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18 March 2019

The Director
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Anti-Dumping Commission
55 Collins Street
Melbourne
Victoria 3000

By email

Dear Director

China Chamber of International Commerce Investigation into ammonium nitrate from China

We write on behalf of the China Chamber of International Commerce ("CCOIC").

In this submission, we would like to draw the Commission's attention to a number of key issues stemming from the Statement of Essential Facts No 473 ("the SEF") published on 25 February 2019, and issues concerning the Chinese exporters in this investigation generally.

A SEF dumping margin should take into account all relevant information

At the outset, CCOIC welcomes the SEF's correction of the dumping margin calculation, which has reduced the dumping margin determined for all Chinese exporters from the 39.5% applied in the Preliminary Affirmative Determination ("the PAD") to 29.6%.

CCOIC understands that the change is a result of a revised calculation of normal value, reflecting the Commission's recognition that only three of the nominated Chinese exporters exported the goods to Australia during the investigation period ("POI", or "investigation period").[1]

[1] See, the SEF, page 37.

CCOIC supports this correction, as it appears to better reflect the normal value of the goods exported by the three Chinese exporters *"having regard to all relevant information"* available to the Commission, as required under Section 269TAC(6) of the *Customs Act 1901* ("the Act")

At the same time, CCOIC is concerned to ensure that all relevant information has indeed been taken into account by the Commission, in an even-handed way. In this regard, we refer to the following extract from the SEF:

> *In its submission dated 14 December 2018,42 Yahua Australia Pty Ltd (Yahua) provided information relevant to its related party's (Yahua Group's) purchases of ammonium nitrate in the domestic market in China, which it claims were purchased in arms length transactions. The information provided encompassed commercial invoices which appear to pertain to purchases of various types of ammonium nitrate in China.*
>
> *Yahua has referred to this information to argue that the information provided by the applicants to support their opinion of the normal value of the goods in China, and the information which has been used by the Commission to determine the normal value, is "inaccurate and unreliable" because it is inconsistent with the actual prices paid by the Yahua Group during the investigation period.*
>
> *The Commission is aware that Yahua is an explosives and associated services provider in Australia, and is not the manufacturer nor the exporter of the goods from China. The Commission is further aware that its related party did not export the goods to Australia during the investigation period.*
>
> *…*
>
> *The Commission considers that the information provided by Yahua may only pertain to a selection of invoices relevant to its related party's purchases of ammonium nitrate in China. Therefore, the Commission considers that, for the purpose of determining the normal value in accordance with subsection 269TAC(6), the information provided by Yahua is less relevant than the information provided by the applicants.*

CCOIC notes the indications in the SEF that the information pertaining to normal value as provided by the Australian industry applicants ("the applicants") was assisted by *"assumptions"* and affected by the inability to obtain relevant information.[2]

CCOIC does not have access to the information provided by Yahua and is not in a position to comment on the accuracy of that information. However, it would appear to us that the information from Yahua at least provides the Commission with relevant information about the price level of ammonium nitrate in China, which could be verified in a manner no different to verification of information presented by the applicants. For example, the information could be used to cross-check the normal value that has been construed and assumed based on the information provided by the applicant.

CCOIC also does not have access to any information used by the Commission as pertains to the normal value, export price, and dumping margin, or their calculation. This is of concern because it has been made clear to the Commission that CCOIC represents all of the Chinese exporters of the goods under

[2] See the SEF, pages 33 and 34.

consideration to Australia during the investigation period. The Commission claimed not to be able to provide that information to CCOIC on the basis of "confidentiality" – an impediment with which we disagree.

Accordingly, CCOIC can do no more than to place its trust in the Commission to ensure that the export price and normal value have been worked out *"having regard to all relevant information"*, and in an objective and unbiased manner. This includes giving the same weight to Yahua's information as given to that of the applicants, so long as the information is *relevant* for the determination of normal value.

B Inappropriate cumulation of exports

CCOIC submits that the precondition for considering the cumulative effect of the exports under investigation is not met, and that the SEF has erred in assessing the effect of the goods exported from China together with other exports under investigation.

To impose measures against all exporters from different country sources Section 269TAE(2C)(e) of the Act demands that the Minister be satisfied that:

> *(e) 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.*

In this regard, we feel that the conditions of competition relating to the Australian ammonium nitrates market and the participation of the exporters in that market are so different as to require any effects of each export source to be to be separately considered, and not cumulated with each other.

The distinct patterns and dynamics applying to Chinese exports warrant them being treated separately from the goods exported from Thailand and Sweden. We refer to the following facts relating to the exports under investigation which highlight the differences that apply to the goods as exported from China:

- only Chinese exporters exported both HDAN and LDAN to Australia during the investigation period, with HDAN and LDAN being sold at different price levels for different applications;
- a very large part of the exports from China were actually sold to the Australian industry members themselves;
- only Chinese export volume *decreased* in the investigation period;
- only Chinese exports' market share *decreased* in the investigation period;
- the price of Chinese exports was higher than that of the other exports;[3]

[3] SEF, page 76.

- there is no evidence that Chinese exports' prices consistently undercut the prices of the Australian industry.[4]

The conditions of competition must also be considered from the perspective of other exporters, and in that regard we note that the export of the goods from Sweden reportedly took place under a special arrangement *"created by the Australian industry producing like goods"*, and were not intended to be in direct competition with goods exported from China and Thailand.[5]

Separately, and to ensure the Commission correctly assesses and understands the goods exported from China during the investigation period, especially in relation to the volume of the GUC purchased by the Australian industry either directly or indirectly, CCOIC refers to the detailed information about the likely purchases by the Australian industry members in its submission dated 24 December:

> *1 **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales details]** to Orica, **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales details]**. A copy of the commercial invoice and the end user certificate from Orica is attached.*
>
> *2 **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales details]** to Orica, **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales detail]**. A copy of the commercial invoice and the end user certificate from Orica is attached.*
>
> *3 **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales detail]** to Dyno Nobel **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales details].** Copies of relevant Dyno Nobel end user certificates are attached.*
>
> *4 **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales detail]** which were all made to traders and **[CONFIDENTIAL TEXT DELETED – Chinese exporter]** is not aware of the final customers of these imports in Australia.*
>
> *5 **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales details]** with Dyno Nobel being the single largest importer, **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales details]**. Copies of relevant end user certificates are attached.*
>
> *6 **[CONFIDENTIAL TEXT DELETED – Chinese exporter's sales details]**, who resold the goods to Orica.*
>
> *7 **[CONFIDENTIAL TEXT DELETED – Australian market sales behaviour]** imported from China at lower prices to "clear stock" and then to offer to continue to supply at a much higher price. **[CONFIDENTIAL TEXT DELETED – Australian market sales behaviour]**.* [footnote omitted]

We note the SEF only confirmed *imports* by Orica in March 2018 and by Dyno Nobel in the last quarter of the investigation, before commenting that:

> *By excluding the import volumes by Orica and Dyno Nobel from China during the investigation period, the Commission found that the import volumes of the goods from China, when*

4 SEF, page 72.

5 SEF, page 48.

> *expressed as a percentage of the total Australian import volume of the goods, is still greater than three per cent of the total Australian import volume and is therefore not negligible.*

This statement is confusing, for two reasons:

- the volume and timing of imports by the Australian industry as mentioned in the SEF is inconsistent with the *export* information provided by CCOIC; and
- the volume that should be taken as *non-injurious* or be excluded for the purpose of determining "negligibility" is the volume *exported* from China to Australia during the investigation period, not the *imports*.

In addition, despite the detailed information provided by CCOIC regarding the direct and indirect exports to the Australian industry both during the investigation period and after the investigation period, it is unclear whether the Commission has sought to investigate the matter further by requesting the relevant information from the Australian industry members. This is of particular concern in light of the SEF's statements that:[6]

> *The Commission has received a number of submissions which claimed that the Australian industry has, subsequent to importation of the goods from China and Sweden by other entities, purchased some of those goods. The Commission notes that most of these claimed purchases of the goods from China occurred following the investigation period. Further, these claims were not substantiated with any evidence that showed that these imported goods were subsequently sold to the Australian industry.*

The goods exported from China that were destined to the Australian industry is obviously an important issue that requires the Commission's careful assessment and treatment in this investigation. CCOIC respectfully urges the Commission to carry out such an assessment by making direct inquiry of the relevant Australian industry members.

C No evidence of injury to the Australian industry caused by dumped exports

Section 269TG(2) of the Act provides that the Minister may impose anti-dumping measure if the goods concerned have been exported to Australia at a dumped price *and* are likely to continue to be exported at a dumped price in the future, and:

> *…because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered.*

In our view, the SEF's preliminary findings and proposed recommendations do not comply with the pre-conditions for imposing anti-dumping measures as required under Section 269TG(2).

The injury finding required by Section 269TG(2) of the Act calls for the Commission's determination of two major aspects. The first is to determine the existence of material injury. The second is whether material injury is caused by dumping. Typically, one would expect the determination of the existence or likelihood of material injury to come first, before determining the causes of same, and whether dumping

[6] SEF, pages 54 and 55.

itself caused material injury taking into account other causal factors as well. Reversing the sequence of determination risks either making an assumption about the existence of injury, or attributing injurious effects to dumping when in truth other factors have caused that injury.

The SEF notes that the Australian industry applicants claimed to have experienced material injury in 2017:

> *In the application, the applicants claimed that the Australian industry has experienced material injury in 2017 in the form of:*
>
> *…*
>
> *Subsequent to the initiation of this investigation, Orica also claimed that the Australian industry has experienced injury in the form of reduced market share and reduced growth in an expanding market.*
>
> *The applicants allege that injury from the dumped goods exported from China, Sweden and Thailand commenced in 2016; however, it is claimed that in 2017 the "injury increased" and is considered by the applicants to be material.* [footnote omitted]

The SEF finds that the Australian industry could not have been materially injured by the alleged dumping during the investigation period:

> *The Commission found that the majority of ammonium nitrate in the Australian market is sold and purchased in accordance with fixed-term contracts.*
>
> *The Commission also found that the majority of the applicants' sales during the investigation period were made in accordance with contracts negotiated several years prior to the investigation period, and, in some instances, before the volume of the goods exported from China, Sweden and Thailand increased substantially. Therefore, the applicants' selling prices and volumes observed during the investigation period reflect the contract terms, including prices and volumes, negotiated and agreed to before the investigation period.* [underlining supplied]

This is a finding that dumping-caused material injury in the investigation period was not present, because no material injury to the Australian industry could have been caused by the exports under investigation.

This should have been the end of the assessment.

The investigation should have been, and still should be, terminated immediately as required by Section 269TDA(13) of the Act:

> *Subject to subsection (13A), if:*
>
> *(a) application is made for a dumping duty notice; and*
>
> *(b) in an investigation, for the purposes of the application, of goods the subject of the application that have been, or may be, exported to Australia from a particular country of export, the Commissioner is satisfied that the injury, if any, to an Australian industry or an*

> *industry in a third country, or the hindrance, if any, to the establishment of an Australian industry, that has been, or may be, caused by that export is negligible;*
>
> *the Commissioner must terminate the investigation so far as it relates to that country.*
> [underlining supplied]

The SEF then proceeds to assess the economic condition of the Australian industry based on the nominated injury analysis period of 1 April 2014 to 31 March 2018, at chapter 8 of the SEF. Chapter 8 does *not* draw any conclusions as to whether the Australian industry is considered to have been materially injured.

We do not intend to repeat the SEF's injury assessment from Chapter 8 in this submission. It suffices to note that the SEF observes that the economic condition of the Australian industry applicants fluctuated over the four year period, with signs of decline during the investigation period in certain aspects, such as price, profit and volume. On the other hand, the economic performance of separate companies making up the Australian industry was not always consistent. CSBP, for example, appears to be well off when it comes to price and profit. CSBP increased its profitability by over 41% over the four year injury analysis period. The SEF does not appear to consider the fact that the Australian industry enjoys over 97% of the total market share in Australia, and that the imported goods accounted for roughly less than or about 2% of the total market once the goods imported by the Australian industry itself are excluded, as relevant aspects of assessing the existence of injury.

More importantly, the assessment of the injury analysis period of 1 April 2014 to 31 March 2018 shows that the fluctuation and decline have occurred for reasons *not* related to the dumped exports under investigation. For example, it was noted that the decrease in CSBP's production volume during the investigation period was due to a major planned shutdown, as well as unplanned shutdowns. Further, QNP's production was impacted by Cyclone Debbie as well as production issues, and it would appear that Orica and QNP were unable to pass on significant cost increases in natural gas, because their rise and fall contractual provisions with their customers are based on the movement of other variables, such as ammonia.[7]

The assessment relating to the injury analysis period is clearly of relevance for the current investigation, because it informs the Commission of the fundamental question of whether the Australian industry producing like goods has been or is being injured, the materiality of the injury, and whether material injury was caused by the dumped imports.

If the Australian industry is not considered to have been materially injured, or is not being injured, then the question of causation is not reached. If the Australian industry is considered to have been injured, but not due to dumped imports, then the Commission must take that into consideration in considering the existence of injury that is said to be caused in the present and in considering the likelihood of a threat of material injury from dumped goods in the future. These latter two must be informed by the Commission's retrospective observations of the Australian industry's economic condition *during the injury analysis period*, and its relationship with any dumped exports under investigation *during the investigation period*. Without making an assessment of what "has been", and without considering facts from a past period, any finding in relation to what is likely to be happening now or in the future can only be uninformed and speculative.

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7 See SEF at page 59.

We respectfully submit that the SEF's injury analysis is flawed, because:

- the SEF is inconclusive as to whether the Commission considers the Australian industry to have suffered material injury during the investigation period, or the injury analysis period;
- the SEF clearly confirms that, whether or not the Australian industry suffered material injury during the investigation period, such injury if any was not caused by dumped exports during the investigation period; and
- the SEF has not examined the Australian industry's economic condition post 31 March 2018, therefore any findings as to whether the Australian industry has been materially injured after the investigation period are not based in fact.

D Wrong presumption that dumping is causing and will always cause injury

Despite the absence of any assessment of the Australian industry's economic conditions after 31 March 2018 the SEF claims, in Chapter 9, that *"the Commissioner found injury to the Australian industry, particularly injury in the form of price depression, caused by dumping"*. This view appears to be based on the Commission's observation that, in some instances, the Australian industry's price negotiations were influenced by the price of dumped imports, and in a few instances lost sales to dumped imports.

With respect, CCOIC is of the view that the SEF has failed to carry out a genuine injury assessment of the Australian industry as a whole in the post-investigation period. Instead, the SEF again seems to be guided by a policy that focuses on *selective* periods and *selective* interactions with the purpose of ensuring that dumping will be considered to be causing injury to the Australian industry. This policy approach disregards the Australian industry's economic condition as a whole, dismisses the significance of competition between the Australian industry members, and discounts the wider business and regulatory environment that impacts more heavily on imports than on Australian production.

The determination of material injury must be carried out for the Australian industry as a whole, taking into account all relevant economic factors and conditions of competition. This is recognised by the Commission's own policy manual:

> *Article 3.1 of the ADA requires that a determination of injury be based on positive evidence and involve an objective examination of the volume and price effects that constitute injury and the consequent impact on domestic industry. Article 3.4 of the ADA provides a non-exhaustive list of factors that must as a minimum be taken into account when assessing whether the domestic industry has experienced material injury. There are similar provisions in the SCM Agreement. The provisions are reflected in section 269TAE.*

However, the SEF appears to either downplay the standard of proof or the burden of probability that is required to reach a finding in an administrative inquiry such as this. The mantra seems to be that if dumped goods competed with, or did not compete with but "influenced", the Australian industry sales and prices then those goods must have caused injury to the Australian industry.

We submit, with respect, that this is in truth what the Commission's "but for" analysis in Chapter 9 of the SEF is all about. That analysis confines its attention to 13 examples – examples that the Commission appears to have invited and encouraged the applicants to provide - to demonstrate the alleged injurious effect of dumped exports on the Australian industry.

We provide the following observations regarding the Commission's consideration of these 13 examples:

1. The Commission considered that there is a connection between the dumped exports and the applicant's claimed injury in seven of the 13 examples.

2. Only those seven examples were "included" in the SEF injury assessment.

3. The Commission considers examples 5 and 6 to be examples where *"volumes were directly displaced by dumped imports"*. It is not clear whether the displacement related to goods under investigation exported during the investigation period, and no assessment of the materiality or otherwise of that displacement in the overall market share and volumes of the Australian industry is apparent.

4. It is unclear as to what extent the seven examples represent or demonstrate an impact on the Australian industry's economic condition as a whole, and for what period.

5. The seven examples consist of three examples relating to CSBP and four examples relating to QNP, but none relating to Orica.

6. The Commission has only conducted verification in relation to CSBP and Orica, but not QNP.

7. In so far as the alleged injury, *"particularly injury in the form of price depression"*, is said to be supported by the examples relating to CSBP, the SEF indicates that CSBP enjoyed continuous price increases during the injury investigation period, and increased profit and profitability.

8. Contrary to the necessity to make a finding regarding injury to the Australian industry as a whole, the SEF is completely silent on any price undercutting analysis at an overall level.

In our view, the SEF's so called "but for" injury assessment, based only on the selected examples, is a mechanism that will *always* conclude that dumped exports will *necessarily* cause injury – because they had influenced the Australian industry's price or sales in particular instances, or competed with the dumped exports - regardless of the Australian industry's overall economic performance as a whole. With respect, CCOIC does not accept that the SEF is a proper injury and causation analysis. It is the latest high-water mark in a radical "anti-dumping" fixation that amounts to a prohibition on any form of competition and the existence of allegedly dumped exports in Australian markets.

Further, in terms of materiality of the injury, we note the following statements from the SEF:[8]

> *The Commission determined the profit forgone (on a per annum basis) based on the 'undumped price' (which is, on average, approximately 4.8 per cent lower than the USP) derived for each example. The Commission considers that the applicants would have been able to achieve these prices in the absence of dumping.*
>
> *The Commission found that profit forgone as a percentage of the applicants' total profit is significant and is material to the Australian industry as a whole.*

We respectfully urge the Commission to provide clarification of this assessment. In particular, the Commission should clarify whether the amount of *"profit forgone"* is quantified based on and for the

[8] SEF, at page 82.

seven selected examples only. Is that *"profit forgone"* merely a drop in the bucket when compared with the likely profit performance of the entire Australian industry across all of its sales over the entire period that the *"profit forgone"* test was applied?

We recall:

- that the SEF's assessment of the economic condition of CSBP during the injury analysis period does not support any form of price or profit related injury, nor do any of the examples related to Orica;

- that the "but for" analysis could have only related to those seven examples, and not to the Australian industry as a whole;

- that the Australian industry holds 94 to 97% of the market, with the majority of the market locked away from imports for logistical, regulatory and supply risk reasons, meaning that the extent by which it is even capable of being injured by dumped imports would be negligible, and not much more negligible even when considering those seven examples.

- that the SEF appears to assume, as advocated by Orica, that *"in the absence of the dumping, Orica's selling prices would have been comparable to non-dumped levels"*,[9] an assertion that flies in the face of the obvious facts that competition that exists between and amongst Orica and the other Australian industry members, and that imports not subject to this investigation also participate in the market.

CCOIC is deeply perplexed as to how the Commission could be satisfied that the impacts of such a limited range of negotiation examples could cross the "materiality" line with respect to the condition of the entire Australian industry. CCOIC is not the only interested party confused by the approach in the SEF. As shown in the Commission's public record for this investigation, Yara AB has also made inquiry with the Commission about the approach in the SEF, in its email dated 7 March. CCOIC respectfully urges the Commission to provide better clarity to all interested parties as to the methodology it has adopted in the SEF before it makes its final recommendation to the Minister.

Lastly, we consider it useful to recall extracts from the Ministerial Direction for injury analysis:

- *It is not enough to assert that because there is dumping or subsidisation injury automatically follows.*

- *I would expect it to be shown that the industry is suffering injury and that the injury caused by dumping or subsidisation is material in degree.*

- *The injury must also be greater than that likely to occur in the normal ebb and flow of business.*

- *I direct you to consider material injury to be injury that is not immaterial, insubstantial or insignificant.*

- *I note that in cases where the dumped or subsidised imports hold a small share of the Australian market, it may be difficult to demonstrate material injury.*

[9] Orica submission dated 15 March 2019, at page 3.

The SEF's analysis appears to be the opposite of these directions:

- it assumes that injury to the Australian industry automatically follows from even the *"presence of dumping"*;[10]
- it assumes that dumping causes injury, before even assessing the existence of injury;
- it ignores any factors unrelated to dumping, and the normal ebb and flow of business;
- it considers that any competition from dumped exports, or even import prices not even offered in a negotiation but which simply "influenced" the price negotiation position of the Australian industry, necessarily cause injury;
- it has no difficulty whatsoever in reaching the conclusion that a minimal amount of dumped imports is responsible for material injury to an industry that is profitable and expanding, and almost absolutely dominates the market.

With respect, we submit that the causation analysis adopted by the SEF is erroneous and mixed-up. It is based on a narrative that dumped exports – regardless of how small and how non-competitive with the Australian industry they are - always cause injury, that the domestic industry is only competing with and is only influenced by dumped exports, and that the domestic industry is impacted upon by no other factors that could cause it to make less money at one time as compared to another.

This is not the kind of injury analysis envisaged by the Australian legislation and by the WTO Anti-Dumping Agreement.

E Improper consideration of factors unrelated to dumping

As identified above, the SEF's approach effectively *ensures* dumping is always causing injury to the Australian industry and ignores the real commercial world in which the Australian industry and the Australian market for the goods under consideration exists. This approach cannot be said to have discharged the Commission's obligation of non-attribution set out in Section 269TAE(2A) of the Act.

We highlight some of these "other factors":

1. Dumped imports do not and cannot compete with the Australian industry at all under major long term supply contracts.[11]
2. Three members of the Australian industry operate on the east coast, strongly in competition with each other.
3. Competition is only going to become fiercer amongst Australian industry members, as the Burrup plant in the west of the country becomes fully operational.

[10] SEF, page 72.

[11] SEF, page 26.

4. Contract prices are constantly adjusted to reflect movements in major raw materials, such as ammonia.[12]

5. Import prices may well be used as a reference point for negotiation, but without there being any direct competition with the Australian industry at all. The finding that prices of the dumped exports *"regardless of the volume imported"*[13] could result in the Australian industry reducing its prices to secure a contract highlights that the real factor at play is *not* the dumped exports. Rather, it is the bluff and bluster of the negotiations between the Australian industry and its customers that is determinative, a game of "chicken" that has nothing to do with dumped exports *per se* because they may not even have been offered and could not realistically be offered in those negotiations.

6. A substantial amount of dumped imports were imported or used by the Australian industry itself, to remedy its own inability to supply. Whilst it was said that, in one specific instance, Orica did not refer to its own imports from China for price negotiation, there is no evidence that these imports were not the basis of price negotiation by other Australian industry members. The SEF is also silent as to the other Chinese exports brought to Australia by other members of the Australian industry during the investigation period.

7. The major competitive force is and must have been the interactions between the Australian industry members themselves, who hold 94% to 97% of the market share.

8. There are clear practical limitations on the "real" commercial impact that dumped exports could have on the Australian industry, due to the limitations on importation of ammonium nitrate.[14]

9. The Australian industry's inability to supply is expected to be overcompensated by the normalisation of operations at the Burrup plant, meaning reliance on imports in the future is going to be even lower than at present and that price competition between Australian industry members will be even tougher.

10. The volume of imports not subject to this investigation is just as substantial – if not even more substantial – than those under investigation. It is unreasonable to ignore these imports, and to consider that the Australian industry could have charged its customers whatever it wanted, but for the *dumping margin* of the exports under investigation.

F Non-injurious price determination raises questions

If the Commission maintains its position in the SEF, despite the total opposition of CCOIC, other exporters and importers and the user industries, then the question of the non-injurious price ("NIP") will come into play.

The NIP must reflect the *minimum* price necessary to prevent injury caused by dumping of the goods. In our view, there are at least three options the Commission should consider:

12 SEF, page 57, 59 and 74.

13 SEF, page 79.

14 SEF, pages 24 and 79.

1. The NIP as determined for exports from Russia.

2. Export prices from China to the Australian industry.

3. Un-dumped exports.

4. NIP based on the selling prices of the Australian industry as a whole.

Firstly, the NIP as determined for exports from Russia should be considered, as the SEF notes that this NIP was effective in addressing injury:

> *The Commissioner observes that, since 2001 when measures were put in place in respect of ammonium nitrate exported to Australia from Russia, the ammonium nitrate market in Australia has seen significant growth and the Australian industry has maintained a high share of the market. The industry has also experienced a high level of profitability. Therefore, it is clear that the measures (effectively a floor price based on the NIP) in place have been effective in remedying the injury that was being caused to the Australian industry from dumped goods and preventing further injury from occurring.*

This view is supported by Orica.[15]

To proceed otherwise would be to set the NIP at a level which favours exports from Russia over exports in the current investigation.

With respect to the second option, the exports from China *to the Australian industry*, either directly or indirectly, must of course be considered as non-injurious.

This is further supported by the Commission's observation that:

- the Australian industry's Chinese imports do not influence the Australian industry's pricing (at least for Orica);

- "*[Orica's] competitor prices as estimated by Orica and notes that domestic prices are more competitive than the estimated Chinese price (at equivalent terms).*"[16]

Accordingly, the Commission should calculate a NIP tailored to the situation of exports from China, by taking into account all of China's exports which were either directly or indirectly imported *by* or *for* the Australian industry during the investigation period.

As to the third option, the Commission is reminded of the equivalent volume of exports of ammonium nitrate that are not subject to this investigation, which must be presumed to be un-dumped (including imports from Russia brought in at or above NIP level). The Commission could work out the NIP by reference to these un-dumped imports. As mentioned above, it would be unreasonable to ignore these imports, and to consider that the Australian industry could have charged its customers whatever it wanted, but for the *dumping margin* of the exports under investigation.

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15 SEF, page 86

16 SEF, page 72

Lastly, in relation to a NIP based on the selling prices of the Australian industry, which is the tack adopted in the SEF, we would like to raise the following concerns:

- Only the average selling prices of CSBP and Orica were used. This appears to be inconsistent with the Commission's approach of treating at least all three applicants as the Australian industry.

- The Commission's injury causation analysis identifies that only the negotiations by CSBP and QNP demonstrated a connection between alleged injury and dumped exports, not those involving Orica.

- There is no reason why the average selling prices of *"two years prior to the investigation period"* provide a better basis than the average selling prices of the investigation period itself, which reflects the Australian industry's price level *yet to be affected* by dumping, as acknowledged by the SEF itself. The Australian industry's prices *during the investigation period* would reflect a more up-to-date condition of the Australian industry and the Australian market.

- There is no reason why a component for selling and administration cost and profit should not be taken into account in deriving the NIP. The fact that *some* importers may consume the goods rather than on-sell them did not prevent the Commission from considering such importers to be competing directly with the Australian industry producing like goods, nor has it prevented the Commission from considering that part of the Australian industry that sell the goods as part of its explosive services as being affected by the dumped exports. Orica can provide the relevant information as to the level of cost and profit related to its importation and sale of the ammonium nitrate from China, Egypt, and Indonesia.[17]

- The calculation takes into account "consumer price index". However, it does not appear to take into account the other, and likely more prominent, price adjustment factors as shown in the contracts between Australian industry and its customers. We refer to the following:

> *These contracts also specify provisions (referred to as 'rise and fall' provisions) to adjust these base prices on a periodic basis, including the formulas and variables used to adjust the base price, to take into account variations in raw material costs (such as ammonia and natural gas) or prices, including movements in price indices published by third-party or government agencies. These price adjustment provisions in contracts are the primary method by which the applicants 'pass through' cost movements in feedstock to preserve margins.*

Accordingly, as part of the NIP determination, we ask the Commission to recalculate the Australian industry based USP by taking into account:

- the price of the Australian industry as a whole, which forms the basis of the Commission's injury finding; OR

- the price of QNP only, being the only Australian industry member who has demonstrated price depression and suppression during the injury analysis period *and* that was considered by the Commission as having evidence of being influenced by dumped exports; AND

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17 SEF, at page 7.

- the price of the investigation period, with all necessary adjustments as shown in the contracts between the Australian industry and the customers, reflecting the *current* market condition.

Lastly, once the four NIP options are determined, the Commission should then apply the *lowest* one in relation to the goods exported from China, for the purpose of applying the lesser duty rule.

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In conclusion, CCOIC expresses its serious concern in relation to the issues arising from the SEF, and the process of this investigation as they relate to Chinese exporters generally.

CCOIC once again urges the Commission to objectively and genuinely analyse the Australian industry's condition and the conditions of competition between the ammonium nitrate produced by the Australian industry and that imported from China, according to Australian law and the rules of the WTO Anti-Dumping Agreement.

Yours sincerely,

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