

For Publication

The Director
Investigations 2
Anti-Dumping Commission
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Dear Sir

Application for Ministerial Exemption under section 8(7) of the *Customs Tariff (Anti-Dumping) Act 1975 (Cth)*: Nitro Sibir Australia (NSA)

We refer to the exemption application lodged on 14 May 2018 on behalf of NSA, our letter dated 8 June 2018 and the expert report attached thereto, and the meeting between NSA and the Commission held on 26 July 2018. We make the following further submissions in support of the exemption application.

1. **"Like or directly competitive"**

1.1 There is no definition of "like or directly competitive goods" or "directly competitive goods" as terms in and of themselves in the *Customs Tariff (Anti-Dumping) Act 1975 (Cth)* (**Anti-Dumping Act**), the *Customs Act 1901 (Cth)* (**Act**) or the WTO agreements.

1.2 Section 269 of the Act does, however, define "like goods" as a discrete term: "...Goods that are identical in all aspects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration". The Commission's *Dumping and Subsidy Manual* provides guidance on how "like goods" should be determined. It provides that where goods are not alike all respects, the Commission will assess whether they have characteristics closely resembling each other including assessing their physical likeness, commercial likeness, functional likeness and production likeness.

1.3 As to what is meant by "directly competitive", the term "like or directly competitive goods" has been considered by the WTO Dispute Settlement Body (**DSB**) in a number of cases. The primary characteristics of goods to which the DSB had regard in these cases include:

- (a) the competitive commercial relationship between goods in the marketplace;¹
- (b) interchangeability and substitutability, or whether the goods provide "alternative ways of satisfying a particular need or taste";² and
- (c) commercial interchangeability of products.³

1.4 In *Korea - Alcoholic Beverages*, the prevailing view of the DSB was that:

"The term 'directly competitive or substitutable' describes a particular type of relationship between two products, one imported and the other domestic. It is

¹ *Korea - Alcoholic Beverages* (WT/DS75/AB/R, WT/DS84/AB/R) at 114.

² *Ibid* at 115.

³ *US - Cotton Yarn*, (WT/DS192/AB/R) at 96 - 98.

evident from the wording of the term that the essence of that relationship is that the products are in competition. This much is clear both from the word "competitive" which means "characterized by competition", and from the word "substitutable" which means "able to be substituted". The context of the competitive relationship is necessarily the marketplace."

- 1.5 In *US - Cotton Yarn*, the DSB noted:

"It is significant that the word "competitive" is qualified by the word "directly", which emphasizes the degree of proximity that must obtain in the competitive relationship between the products under comparison", and that, "Under this definition of "directly", a safeguard action will not extend to protecting a domestic industry that produces unlike products which have only a remote or tenuous competitive relationship with the imported product."

- 1.6 NSA submits that the Commission ought to have regard to the definitions and jurisprudence set out above in considering the exemption application.

2. Preliminary Observations

- 2.1 NSA is aware that certain parties opposing this exemption application import HDAN from countries such as China. For example, NSA is aware that as at late June 2018, [REDACTED] had an order for about 20,000 tonnes of HDAN with [REDACTED], [confidential third party identification and information] and had just imported 7,000 tonnes of HDAN from the same Chinese supplier. NSA respectfully urges the Commission to verify these overseas HDAN imports via its customs database, and any similar imports.

- 2.2 NSA submits that importation of HDAN from overseas suppliers supports the contention that "like or directly competitive goods" are not available in Australia.

- 2.3 Further to this point, NSA notes that the objection by Orica Australia Pty Ltd (**Orica**) to the proposed exemption on the ground that, "*Russia is not the only source of a suitable solid emulsion grade ammonium nitrate raw material. Other countries can provide this source where dumping behaviour is not seen*" (Response at B.1 (d)) is misconceived. The relevant test for the purposes of s 8(7) of the Anti-Dumping Act is whether like or directly competitive goods are offered for sale in Australia (to all purchasers on equal terms under like conditions), not whether Australian purchasers can source like goods from other countries.

- 2.4 NSA also notes that Orica's objection to the proposed exemption on the ground that, "*The market circumstances by which the ADC determined that dumping occurred from Russia are still in place*" (Response at B.1 (e)) is misconceived and irrelevant to the inquiry, as an application under s 8(7) of the Anti-Dumping Act does not invite review of whether or not dumping is occurring.

3. Respondents' "like goods" assessment

- 3.1 Orica, Queensland Nitrates Pty Limited (**QNP**) and CSBP Limited (**CSBP**) (together, the **Respondents**) oppose the exemption application on the basis that "like goods" to HDAN are offered for sale in Australia. In relation to the factors the Commission will consider in determining whether products have characteristics closely resembling each other, the Respondents assert that:

- (a) Physical likeness - HDAN, LDAN and ANSOL are physically similar as they are all ammonium nitrate with minor technical variations in density, form and concentration;
 - (i) However, Orica acknowledges the significance of the additives added to AN (seen in LDAN), which it notes "*may inhibit emulsion formation and product stability*" to the extent that certain products are not suitable for use as an emulsion raw material. For this reason, Orica says, local explosives manufacturers prefer to use ANSOL as it is "*chemically pure*": Response at pp 6, 7.
 - (ii) Orica also acknowledges the significance of ANSOL's liquid state as compared to HDAN, having stated that it "*is not feasible to import hot and concentrated AN solution as it will solidify in transit*": Response at p 6.
- (b) Commercial likeness - HDAN, LDAN and ANSOL have a commercial likeness as they compete in the same market, being emulsion explosives manufacture;
- (c) Functional likeness - HDAN, LDAN and ANSOL are functionally similar as they are all used in the manufacture of explosives; and
- (d) Production likeness - HDAN, LDAN and ANSOL are all manufactured using similar production processes and often in the same production facility.

3.2 The Respondents also assert that LDAN and ANSOL are "directly competitive goods" to HDAN, as they compete directly in the market of emulsion explosives production.

3.3 NSA submits that these responses are misconceived and erroneous. The Respondents' assessment of "likeness" and "direct competitiveness" has been conducted with broad-brush at a high level of abstraction, and fails to establish that the products have "characteristics closely resembling each other" or the necessary commercial interchangeability. LDAN and ANSOL are neither "like" nor "directly competitive" with HDAN, for the reasons set out in sections 4 and 5 below.

4. Are LDAN and HDAN "like or directly competitive"?

4.1 NSA repeats its submission that LDAN and HDAN are not "like or directly competitive" goods.

"Like" goods

4.2 LDAN and HDAN are not "like" goods because:

- (a) Physical differences:
 - (i) Density - HDAN consists of high-purity ammonium nitrate (AN) in a dense granular form. LDAN consists of free-flowing prills, which each contain over 6% air voids.⁴

⁴ 'Report 12164: Selection of AN Source for the Nitro Sibir BlackBear Plant' prepared by Detonics Australia Pty Ltd, dated 4 June 2018 (**Detonics Report**) at [2.2], [2.4].

- (ii) Additives - Unlike HDAN, LDAN prills contain internal additives to assist air void formation, and external coatings to reduce the hygroscopic properties of AN and to prevent the prills from clumping together.⁵
 - (iii) NSA submits that the Respondents' use of the qualifier "*minor*" in respect of conceded technical variations in density, form and concentration is incongruous and unjustified, particularly given Orica's concessions set out at 3.1(a)(i)-(ii) above.
- (b) Commercial differences:
 - (i) Market sector - The products do not compete in the same market sector. HDAN is used for the production of ANE. LDAN is used for the production of ANFO.⁶
 - (ii) Commercial substitutability - Emulsion explosives manufacturers are unable to use LDAN in the place of HDAN for the production of ANE. LDAN cannot be used to produce ANE of acceptable quality for mining use because the additives and external coating present within the prills degrade and destabilise the final product, and cause failure of the explosive.⁷ Multiple scientific research projects have determined that it is not possible, via flocculation, to use LDAN for the industrial production of ANE, because of the process time to flocculate off the unwanted agents, the reduced recovery rate and the difficulties (including cost) associated with disposing of the waste.⁸ Indeed, no Australian emulsion explosives manufacturer uses LDAN to produce ANE.
- (c) Functional differences:
 - (i) Functional substitutability - LDAN is incapable of performing the same function as HDAN (production of ANE), and is never used for this purpose: see 4.2(b)(ii) above.
 - (ii) NSA also refers to the submissions of Incitec Pivot in Anti-Dumping Commission Inquiry 169 dated 21 March 2011 at paragraphs 3.4 - 3.5 in this regard.
- (d) Production differences:
 - (i) Additives - Unlike HDAN, internal additives and external coatings are added to the AN in the production of LDAN.⁹

4.3 NSA refers to the Commission's findings in Report 238 (Deep Drawn Stainless Steel Sinks - China) at pp 113 - 115 wherein it was determined that the Australian industry did not produce "like goods" to imported deep drawn stainless steel cleaner's sinks because, although the goods in question (Australian-produced inset sinks and the imported cleaner's sinks) had

⁵ Detonics Report at [2.4].

⁶ Detonics Report at [2.2], [2.4].

⁷ Letter from Mr Ian Tolliday dated 20 August 2018 (**Tolliday letter**), Detonics Report at [3].

⁸ Statutory declaration of Mariana Kaker dated 21 August 2018 (**MK Statutory Declaration**) at [10] - [11].

⁹ Tolliday letter, Detonics Report at [2.4].

similar physical and production likeness (including that both goods were made from stainless steel and were classified to the same tariff classification):

- (a) they did not possess commercial likeness. That is, while the goods could be interchanged in certain circumstances, this was unlikely due to their characteristics and differences in their installation process and requirements, including spatial requirements and the cost of installation; and
- (b) while there was some functional likeness between the products, in that both could be used for the same purpose of storing and draining water for environmental cleaning purposes, there were key differences in terms of "practicality of use", in that the cleaner's sinks were a more practical solution for the purposes of environmental cleaning.

4.4 Considering the above points in relation to commercial likeness, it was determined that the products were not directly substitutable (at p 115).

4.5 The Commission also found in Report 238 at pp 116 - 119 that imported hand wash basins were not "like goods" to Australian-produced inset sinks, for similar reasons, namely that:

- (a) they did not possess commercial likeness. The Commission considered that while end users could switch between the products in certain circumstances, this was unlikely due to differences in installation requirements, including spatial considerations and installation cost differences; and
- (b) while there was some functional likeness between the products, in that both could be used for the same purpose of washing hands and the products were of comparable quality, hand washing basins were a more practical solution for the purpose of hand cleaning in certain applications like a hospital, due to their size and accessibility.

4.6 Considering the above points in relation to commercial likeness, it was determined that the products were not directly substitutable (at p 119).

4.7 Analogously, NSA submits that the Commission cannot be satisfied that LDAN and HDAN are "like goods" simply because they are both forms of ammonium nitrate (being a broad product description) and are classified to the same tariff code.

4.8 The Commission has previously found that theoretical interchangeability of products is not sufficient to establish "likeness", and that goods will not be commercially or functionally "like" if end users are unlikely to switch between them. In this case, HDAN and LDAN have a complete lack of commercial and functional likeness, as LDAN cannot be used in the production of ANE. Accordingly, the Commission ought to find that HDAN and LDAN are not "like goods".

"Directly competitive" goods

4.9 As set out above at paragraphs 1.3 - 1.5, whether the Australian industry produces "directly competitive" goods to HDAN requires considering whether an immediate commercial relationship exists in the marketplace between the two products, having regard to the commercial uses of the products. The products must be directly commercially substitutable.

4.10 Referring to the points set out at paragraph 4.2(b) above, it is submitted that no such commercial relationship exists between the products and hence they are not directly

competitive. Most critically, the fact that LDAN is not, and cannot be, used for the industrial production of ANE (let alone utilising the same infrastructure and processes as for HDAN) means they are not relevantly substitutable.

5. **Are ANSOL and HDAN "like or directly competitive"?**

- 5.1 NSA repeats its submission that ANSOL and HDAN are not "like or directly competitive" goods.

"Like" goods

- 5.2 ANSOL and HDAN are not "like" goods because:

(a) Physical differences:

- (i) Form - HDAN consists of high-purity AN in a dense granular form. ANSOL is a super-saturated solution of pure AN in water.¹⁰
- (ii) Transport, storage and handling - As a 90% solution, ANSOL must remain heated (at about 120°C) during transport, storage and handling to prevent AN from crystallising out of the solution. This necessitates infrastructure including heated bulk storage tanks within a bunded area, insulated pipes and pumps.¹¹

(b) Commercial differences:

- (i) Market sector - HDAN and ANSOL do not compete in the same market sector and are not relevantly interchangeable. Unlike HDAN, ANSOL cannot alone be used as the raw material for the production of ANE. HDAN is always required for ANE production. This is because, in order to use ANSOL to produce ANE, it must be cooled from its storage temperature of 120°C down to 75 - 80°C and the only way to achieve this is to use about 10 - 15% HDAN.¹²
- (ii) Commercial substitutability - End users are unable and unwilling to switch between HDAN and ANSOL for the purpose of ANE production as the products require completely different transport, storage, handling and processing infrastructure and regulatory approvals. In order for an ANE manufacturer with HDAN-suitable infrastructure to be able to use ANSOL for ANE production, for example, it would need to:
 - A. commission bespoke infrastructure including bulk heated tanks in a retained structure, insulated pipes and pumps;
 - B. obtain regulatory approvals and licences from council and regulatory agencies;
 - C. purchase, lease, obtain or utilise additional land to install necessary infrastructure;

¹⁰ Detonics Report at [2.2], [2.3].

¹¹ Detonics Report at [3], MK Statutory Declaration at [13] - [14].

¹² MK Statutory Declaration at [13].

- D. bear the significant cost of commissioning the necessary infrastructure; and
- E. expend years commissioning and installing the necessary infrastructure.

In NSA's case, it is not possible to install the infrastructure required to use ANSOL for the purpose of ANE production, due to regulatory restrictions, additional land requirements, and the prohibitive capital cost.¹³

(c) Functional differences:

- (i) Functional substitutability - ANSOL and HDAN are not functionally substitutable, as HDAN is always required in the production of ANE (see 5.2(b)(i) above) and the products require completely different infrastructure and equipment to be usable for this purpose (see 5.2(b)(ii) above). Put another way, a HDAN ANE production plant could not switch out HDAN to ANSOL.

5.3 NSA refers again to the Commission's findings in Report 238, set out above at paragraphs 4.3 and 4.5, and submits that the Commission should similarly find that differences in the production process and infrastructure required to be able to use ANSOL (as compared to HDAN) to produce ANE, including the significant time and cost to install such infrastructure, and licencing/regulatory and spatial requirements, mean that ANSOL and HDAN are not commercially or functionally like. That NSA could only use ANSOL for the purpose of ANE production if it completely reconfigured its production facilities (at prohibitive expense and difficulty, notwithstanding that regulatory approvals are unlikely to be granted)¹⁴ means that ANSOL and HDAN do not satisfy the "like goods" test.

"Directly competitive" goods

- 5.4 Referring to the above points in relation to commercial differences between ANSOL and HDAN, it is submitted that no such commercial relationship exists between the products and hence they are not directly competitive.
- 5.5 To suggest that products that require completely different infrastructure and regulatory approvals in order to be usable for the purpose of producing ANE are commercially interchangeable is, in NSA's submission, farcical. At best, this reflects the *"remote and tenuous competitive relationship"* which the *US - Cotton Yarn* decision emphasises is not sufficient to satisfy the "directly competitive" test.

"Offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade"

- 5.6 Additionally, NSA submits that ANSOL is not offered for sale in Australia to all purchasers on equal terms under like conditions. Having regard to the impossibility of transporting ANSOL to Western Australia from the east coast of Australia, the only source of ANSOL available to

¹³ MK Statutory Declaration at [14] - [15].

¹⁴ MK Statutory Declaration at [14].

NSA is [REDACTED] [confidential business information].¹⁵ However, [REDACTED] is not always able or willing to supply ANSOL to NSA. We attach as **Confidential Attachment 1** an email chain between NSA and [REDACTED] dated 19 - 20 July 2018 in which [REDACTED] indicated that it would not accept a purchase order for ANSOL. (While NSA provides this document in confidence, it would be happy for the Commission to seek to verify this information with the supplier concerned). NSA notes that [REDACTED] is a direct competitor in the manufacture and supply of ANE.

6. **HDAN not available in Australia**

6.1 NSA repeats its submission that HDAN is not available for purchase in Australia. This is supported by the fact that Australian ANE producers have turned to overseas suppliers for HDAN: see paragraph 2.1 above.

7. **Conclusion**

7.1 NSA submits that an exemption ought to be granted pursuant to s 8(7)(a) of the Anti-Dumping Act in respect of HDAN imported to Australia from the Russian Federation (and otherwise subject to Anti-Dumping Notice No. 2016/34), as there is no like or directly competitive good offered for sale in Australia.

Yours sincerely



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