Canberra
6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
Australian Capital Territory 2609

Brisbane
Level 4, Kings Row Two
235 Coronation Drive
Milton, Brisbane
Queensland 4064

Melbourne
Level 39, 385 Bourke Street
Melbourne
Victoria 3000

Australia

Canberra +61 2 6163 1000
Brisbane +61 7 3367 6900
Melbourne +61 3 8459 2276

www.moulislegal.com

moulislegal
commercial + international

05 December 2018

The Director
Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra
Australian Capital Territory 2601

By email

Dear Director

Yara AB – Comments on Verification Report and PAD

As you know we represent Yara AB ("Yara") in this investigation.

We take this opportunity to comment on the Yara Verification Report,[1] which is now on the public record, and the Preliminary Affirmative Determination ("PAD")[2] published for this investigation.

1 Doc 023 – Yara Verification Report.
2 Doc 021 – ADN 2018/166 Preliminary Affirmative Determination and Imposition of Securities – PAD 473.

A Comments on the Yara Verification Report

Yara strongly disagrees with the methodology presented in the Verification Report, and the Commission's determination of a 51.1% dumping margin. The Verification Report illustrates an overly simplistic assessment of the goods the subject of the investigation, and of the conditions of sale in Australia and foreign markets.

Yara's view is that a constructed normal value needs to be adopted for a more appropriate comparison with the export price. Counter to this point, the Verification Report collates a finding that the domestically sold goods are "like goods" with the finding that sales of like goods in the domestic market are an appropriate basis for determining a normal value under Section 269TAC(1) of the *Customs Act 1901* ("the Act").

This is incorrect, and does not sit easily with the law. In particular, we note:

- Section 269TAC(1) only operates subject to the rest of Section 269TAC.
- Section 269TAC(8) provides that where the normal value of goods exported to Australia is the price paid or payable for like goods and that price and the export price of the goods exported adjusted in accordance with directions by the Minister so that that certain differences in the products or terms and circumstances of the sale do not affect the comparison of the export price to the normal value.

Our view, is that the Section 269TAC(1) normal value adopted has not been adjusted in accordance with 269TAC(8) and so, is inaccurate. The domestic sales are modified differently due to the nature of the goods, as well as due to the terms and circumstances of those domestic sales. More specifically:

1 Differences in the nature of the goods

Yara developed and manufactures "tropical" and "non-tropical" ammonium nitrate, designed to be appropriate for the particular climatic conditions of different markets. Ammonium nitrate of the tropical variety was exported to Australia, whereas ammonium nitrate of the non-tropical variety was sold domestically. The sales of the export goods and the domestic goods are not sales of "identical goods".[3]

Section 269TAC(8) calls for an adjustment in circumstances where the export sales and the domestic sales are not in respect of identical goods. Given no tropical product was sold on the domestic market, working out how to adjust domestic prices is quite difficult. The approach adopted in the Verification Report is to rely on third country sales information in order to isolate the impact:

> *The verification team had regard to third country export prices by Yara sourced from a detailed listing provided by Yara. In doing so, the verification team ensured to control for the variables of country, customer, quantities, timing and delivery terms. The verification team notes that the levels of trade for customers in third countries included both traders and blasting service providers.*

[3] Doc 023 – Yara Verification Report, page 4.

> *With respect to the relevant third country customers to which Yara sold both tropical and non-tropical grade PPAN, the verification team found that there was no significant or consistent difference in price between those grades.*[4]

Yara submits that these sales to third countries are irrelevant for determining the impact of the differences in products on prices in the Swedish and Australian market. The key question in Section 269TAC(8) is the impact on the price on the domestic market – insights from other markets are not relevant to this. This general position notwithstanding, Yara has now been granted the opportunity to review the analysis undertaken after the verification for the purpose of the report. That analysis does not support the conclusion the Verification Report reaches. In particular we note:

- Yara sold ammonium nitrate to [CONFIDENTIAL INFORMATION DELETED – number] countries (Australia and Sweden inclusive).
- Of these countries, the Commission has identified [CONFIDENTIAL INFORMATION DELETED – number] markets where both "tropical" and "non-tropical" ammonium nitrate were sold, these are [CONFIDENTIAL INFORMATION DELETED – markets].
- Ultimately, over the course of the investigation period the total sales to all markets was [CONFIDENTIAL INFORMATION DELETED – number] tonnes. The conclusion in the Verification Report is based only on sales of [CONFIDENTIAL INFORMATION DELETED – number] tonnes ([CONFIDENTIAL INFORMATION DELETED – number] of the total sales volume).

The analysis regarding the impact of these product differences on prices is uniformed, and ultimately irrelevant to the question of whether domestic sales of like goods are an accurate comparator for the export price. Yara maintains that the exported goods and domestically sold goods are not identical and it is inaccurate to compare them as if they were.

2 Differences in the terms and circumstances of sale

Secondly, and far more importantly, the terms and the circumstances of the domestic sales differ greatly between themselves, and as between those that pertain to the export price. Section 269TAC(8)(c) calls for adjustments where the terms and circumstances of the sale modify export prices and domestic prices in different ways.

We note that [CONFIDENTIAL INFORMATION DELETED – number] of the Yara's domestic sales were made subject to long-term supply agreements. Each of these contracts were entered into at different times and have different scopes of operation. For example:

[CONFIDENTIAL INFORMATION DELETED – details of supply agreements]

As explained to the verification team, the circumstances of sale for the goods differ based on a variety of factors, including, the market, customer, level of trade and product specification. These factors impact the terms of the relevant supply agreements entered into. It is, for example, a significantly different prospect negotiating a pricing mechanism in a contract that covers one product for one market, then it is to negotiate multiple pricing mechanisms for multiple products in multiple different markets between multiple parties. Even the period in which the contract was negotiated can leave to

[4] Doc 23 at page 5.

significantly different outcome, as the assumptions that underpin the base price or the fixed-price component differ significantly with time.

Additionally, it should be clearly noted that the ANPP is not frequently sold in the Swedish market. Yara sells ANS in far larger volumes at far lower prices. ANPP is a premium product, and thus achieves a price premium in the Swedish market which it would not in other markets.

These are terms and circumstances of the relevant sales which modify the export prices and domestic prices differently. Failing to adjust for such differences means that the comparison of export price to normal value is affected by these terms and circumstances. Thus the dumping margin determined is inaccurate. It is not based on a fair comparison between export price and normal value.

****

Ultimately, we understand why the Commission has not attempted to adjust the normal value in response to these complex circumstances, as determining the price impact is a task of significant difficulty. Nonetheless, inability to adjust the price does not excuse the use of an inaccurate normal value. Simply put, where the Commission is unable to determine an appropriate adjustment the domestic sales cannot be considered to be "relevant" for the purpose of Section 269TAC(2)(a)(i). Accordingly, the Commission must adopt a constructed normal value – this is both the legally correct route and will result in a normal value that is not impacted by the above factors.

B Comments on the Preliminary Affirmative Determination

The application was premised on allegations put by the applicants that they had suffered specific, quantifiable injury as a direct result of the importation of the subject goods. These allegations were the basis for the initiation of the investigation, and put other interested parties on notice as to the supposed effect their imports had on the applicants.

Interested parties, including major mining companies, lodged detailed submissions that offered significant factually-based critiques of the allegations in the application. Yara was disappointed by the lack of regard that the PAD had to these submissions. It is also disappointing that, despite that report having considered information provided by CSBP and Orica during verification, no verification report has yet been made available to interested parties at the time of writing.[5]

That said, the PAD appears to implicitly accept interested parties criticisms of the injury allegations in the application. Section 7 "Injury to the Australian industry" does not state that injury has been suffered, or is likely have to have been suffered by the applicants during the investigation period. We would think that this would be sufficient to prevent the publication of a PAD and would signify that this investigation is misfounded. It is no mistake that the Act requires injury findings to be based on facts. An applicant who has been injured as a result of the subject imports should be able to establish objective facts in support of those allegations. This has not occurred.

And yet a PAD was made. That PAD was based on the following logic:

- The relatively lower prices of the goods from Sweden, China and Thailand have supposedly "contributed" to the ability of certain customers to exert price pressure on the applicants to lower their prices during price negotiations.

[5] In contrast, Yara was given only a week to sign off on a copy of its Verification Report.

- This results in the fixing of a margin for the duration of the contract that is lower than it otherwise might have been.

- Some of these negotiations are still ongoing and that the outcome is indeterminate, so injury in the form of reduced revenue and profits will continue into future years.

Yara disagrees with this logic. In explaining why, we will address the concept of "price pressure", the supposed impact on margin and the "future injury" discussed in the PAD.

1 Purported "price pressure"

The price pressure the PAD is concerned about is explained in the following way:

> *The applicants claim that these tender processes, and the dual sourcing by mine operators and mining services providers, exposes the Australian industry to competition from imports, with customers citing the availability of imported ammonium nitrate as the benchmark or alternative source to the local ammonium nitrate supplier.*[6]

This is completely irrelevant to the imports from Sweden. For reasons already disclosed to the Commission, the prices of the Swedish exports to Australia were unique to the circumstances of the specific supply contract under which they were made. They would not be replicated in any future contracts. They are not available outside of the specific agreement under which they were supplied. We fail to see how these could credibly be used in any price negotiation. If they have been used, it has been done without Yara's knowledge, consent or input.

[CONFIDENTIAL INFORMATION DELETED – details of Yara's participation in Australian market during POI]

Put simply, we believe it is a bridge too far too suggest that imports from Sweden have caused material injury in these circumstances. The only relevance of these imports appears to be that they were made to Australia and *may* have loosely and, we would suggest unconvincingly, been cited in price negotiations to which Yara was not a party and had no direct interest. Does the Commission really consider this to be something to be cured by anti-dumping measures?

2 Supposed impact on applicants margin

The impact of the subject imports that the PAD is concerned about appears to be manifested in circumstances where, in the process of negotiating a supply agreement, the applicants have either revised down their initial offer on the basis of feedback from the tenderer, or have taken a strategic decision to take into account import prices from some sources. This is characterised as "price depression".

Yara notes that it has raised considerable concerns about such an approach in its submission of 27 September 2018. These concerns were not addressed in the PAD, and we would ask that they be properly considered prior to the publication of the SEF.

Having failed to consider Yara's submission, the position in the PAD appears to be that the applicants will be materially injured unless they are awarded tenders at any price they offer. This is dangerously

---

6 Page 9.

removed from commercial reality. The corollary of such a position is that the applicants' customers should pay prices that achieve whatever margins the applicants deems themselves due.

Yara does not accept that this form of negotiation is injurious. Negotiation is a normal commercial function. It is part of the ebb and flow of business. Are we to accept that prior to the period of investigation the applicants always achieved the initial price proposed in their negotiations? Why, now, would it be injurious "price depression"?

Ultimately, the conclusion that higher prices might have been agreed to absent the imports is merely speculation and is therefore not a legally correct basis upon which to impose measures. No actual material injury has been suffered.

3 Future injury is speculative

The PAD has adopted the concept of "future injury" as justification that there are "sufficient grounds" to warrant the publication of a dumping duty notice. The concept of future injury is a legally irrelevant consideration, and cannot be the basis of a dumping duty notice.

To be clear the idea of "future" injury is to be distinguished from the concept of "threat of material injury". Regarding threat, as stated at Section C-2 of the application:

> *This application is not based on a threat of material injury to the Australian industry. The Applicants have demonstrated that AN exported to Australia from China, Sweden and Thailand during 2017 has caused material injury to the Australian industry.*
>
> *The Applicants, therefore, have not relied upon a 'threat' of injury to warrant the imposition of measures.*[7]

The threat of material injury is a separate legal concept that has its own legislative considerations, as stated in Section 269TAE(2B) of the Act:

> *the Minister must take account only of such changes in circumstances, including changes of a kind determined by the Minister, as would make that injury foreseeable and imminent unless dumping or countervailing measures were imposed.*

"Threat" is explicitly not argued by the applicants as a basis for the imposition of measures, nor is it mentioned by the Commission in the PAD, so consideration of "future injury" should not form part of this investigation. We also recall that an injury finding must be based on facts and not merely on allegations, conjecture or remote possibilities. To the extent that the applicants' injury allegations cannot be factually established, that should be sufficient to prevent those allegations being relied upon in a PAD or as a basis for the imposition of measures under Section 269TG.

Concerning future injury the PAD has states:

> *Given that supply in accordance with some of these contracts negotiated during the investigation period (and some negotiations continuing post-investigation period) will eventuate in future years, injury in the form of reduced revenue and profit will continue into future years.*[8]

---

7 Doc 001 at page 40.
8 Doc 021 at page 12.

and

> *This fixed margin will apply for the duration of the contract and therefore injury in the form of reduced profit and profitability will continue into future years.*[9]

As stated in the Ministerial Direction on Material Injury:

> *I direct that identification of material injury be based on facts and non on assertions unsupported by facts.*[10]

By its very nature, future injury is speculative and is not based on facts. It cannot be said if and to what extent injury will be suffered, nor can any possible injury be considered a consequence of dumped imports. The reliance on this concept to make the PAD is incorrect and should not be continued in the SEF. When reliance is had to the facts, the import from Sweden cannot factually be considered to have injured the applicants.

C Yara's sales should not be cumulated with subject imports

Yara has previously explained that its sales to Australia occurred under unique circumstances and to the benefit of the Australian industry. Owing to these special circumstances, Yara submits that these sales should not be cumulated with the other imports subject to this investigation.

This is in line with section 269TDA(14B)(f) of the Act which states:

> *it is appropriate to consider the cumulative effect of those exportations, having regard to:*
>
> *(i) the conditions of competition between those goods; and*
>
> *(ii) the conditions of competition between those goods and like goods that are domestically produced.*

Yara does not believe it is appropriate to consider the cumulative effect of Swedish exports with those from China and Thailand. In particular, Yara's exports were:

- [CONFIDENTIAL INFORMATION DELETED – details of customer].
- For the benefit of the Australian industry producing like goods.
- [CONFIDENTIAL INFORMATION DELETED – details of future imports].
- To Yara's knowledge, do not directly compete with imports from China of Thailand, nor with the production of the Australian industry.

Cumulating the effect of Swedish exports with those from the other countries is not appropriate in these circumstances. Doing so in the SEF will simply lead to an inaccurate outcome. The accurate conclusion with regard to imports of Swedish ammonium nitrate is that they have not caused material injury to the Australian industry producing like goods.

---

9 Doc 021 at page 13.
10 Australia Customs Dumping Notice No. 2012/24.

****

It is regrettable that a PAD was made. Yara cannot understand why the decision was made to support the largest highly-profitable players in the Australian ammonium nitrate market against imports that amount to less than 2% of that market. The reasoning supporting that PAD simply does not stand up to scrutiny and the purported need for interim protection is illusionary.

This investigation is ill-founded. Imports from Sweden have not caused injury to the applicants. Rather those imports benefit the wider Australian industry.

This investigation is an unfortunate and unnecessary intrusion in to the ammonium nitrate market. We request it be terminated as soon as possible.

Yours sincerely

Alistair Bridges
Senior Associate

+61 2 6163 1000