services of clearance, movement and storage of the goods once they have landed in Jamaica. In the instant case, the Commission has determined that the cost of these services are included in the weighted average FOB export price. The Commission's goal is to ascertain the actual export price for the goods solely. Consequently, the Commission has made an adjustment to the export price (a deduction) to take into account this additional benefit accruing to the Importer, in the same manner as one would account for a discount or rebate or any other incentive that affects the actual price of the goods.

Indirect selling expenses - Indirect expenses are not sale specific and are generally incurred regardless of whether or not the sale is made, and therefore does not affect price comparability. ACC has made a claim for a downward adjustment to be made for those indirect selling expenses incurred by PREMIUM (JA) for the importation of the goods, but has not provided an estimate of the amount for this adjustment. No adjustment has been made.

Importer's Commission - Agri-Chemicals has indicated that it intends to bill the Exporter a fee of approximately 1 per cent of the total value of goods imported into Jamaica. The Commission contends that this represents an additional benefit that the Importer will incur from the Exporter, and thus has made the appropriate adjustment.

**D. THE MARGIN 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 margin of dumping is based on a comparison of the weighted average normal value (the weighted average price of all sales by FERSAN in the Dominican Republic of fertilisers that are similar to those exported to Jamaica (including Urea and Sulphate of Ammonia)) for the period January to June 2001, and the weighted average export price (garnered from the Customs C-78 entry forms and adjusted with landed costs and the importer's commission). The resulting margin of dumping is 37.33 per cent.

**XII. 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 concerning material injury, the Commission has found evidence of negative volume effects, significant 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 utilisation. It is the view of the Commission that if the dumped imports are allowed to continue unabated the injury that is being,

and has been, experienced by the domestic industry will jeopardise the industry's viability in the future.

**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 October 2001 (prior to the initiation of this investigation) imports of the goods under consideration amounted to 11,030 MT, this represents a significant increase relative to imports of similar goods, there being no imports of fertiliser from the Dominican Republic prior to March 2001. For November 2001 to January 2002, imports amounted to 3,750 MT. This brings the total amount of the goods under consideration imported from the Dominican Republic between March 2001 and January 2002 to 14,780 MT, and represents import penetration of approximately 26.64 per cent relative to domestic consumption.

**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 price 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.

Notwithstanding the fact that the Complainant's prices were marginally lower on average than the goods under consideration throughout the period of dumping, the price depression is not significant.

**(ii) PRICE UNDERCUTTING**

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

Despite the Commission's repeated requests, AIJCFA did not provide information on the actual selling prices of the imported fertiliser to its members and the general public. The only indication of the selling prices of AIJCFA was that submitted in ACC's complaint. The price lists submitted by ACC were not challenged by any of the other interested parties and thus the Commission has used these as the basis for its analysis of price undercutting. Based on the information on the record, there is no significant price undercutting.

**(iii) PRICE SUPPRESSION**

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

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 at that time relative to the previous year. As a result the margin between the ACC's cost of production and its average selling price was reduced in this period relative to the similar period 1999/2000.

As a result of reductions in the prices for Urea and DAP, 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, the effect of the reduction in volumes sold per unit has been an increase in the cost of production. This, in conjunction with the decline in average selling prices, has resulted in a continued suppression in the domestic industry's prices. The margin between the domestic industry's average unit cost of sales and average unit prices declined relative to the period October - February 00/01 by 14.87 per cent. The evidence on the record shows that there has been significant price suppression in every period examined.

**C. LOSS IN MARKET SHARE**

For the full year to September 2001 the loss in market share stood at approximately 25 per cent as compared with a similar period 1999/2000. It is interesting to note that the reduction in the sales volume for ACC for the period that the dumped imports have been in the market, (i.e. the period March 2001 to February 2002) is greater than the amount of the goods imported from the Dominican Republic due mainly to the importation of similar fertilisers from other sources, by companies that have traditionally been large customers of the Complainant. Prior to the importation of fertiliser from the Dominican Republic, ACC held approximately 98 per cent of the market. In 2001 ACC's market share was reduced to approximately 73 per cent, with imports from the Dominican Republic accounting for approximately 22 per cent.

**D. INCREASE IN RAW MATERIAL INVENTORY**

Upon the introduction of fertiliser from the Dominican Republic on the Jamaican market, ACC's inventory levels had 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, given the reduction in demand for its product.

**E. PROFIT EFFECTS AND RETURN ON INVESTMENT**

The Commission's analysis attempted to quantify the impact of the dumped imports on the domestic market, by reviewing the Complainant's profitability for the exact period that the dumped imports have been in the market, that is March 2001 to February 2002. When compared

to the similar period March 2000 to February 2001 the Commission notes that all major line items, sales, gross profit margin, net profit before finance charges and return on investment, were down significantly.

#### **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 it did not recall its nine (9) casual workers as is usually required in the peak season (January to June 2001), but maintained its ordinary work force on an eight hour single shift basis. The total productive work force at the end of the financial year September 2001 was 24 workers down from 30 in 2000. Average product per worker for the period October to May 2000 declined as compared with the similar period 1999/2000, representing a 24.7 per cent decline in productivity. Consequently, wages have fallen with production as the number of hours worked has declined.

On these facts, it would appear that there has been a decline in productivity; however, it is the view of the Commission that because the inorganic fertiliser production industry is not labour intensive, the significance of wages on productivity analysis is arguable.

#### **G. OUTPUT AND CAPACITY UTILIZATION**

Capacity is defined as the maximum level of production that an establishment can 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 2000, 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.

### **XIII. CAUSAL LINK**

Where the Commission finds dumping and injury, the evidence before it must demonstrate that the injury to the domestic industry is attributable to the effects of the dumping. In its analysis of the causal connection between dumping and injury, the Commission is required to examine any known factors other than the dumped imports which at the same time are injuring the domestic industry: The injuries caused by the other factors must not be attributed to the dumped imports.

The Commission examined all known factors other than the dumped imports, which at the same time are injuring the domestic industry. Between 1997 and 2000, there was a negative impact on the Jamaican fertiliser industry resulting from a decline in agriculture and the devaluation of the

Jamaican dollar. The effects of these factors have been reflected in ACC's financial performance over the years prior to 2001. For the period January to December 2001, the exchange rate declined by 4.2 per cent over 2000, however all indications are that the agricultural sector improved. The deterioration in the exchange rate could not have been responsible for the sharp declines in ACC's performance in 2001, when compared with the effect of exchange rate declines in previous periods. There is a more significant correlation between the trend in dumped imports and the deterioration in the domestic industry's performance.

As previously mentioned, the structure of the Jamaican inorganic fertiliser market changed in 2001 with the increased importation of goods similar to the goods under consideration from sources other than the Dominican Republic. Specifically, fertiliser imports from Costa Rica represented approximately 16 per cent of the total imports and constituted part of the injury suffered by the local industry, because while the total market did not contract, the demand for ACC's product contracted as the importers of the fertiliser from Costa Rica had traditionally been large customers of the Complainant.

It is evident that the injury suffered by the domestic industry can be attributed to both the dumped fertiliser from the Dominican Republic and the other imports not under consideration. However, the volume of dumped imports from the Dominican Republic is significantly higher than the increased volume of the other imports in 2001. Thus, the Commission finds that the dumped imports are a significant factor causing material injury to the domestic industry.

#### **XIV. THREAT OF MATERIAL INJURY**

Section 11 of the Act provides that the Commission must find that the dumping has caused, is causing or is likely to cause material injury to the domestic industry as a prerequisite for the imposition of anti-dumping duties. Thus a finding of past, present or threat of future injury is required. In the instant case, the finding of past and present material injury is satisfied and as such the Commission did not find it necessary to pursue the analysis of threat of material injury in the final investigation phase.

#### **XV. DEFINITIVE ANTI-DUMPING DUTY/LESSER DUTY ANALYSIS**

Lesser duty is a provision in anti-dumping legislation that allows for an amount less than the margin of dumping to be collected as the anti-dumping duty; that lesser amount is the amount that is considered adequate compensation for the injury to the domestic industry. The Commission adopts the view that duties provide highly visible, concentrated benefits for a small group of people, while imposing widely dispersed costs that are often difficult to identify on the general citizenry,<sup>14</sup> and that therefore it may be desirable, where appropriate, to reduce any distortions caused by an the anti-dumping duty by applying a lesser amount.

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<sup>14</sup> Sobel, Stroup, Gwartney, *Economics Public and Private Choice*, (2000) pg. 465

An antidumping duty is a special duty imposed to offset the effect of dumping that has either materially injured, or threatened material injury to, domestic producers. An immediate effect of an antidumping duty may be to raise the price paid by consumers, and this is the issue that causes the most debate. Experience suggests that the benefits of dumping, namely the potential of significantly lower prices to the consumer, often remain concentrated in the hands of the importers in the form of larger profit margins and are not passed on to the consumer, even in the absence of an anti-dumping duty. Regardless of how much prices rise, the issue that concerns consumers is the fact that prices will rise.

Section 11 of the Jamaican Act addresses the application of lesser duties. It states in pertinent part that:

Duties shall be imposed, in accordance with sub-section (2), on all dumped or subsidized goods imported into Jamaica in respect of which, before the release of the goods, the Commission has made a finding that the dumping or subsidizing of such goods has caused, is causing or is likely to cause material injury . . . in an amount equal to the margin of dumping . . . or, as the case may require, such lesser amount as is considered adequate compensation for the injury.

The language of the statute “as the case may require” gives the Commission discretionary power to impose or not to impose a lesser duty.

The lesser duty analysis requires an assessment of whether a lesser duty should be applied and a determination as to the level of duty, based on the injury margin. To determine whether a lesser duty should be analysed it is necessary to evaluate all the arguments for or against the duties on the particular product under investigation. Neither the Act nor the Regulations gives guidance as to how a lesser duty is to be calculated. However the Commission has sought guidance from the practice of other jurisdictions, principally the European Union and Canada, in formulating its own practice. The lesser duty rule calls for the restriction of the level of duty to the actual injury suffered. In practice, this entails an assessment of the extent of injury and its subsequent quantification, the result of which is an “injury margin.”

The injury margin is calculated on the basis of a “non-injurious price” (NIP), the weighted average cost of production for the domestic industry, and a reasonable amount for profit. After the non-injurious price has been determined, it is compared to the price at which the dumped imports would have entered the market, “the importer’s sale price” (ISP). The ISP would include all those cost elements incurred upon importation, such as freight, insurance, movement costs, broker’s fees and any other costs. The injury margin is the difference between the NIP and the ISP. The percentage margin of injury is usually expressed as a percentage of the export price used in the calculation of the dumping margin percentage. If the injury margin calculated is less than the dumping margin, then a lesser duty may be considered.

In the instant case, the Commission found that its consideration of the application of lesser duties was warranted in light of the importance of the agricultural sector to the Jamaican economy, and the significant input that fertiliser represents for the agricultural sector. The Commission is mindful of the potential impact of the increased cost of fertiliser on the wider economy. The

decision to consider the adoption of a duty less than the margin of dumping was motivated by the aforementioned public interest considerations and balanced with the desire to provide an adequate remedy for the injury suffered by the domestic industry.

The Commission's calculation resulted in an injury margin which is less than the margin of dumping. Consequently, the Commission has decided to impose a definitive anti-dumping duty in the amount of 15.61 per cent.

## **XVI. RETROACTIVE IMPOSITION OF DEFINITIVE 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 the test for the imposition of duties retroactively on goods that were released during the period of ninety days preceding the day on which the Commission makes a Preliminary Determination. Both the WTO Agreement and the Act set out a two pronged test and stipulate that a finding be made that –

1. There is a history of injurious dumping in relation to the goods that are like the ones that are the subject of the investigation; or
2. The importer knew or should have known that the exporter practices dumping, that would cause injury.

Either of the aforementioned represents the first prong. The above finding must be coupled with a finding in relation to the second prong: that, pursuant to section 13 (2) (a) (ii) of the Act, there has been significant importation, which has caused 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. Similarly, the relevant section of the WTO Anti-Dumping Agreement states that the Authority should find 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.

It is the view of the Commission that the facts of the instant case support a finding for the imposition of duties pursuant to section 13 of the Act and Article 10.6 of the WTO Anti-Dumping Agreement.

### **A. HISTORY OF DUMPING AND MATERIAL INJURY**

The Commission's research reveals that there are no outstanding anti-dumping orders for the goods under consideration and as such it finds that there is no history of dumping in relation to goods that are like the ones that are the subject of this investigation.

### **B. KNOWLEDGE ON THE PART OF THE IMPORTER**

However, the Commission finds that the Importer should have known that the Exporter practices dumping that would cause injury. The Commission bases this finding on the following grounds:

1. That given Agri-Chemicals' sophistication and experience as an importer of agricultural pesticides and fertilisers and the magnitude of the margin of dumping, approximately 37 per cent, the Importer should have been put on notice that the

- Exporter practises dumping that would cause injury once he was able to obtain an export price that is significantly below that of normal value; and
2. That the relationship between Agri-Chemicals and PREMIUM (JA) is such that it should give the Importer constructive notice of the actions of the Exporter. One of the shareholders in and Managing Director of Agri-Chemicals is also a shareholder in and Director of PREMIUM (JA); a company established by PREMIUM (DR) to accept payment in Jamaica for shipments of fertiliser exported from the Dominican Republic. It is the Commission's view that although PREMIUM (DR) and PREMIUM (JA) may be separate legal entities, the evidence on the record indicates that, for the purposes of this investigation, the two entities should be seen as one, as essentially they perform two sides of the same transaction; PREMIUM (DR) supplies the goods to the Jamaican market and PREMIUM (JA) collects payment for the goods supplied.

The Commission relies on the following facts from the parties' submissions.

1. Agri-Chemicals has been an importer and distributor of agricultural pesticides and fertilisers for the past 26 years.
2. Agri-Chemicals signed the required import documents (C-78 forms) under the Customs Act, but does not possess title or beneficial ownership of the goods when they are imported.
3. PREMIUM (DR) claims that it pays for the clearing, moving and storing of the imported goods, until the customer in Jamaica collects them. Submissions from Agri-Chemicals confirm that this is true.
4. Agri-Chemicals is related to PREMIUM (JA), as one of the shareholders in and Managing Director of Agri-Chemicals Limited is also a shareholder in and Director of PREMIUM (JA).
5. PREMIUM (JA) is effectively an agent of or affiliated with PREMIUM (DR) the Exporter. PREMIUM (DR) claims that it decided to incorporate a local company to collect payments on its behalf, and that the said local company PREMIUM (JA) has merely been a convenient conduit and barely performs any functions, save the operation of a bank account.
6. The majority shareholder in PREMIUM (JA) is also a Director of PREMIUM (DR).
7. PREMIUM (DR) also claims that the understanding was that all payments for the product were to be made to the Exporter, however, due to some interference in the marketplace PREMIUM (DR) was forced to incorporate a company in Jamaica.
8. AIJCFA claims that payment for the imported products are made to PREMIUM (JA) on behalf of PREMIUM (DR).
9. The Managing Director of Agri-Chemicals and a Director of PREMIUM (DR) constitute the Directorship of PREMIUM (JA) and thus they have a common interest.

It appears from the aforementioned facts that three aspects are evident: sophistication of the Importer (Agri-Chemical), a relationship between PREMIUM (JA) and PREMIUM (DR) and common interest among the parties.



### **C. SIGNIFICANT IMPORTS**

In keeping with Section 13 of the Act, the Commission finds also that aggregated post-initiation shipments have increased significantly when compared to a similar time period before initiation. Imports of all fertilisers as defined by the scope of this investigation for November 2001 to January 2002 were 3750 MT and for August 2001 to October 2001 were 1850 MT, representing an increase of over 100 per cent. This increase, coupled with the relative significance of the imports, based on their timing, relative to share of consumption and production, in addition to the nature and size of the industry would lead to the conclusion that these importations are, in and of themselves, significant. As a result of continued importation further material injury has been sustained by the domestic industry, manifested in the displacement of industry sales and hence a decline in its profitability as evidenced by the injury analysis in this report. In order to remedy the injury being caused by the imports in the period after Initiation, the Commission finds it necessary to impose retroactive anti-dumping duties on goods that entered Jamaica in the period of 90 days prior to the imposition of provisional measures, that is, between November 5, 2001 and February 3, 2002.

Similarly, in keeping with Article 10.6 of the WTO Anti-Dumping Agreement, the Commission's injury analysis reveals that further injury has been caused by the dumped imports and that the timing and volume of the imports, in preparation for the peak season (January to June) for sugar cane customers (the industry's major customer), could be devastating to the survival of the domestic industry as evidenced by the analysis of the 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 fertiliser demand could irreparably harm the domestic industry and may render it unable to maintain its viability. The large volumes of dumped imports are likely to seriously undermine the remedial effect of the application of definitive antidumping duties. Therefore, the imposition of definitive anti-dumping duties alone may not adequately remedy the injury caused to the domestic industry by the imports, which entered Jamaica between November 2001 and January 2002.

### **D. CONCLUSION**

The Commission has determined that the Importer should have known that the Exporter practises dumping that would cause injury and that material injury has been caused by the importation of significant volumes of the dumped product into Jamaica. In order to remedy the injury being caused by the imports in the period after Initiation, and to prevent recurrence of such injury, the Commission finds it necessary to impose definitive anti-dumping duties retroactively on goods that entered Jamaica between the date of initiation and the date of the Preliminary determination, November 5, 2001 to February 3, 2002.

## **XVII. DECISION**

Pursuant to section 30 of the Act, the Commission has made an affirmative Final 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 material injury to the domestic industry.

Pursuant to Section 11 of the Act, the Commission has decided to impose a definitive anti-dumping duty an amount less than the margin of dumping, that is, in the amount of 15.61 per cent on all goods that are imported into Jamaica which are the same description as those to which the Final Determination applies, effective May 4, 2002.

Additionally, pursuant to section 13 of the Act, the Commission has made an affirmative Final Determination concerning the imposition of a definitive anti-dumping duty in the amount of 15.61 per cent retroactively on goods which are the same description as those to which the Final Determination applies that were released from Jamaica Customs between the date of initiation, November 5, 2001 and the date of the Preliminary Determination, February 3, 2002.

#### **COMMISSIONERS SITTING:**

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Mrs Beverley Morgan  
Chairman

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Mr. Lloyd Goodleigh  
Commissioner

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Dr. Cecil Goodridge  
Commissioner

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Ms. Sandra Shirley  
Commissioner

#### **FUTURE ACTION**

Imports of the goods in respect of which the Commission has made a finding of dumping which caused injury or are likely to cause injury, which are released from Customs' possession as of the date of the Commission's Final Determination will be subject to the definitive anti-dumping duty.

An anti-dumping duty shall remain in force as long as it is necessary to counteract dumping which has caused, is causing or is likely to cause material injury. Any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition, unless the Commission determines in a review initiated before that date that the expiry of the duty will lead to continuation or recurrence of the dumping and injury

**INFORMATION**

The Notice of Final Determination in this investigation is being published in the *Jamaica Gazette* and in a daily newspaper. This Statement of Reasons along with the Notice of Final Determination of this investigation has been provided to parties interested in 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