Australian Government
Department of Industry, Science, Energy and Resources

Anti-Dumping Commission

CUSTOMS ACT 1901 - PART XVB

Anti-Dumping Commission Preliminary Report to the Anti-Dumping Review Panel

Reinvestigation of Certain Findings in Investigation 473

Ammonium nitrate exported to Australia from the People's Republic of China, Sweden and the Kingdom of Thailand

6 March 2020

CONTENTS

ABBREVIATIONS

the Act	*Customs Act 1901*
ADN	Anti-Dumping Notice
the Australian industry applicants	CSBP Limited, Orica Australia Pty Ltd and Queensland Nitrates Pty Ltd
China	the People's Republic of China
the Commission	the Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
CSBP	CSBP Limited
DBS	Downer EDI Mining-Blasting Services Pty Ltd
EPR	electronic public record
Glencore	Glencore Coal Assets Australia Pty Ltd
the goods	the goods the subject of the application
the Manual	*Dumping and Subsidy Manual*
the Minister	the Minister for Industry, Science and Technology
Orica	Orica Australia Pty Ltd
QNP	Queensland Nitrates Pty Ltd
REP 473	*Anti-Dumping Commission Report No. 473*
the Review Panel	the Anti-Dumping Review Panel
Thailand	the Kingdom of Thailand
WTO	World Trade Organization
Yara	Yara AB

1 BACKGROUND

1.1 Introduction

On 25 June 2018, the Commissioner of the Anti-Dumping Commission (the Commissioner) initiated an investigation in response to an application[1] made by CSBP Limited (CSBP), Orica Australia Pty Ltd (Orica) and Queensland Nitrates Pty Ltd (QNP) (collectively, the Australian industry applicants) that alleged that ammonium nitrate (the goods) exported to Australia from the People's Republic of China (China), Sweden and the Kingdom of Thailand (Thailand) at dumped prices has caused material injury to the Australian industry producing like goods.

In *Anti-Dumping Commission Report No. 473* (REP 473) the Commissioner recommended that the Minister for Industry, Science and Technology (the Minister)[2] publish a dumping duty notice in respect of all exporters of ammonium nitrate exported to Australia from China, Sweden and Thailand.

The Minister's decision was published on the Anti-Dumping Commission (Commission) website on 3 June 2019.[3]

1.1.1 Review of the Minister's decision

The Anti-Dumping Review Panel (the Review Panel) accepted an application for a review of the Minister's decision from Downer EDI Mining-Blasting Services Pty Ltd (DBS), Glencore Coal Assets Australia Pty Ltd (Glencore) and Yara AB (Yara). The Review Panel initiated its review of the decision by public notice on 20 September 2019.[4]

On 19 November 2019, the Review Panel requested that the Commissioner undertake a reinvestigation[5] under section 269ZZL(1) of the *Customs Act 1901* (the Act)[6] of the following findings in REP 473:

1. that the injury caused by dumping is material; and
2. that exports from Sweden should be cumulated with other exports to Australia.

The Review Panel requested that the Commissioner report the result of the reinvestigation by 17 February 2020. The Commissioner sought an extension of time to provide his report to the Review Panel and was granted an extension of 46 days. The Commissioner's report is now due by 3 April 2020.

---

[1] Document no. 1 on the electronic public record (EPR) for case no. 473 refers.

[2] For the purposes of the reviewable decision, the Minister is the Minister for Industry, Science and Technology.

[3] Anti-Dumping Notice No. 2019//57 refers.

[4] Notice under section 269ZZI refers.

[5] Notice in accordance with section 269ZZL(1) refers.

[6] All legislative references are to the *Customs Act 1901*, unless otherwise specified.

1.2 Approach to the reinvestigation

This report sets out the preliminary findings of the Commissioner in response to the reinvestigation request by the Review Panel. The reinvestigation by the Commissioner has been conducted in accordance with section 269ZZL(2).

In conducting the reinvestigation, the Commissioner has reviewed the grounds accepted for review by the Review Panel under section 269ZZI, the Review Panel's reasons for requesting the reinvestigation and the applications for a review of the Minister's decision from DBS, Glencore and Yara.

The Commissioner's reinvestigation with respect to each finding is discussed in detail in the following sections.

1.3 Summary of preliminary findings

In accordance with section 269ZZL(2), the Commissioner found that:

- profit forgone is 2.2 per cent of the Australian industry applicants' aggregated profit in the investigation period (1 April 2017 to 31 March 2018), and 3.6 per cent of the Australian industry applicants' aggregated profit in the 12 months following the investigation period (the post-investigation period, 1 April 2018 to 31 March 2019) (set out in section 2.2.1 of this report);
- the 'evidentiary validity' of the profit forgone in the post-investigation period is sound (set out in section 2.2.2 of this report);
- the reduction in profitability caused by dumping of exports during the investigation period, expressed as a percentage point change in profitability, is 0.6 percentage points in the investigation period and 1.1 percentage points in the post-investigation period. However, the Commissioner does not consider that this methodology is preferable to the methodology adopted in REP 473 (where the profit forgone is expressed as a percentage of the Australian industry applicants' aggregated profit) (set out in section 2.2.3 of this report);
- based on the profit forgone in the investigation period and the post-investigation period, the Commissioner considers that the injury to the Australian industry caused by dumping is material (set out in section 2.2.4 of this report); and
- it is appropriate to consider the cumulative effect of the exportations of the goods from China, Sweden and Thailand given the conditions of competition between those goods and the conditions of competition between those goods and like goods that are domestically produced (set out in section 3.3 of this report).

1.4 Submissions

Interested parties are invited to make submissions in response to the Commissioner's preliminary findings as set out in this report. Interested parties are also invited to make submissions on new information which was considered by the Commission in arriving at

the preliminary findings.[7] Details of the new information and how the information was considered by the Commission are set out in section 1.5.

Submissions should be lodged no later than **20 March 2020**. The Commission's preference is to receive submissions by email to investigations2@adcommission.gov.au.

Submissions may also be addressed to:

The Director, Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2600

Interested parties claiming that information contained in their submissions is confidential, or that the publication of the information would adversely affect their business or commercial interests, must:

- provide a summary containing sufficient detail to allow a reasonable understanding of the substance of the information that does not breach that confidentiality or adversely affect those interests; or
- satisfy the Commissioner that there is no way such a summary can be given to allow a reasonable understanding of the substance of the information.

Submissions containing confidential information must be clearly marked "FOR OFFICIAL USE ONLY".

Interest parties must lodge a non-confidential version of their submission, clearly marked "PUBLIC RECORD".

1.5 New information considered in this reinvestigation

On 3 December 2019 the Commission requested financial data from CSBP, Orica and QNP for the period 1 April 2018 to 30 September 2019. Each Australian industry applicant provided data for the period 1 April 2018 to 30 September 2019 (in the same format as previously produced and verified) relevant to the following:

- production and sales volumes, revenue, costs and net profit; and
- details of the sales made in accordance with the contracts analysed in Investigation 473 that were found to be affected by the dumped goods.

The Commission is not limited in a reinvestigation under section 269ZZL of the Act to considering a specified body of information or submissions.[8] The Commission has sought

[7] The Commission has considered the matters raised in joint correspondences from DBS and Yara dated 11 February 2020 and 3 March 2020, and a correspondence from Glencore dated 12 February 2020. The Commission's response is outlined in section 1.5 of this report. These parties are invited to make submissions in response to this preliminary reinvestigation report.

[8] The Review Panel is limited in a Division 9 review to only considering a certain body of information. Namely, relevant information, any conclusions based on the relevant information (section 269ZZK(4)(a)) and further information obtained

the new information because the new information is relevant to a finding the subject of reinvestigation. That is, the Review Panel has requested the Commissioner reinvestigate his finding of profit forgone in the post-investigation period. The new information is directly relevant to this finding.

The Commission has used the new information obtained in the reinvestigation period (i.e. the production and sales volumes, revenue and costs) to recalculate the profit of the Australian industry applicants in the post-investigation period. The Commission is satisfied that the new information is preferable to assuming that profit in the post-investigation period would remain the same as the volume in the investigation period, as the Commission did in Investigation 473.

The Commission has also used the new information to re-calculate the profit forgone in the post-investigation period in respect of certain contracts (outlined in section 2.2.1 of this report).

On 14 January 2020, the Commission met with representatives from Orica, at Orica's request, to discuss the financial data that it provided to the Commission. The information provided at that meeting was set out in a file note published on the public record on 24 January 2019.[9] As set out in section 2.2.1 of this report, the Commission has considered Orica's explanation of its net profit in the post-investigation period. Interested parties are invited to make submissions on the explanation for the increase in profits in the post-investigation period by the date set out in section 1.4 of this report.

in a conference held under section 269ZZHA. Relevant information is defined in section 269ZZK(6)(a) as the information the Commissioner had regard to or was, under section 269TEA(3)(a), required to have regard, when making findings set out in the report to the Minister under section 269TEA in relation to the making of the reviewable decision. However, section 269ZZK(4A) requires the Review Panel to have regard to any report made to it by the Commissioner under section 269ZZL(2). Under section 269ZZL(3), the Commissioner's report is to 'affirm' any of those findings that the Commissioner thinks should be affirmed, and 'set out any new findings that the Commissioner made as a result of the reinvestigation'. Additionally, under section 269ZZL(3)(b) the report may propose new or different conclusions based on the material that has been examined under reinvestigation. Therefore, the Commissioner, is not limited in a reinvestigation to only considering a certain body of information or submissions and it is open to the Commissioner to considering new information, in particular where that information is relevant to a finding the subject of reinvestigation.

[9] Document no. 68 on EPR 473 refers.

2 MATERIALITY OF INJURY

2.1 Introduction

Pursuant to section 269ZZL of the Act, the Review Panel requires the Commissioner to reinvestigate the finding that any injury caused by dumping is material. In particular, the Review Panel requires the Commissioner to review the following matters:

(a) a separate analysis of profit foregone in the investigation period and post-investigation period;
(b) an examination of the evidentiary validity of profit forgone in the post-investigation period;
(c) an alternate methodology comparing the Australian industry applicants' profitability;
(d) reassessment of materiality of injury with regard to profits foregone, taking into consideration the above; and
(e) the possibility of double counting if aggregating profit forgone in the investigation period and post-investigation period.

2.2 Materiality of injury

2.2.1 Profit foregone in the investigation period and post-investigation period

In investigation 473, the Commission defined the investigation period[10] for the purpose of assessing dumping as 1 April 2017 to 31 March 2018; and the injury analysis period for the purpose of determining whether material injury to the Australian industry has been or is being caused by exports of dumped goods as the period commencing 1 April 2014.

The Commission quantified the effect of dumping, which occurred in the investigation period, on the Australian industry's profit in order to determine whether the resulting injury is material to the Australian industry as a whole. Specifically, the Commission determined the profit forgone in relation to the examples listed in section 9.2.1 of REP 473, and only where there was evidence that pricing or volumes were affected or influenced by the dumped goods exported in the investigation period.

In REP 473, the Commission found that the profit forgone (on an annualised basis encompassing both the profit forgone in the investigation period and subsequent to the investigation period), relative to the Australian industry applicants' aggregated profit in the investigation period, is material to the Australian industry as a whole.

As demonstrated in Confidential Attachment 17 to REP 473, and as discussed in conferences with the Review Panel,[11] the profit foregone is made up of the profit foregone during the investigation period and the profit foregone (on an annualised basis) in the post-investigation period. The profit forgone was aggregated and expressed as a

[10] As defined by section 269T(1).

[11] The Review Panel's conference summaries dated 4 September 2019 and 6 November 2019 refer.

proportion (percentage) of the Australian industry applicants' aggregated profit during the investigation period.

In the Review Panel's reinvestigation request, the Review Panel stated that it is 'not as clear that the post-[investigation period] profits foregone can be considered to [be] an economic factor in relation to goods "exported" to Australia, since it appears to relate to the loss of profit arising out of future exports'.[12]

In the investigation, the Commission found that sales in the ammonium nitrate market are made in accordance with fixed-term contracts. While there are 'rise and fall' provisions in the contracts that affect the net price paid, the base price itself will not be altered during the term of the contract nor will the minimum volumes.

Noting the above, the profit foregone in the post-investigation period is not based on notional sales, nor is it influenced by 'future exports'. Instead, the profit forgone post-investigation period is based on Australian industry applicants' sales occurring post-investigation period in accordance with fixed-term contracts. These contracts were negotiated and affected or influenced by the dumped goods exported in the investigation period.[13]

Given this, the Commission determined profit forgone in the investigation period *and* post-investigation period, as some sales in accordance with the relevant contracts occurred in the investigation period and other sales commenced in the post-investigation period in accordance with the date specified in the negotiated contract. Despite some sales occurring in the post-investigation period, these sales have been affected or influenced by the dumped goods exported in the investigation period.[14] In terms of lost volumes and the quantification of profit forgone in relation to these volumes, the Commission took into consideration the period in which the sales volumes in relation to the relevant applicant's bid would have occurred; however, to reiterate, the negotiations for these volumes were still influenced by the dumped goods exported during the investigation period.

In undertaking its analysis of profit forgone post-investigation period, the Commission considers that the assessment of injury is not constrained to the investigation period. The Act does not define the injury analysis period or prescribe a minimum or maximum period for an injury analysis. This was affirmed by the Review Panel in *Anti-Dumping Review Panel Report No. 102*[15] where the Panel expressed that 'no issue arises from the injury period commencing before and *continuing beyond* the investigation period' [emphasis

---

[12] Page 3 of the Review Panel's notice in accordance with section 269ZZL(1) refers.

[13] Chapters 7 and 9 in REP 473 and the Review Panel's conference summary dated 4 September 2019 refer.

[14] In accordance with section 269TAE(1)(f).

[15] ADRP Report No. 102 - A4 Copy Paper exported from Austria, Finland, the Republic of Korea, the Russian Federation and the Slovak Republic.

added].[16] The Review Panel cited the World Trade Organization (WTO) Panel's Report *EC – Tube or Pipe Fittings*, which determined that the Anti-Dumping Agreement does not set forth any express requirements regarding the choice of the period of investigation for the purposes of conducting any injury analysis, and further determined that the importing Member may investigate price effects of imports in an injury investigation period which may be different to the investigation period for dumping.[17]

In this reinvestigation, to reassess the profit forgone following the investigation period, the Commission requested data from each Australian industry applicant for the period 1 April 2018 to 30 September 2019.[18] Each Australian industry applicant provided data for the period 1 April 2018 to 30 September 2019 (in the same format as previously provided and verified) relevant to the following:

- production and sales volumes, revenue, costs and net profit; and
- details of the sales made in accordance with the contracts affected by the dumped goods.

The Commission aggregated the data provided by each Australian industry applicant to determine the net profit (and profitability) in the 12 months following the investigation period (1 April 2018 to 31 March 2019). The Commission found that the aggregated net profit of the three Australian industry applicants increased in the post-investigation period. The Commission observed that this increase is due to increased Australian industry production and sales volumes to customers in the Pilbara region in Western Australia, given that Yara Pilbara Nitrates Pty Ltd is continuing to experience production issues.

In determining the profit forgone, the Commission did not depart from the methodology utilised in REP 473. The profit forgone for the post-investigation period was revised in relation to one example in order to avoid double counting, given that this contract was effective during the investigation period and was renegotiated and extended. The profit forgone was also revised for the example pertaining to lost sales volumes to reflect the profit margin achieved in the post-investigation period for the relevant Australian industry applicant rather than the margin in investigation period. This further reduced the profit forgone in the post-investigation period.

The Commission used the updated data to determine that the profit forgone[19] in the post-investigation period is 3.6 per cent of the Australian industry applicants' aggregated profit in the same period. The profit forgone as a percentage of the aggregated profit in the post-investigation period differs to that determined in Confidential Attachment 17 to REP 473 (4.3 per cent) because the aggregated profit used in the denominator in this

---

[16] Ibid, page 45 refers.

[17] WTO Panel Report, European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, 7 March 2003, paragraph 7.276 refers.

[18] September 2019 was the most recently completed quarter at the time the request was made.

[19] In determining profit forgone, the Commission did not depart from the methodology utilised in REP 473. The methodology is outlined in section 9.4 in REP 473.

revised calculation is relatively higher than the aggregated profit in the investigation period, and the numerator (profit forgone) is relatively lower.

The profit forgone in the investigation period is 2.2 per cent of the Australian industry applicants' aggregated profit.

The absolute profit forgone in the investigation period remains unchanged; however, the profit forgone as a percentage of the Australian industry applicants' aggregated profit has changed given that the Commission has not multiplied the profit forgone by the proportion of the applicants' share of the total Australian industry production volume, as was done in Confidential Attachment 17 to REP 473.[20] The Commission is satisfied that a qualitative assessment of the materiality of the profit forgone is appropriate in circumstances where it does not have the profit data for the other Australian industry manufacturers.

The calculations of profit forgone in the post-investigation period are at **Confidential Attachment 1**.

2.2.2 Examination of the 'evidentiary validity' of profit forgone in the post-investigation period

As set out in section 9.4 of REP 473, the Commission estimated revenue and profit forgone for each individual contract negotiated where the Commission found that dumped imports directly displaced volumes (volume effect on profit) or led to price reductions (price effect on profit) as follows:

- Price effect on revenue (which directly translates to profit forgone) – the 'undumped' price less the re-contracted price (per tonne), multiplied by the contracted minimum annual volume or the volume sold during the investigation period (in tonnes), depending on the specific example. This isolates the effect of dumping from the subject countries, and this is a more conservative estimate than an estimate based on the price prevailing in accordance with the existing contract at the time of the negotiation;
- Volume effect on profit (lost volumes) – the price per tonne offered, multiplied by the annual volume (in tonnes) bid for, multiplied by the relevant applicant's margin.

As noted in section 2.1.1 of this report, and as explained in REP 473, the Commission found that sales in the ammonium nitrate market are typically made in accordance with fixed-term contracts. Therefore, to establish a causal link between injury to the Australian industry and the dumped goods, the Commission assessed the information provided by each applicant in support of its claims that prices, and the increasing volumes, of the goods imported from the subject countries during the investigation period have impacted contract prices that were re-negotiated (where the applicant is the incumbent supplier) or negotiated (where the applicant made an offer to a potential customer). This injury may be either through price pressure as a result of the dumped goods (price depression) or through loss of contract (loss of sales volumes).

---

[20] This was explained and summarised in the Review Panel's conference summary dated 6 November 2019.

The Commission determined profit forgone in the post-investigation period based on contracts that were affected or influenced by the dumped goods exported during the investigation period, however, the sales in accordance with these contracts occurred post-investigation period. These contracts govern supply to a customer for a finite period of time and specify a base price and minimum annual volumes. Therefore, effectively, the contracts lock-in the sales terms (including price and annual volumes) for the duration of the contract and the terms do not vary unless the contract is formally varied.

In Investigation 473, each applicant has provided copies of the relevant contracts and/or listings of the relevant sales made under the contract. The Commission has also been provided with sales data and associated documents from importers. The Commission's assessment of profit forgone in the post-investigation period is based on this information.[21] Therefore, the Commission considers that its assessment is based on facts and not on allegations, conjecture or remote possibility.

However, and recognising that the Review Panel has noted in its reinvestigation request that the Commission has used the aggregated profit in the *investigation period* as the denominator in determining the materiality[22] of the profit forgone in the *post-investigation period*, the Commission requested and received data from each Australian industry applicant to determine the total profit (including profitability) in the post-investigation period (section 2.1.1 of this report refers). This updated data was used to revise the profit forgone as a proportion (or percentage) of the Australian industry's profit in the post-investigation period (refer **Confidential Attachment 1**). The Commission found that the revised profit forgone as a percentage of the Australian industry's profit for the post-investigation period is lower than that determined in Confidential Attachment 17 to REP 473 (section 2.1.1 of this report refers).[23]

The Commission has re-examined the relevant documents (including documents evidencing contract negotiations, finalised contracts and sales records). In respect of each contract set out in Section 9.2.1 and Confidential Attachment 17 of REP 473, the Commission re-affirms its finding that exports from the subject countries caused price depression and/or directly displaced Australian industry volumes. The Commission is satisfied of the evidentiary validity of these findings.

The Commission has also reassessed the level of profit forgone in the post-investigation period attributable to price and/or volume injury identified. The Commission is satisfied of the evidentiary validity of the finding of profit forgone.

---

[21] Confidential Attachment 15 to REP 473 refers.

[22] Profit forgone as a percentage of the Australian industry's aggregated profit.

[23] Revised from 4.3 per cent in REP 473 to 3.6 per cent in this report.

2.2.3 Alternate methodology comparing the applicants' profitability

In REP 473, profitability was calculated as the Australian industry applicants' aggregated net profit as a percentage of their aggregated sales revenue (based on all sales in the investigation period).[24]

In this reinvestigation, as requested by the Review Panel, the Commission calculated the percentage point reduction in the Australian industry applicants' profitability caused by dumping (in the investigation period), for both the investigation period and post-investigation period.

The Commission found that the percentage point reduction in profitability, caused by dumping, was 0.6 percentage points in the investigation period. In the post-investigation period, the Commission found that the percentage point reduction in profitability was 1.1 percentage points.[25]

The Commission does not consider that this alternative methodology is more appropriate than or preferable to the methodology adopted in REP 473, noting that no compelling explanation (presumably other than anticipating it may result in a lower figure) was given by Yara in advocating this methodology over the methodology adopted by the Commission. It is the Commission's view that this alternate methodology represents the profit forgone as a percentage point change relative to revenue and therefore trivialises the total loss of profit, which is in the millions of dollars.

It should also be noted that the contracts that were found to be affected by dumping during the investigation period have different contract terms and periods, in some cases extending over six years. While the profit forgone calculations are confined to a 12 month period (in terms of profit forgone in the investigation period, and profit forgone in the post-investigation period), the injury experienced will continue over the full term of the contract.

2.2.4 Reassessment of materiality of injury with regard to profit foregone

Having regard to both the profit forgone in the investigation period and post-investigation period, the Commission considers that the injury caused by the dumped goods is material to the Australian industry as a whole, given that the Australian industry applicants represent 78 per cent of the Australian industry's total production volume.

Further, the Commission found a causal relationship between the dumped goods and the injury to the Australian industry, and the profit forgone is directly attributable to the dumped imports.[26] The price and volume injury found to have been caused by dumping in the seven examples outlined in section 9.2.1 of REP 473 is not injury that occurred within the normal ebb and flow of business.

---

[24] Footnote 105 on page 63 of REP 473 refers.

[25] Confidential Attachment 1 refers.

[26] Chapter 9 in REP 473 refers.

Further, the Commission's assessment of material injury is not based on a coincidence analysis where trends are observed in variables over time and findings made based upon these relative trends. Therefore, the Commission found that the injury to the Australian industry *caused by dumping* is greater than that likely to occur in the normal ebb and flow of business.

The Commission considers that, in order to determine whether the profit forgone is material in the context of the Australian industry's profit and therefore material to the Australian industry as a whole, it is more appropriate to calculate the profit forgone as a percentage of the Australian industry applicants' aggregated profit.

The Commission considers that, regardless of the calculation used to quantify the materiality of the profit forgone (whether it is expressed as a percentage of the Australian industry's profit or a percentage point change in profitability), the absolute profit forgone determined in the investigation period and the post-investigation period (in the millions of Australian dollars) is material.

The following table shows the variations in the applicants' net profit and profitability (including the profit and profitability in the absence of dumping) from 2014-15 to 2018-19. The data provided by the applicants was used to update the profit and profitability figures for the post-investigating period.

	1 Apr 2014 - 31 Mar 2015	1 Apr 2015 - 31 Mar 2016	1 Apr 2016 - 31 Mar 2017	1 Apr 2017 - 31 Mar 2018	1 Apr 2018 - 31 Mar 2019
Profit	100.0	102.0	100.0	89.9	110.4
Profit in the absence of dumping	100.0	102.0	100.0	91.8	114.3
Profitability (% of revenue)	100.0	98.5	98.6	89.7	97.8
Profitability in the absence of dumping	100.0	98.5	98.6	91.6	101.3

Table 1: Index of profit and profitability variations

2.2.5 Possibility of double counting if still aggregating profit in the investigation period and post investigation period

Given that the Commission has separately determined profit forgone in the investigation period and profit forgone in the post-investigation period, there is no possibility of double counting.

2.3 Preliminary reinvestigation finding

The Commissioner found that:

- profit forgone is 2.2 per cent of the Australian industry applicants' aggregated profit in the investigation period (1 April 2017 to 31 March 2018), and 3.6 per cent of the

Australian industry applicants' aggregated profit in the 12 months following the investigation period (the post-investigation period, 1 April 2018 to 31 March 2019);

- the 'evidentiary validity' of the profit forgone in the post-investigation period is sound;
- the reduction in profitability caused by dumping of exports during the investigation period, expressed as a percentage point change in profitability, is 0.6 percentage points in the investigation period and 1.1 percentage points in the post-investigation period. However, the Commissioner does not consider that this methodology is preferable to the methodology adopted in REP 473 (where the profit forgone is expressed as a percentage of the Australian industry applicants' aggregated profit);
- based on the profit forgone in the investigation period and the post-investigation period, the Commissioner considers that the injury to the Australian industry caused by dumping is material; and
- there is no double counting, given that profit forgone was determined separately in the investigation period and the post-investigation period.

3 CUMULATIVE EFFECT OF EXPORTATIONS FROM SWEDEN

3.1 Introduction

DBS and Yara contend that it is not appropriate to consider the cumulative effect of the goods exported from Sweden, in accordance with section 269TAE(2C), given the 'unique circumstances' under which the exports from Sweden were made and the conditions of competition.

Yara further contends that it was not appropriate for the Commission to have regard to Yara's bid for a particular supply contract in assessing the condition of competition in accordance with section 269TAE(2C)(e), given that exports from Sweden in accordance with this bid have not occurred.

3.2 Yara's bid

The Commission considers that, unlike the assessment required under section 269TAE(1), which requires the Minister to determine actual (or potential) injurious outcomes (that is, the effect of the exportation of goods to Australia on the Australian industry), the assessment under section 269TAE(2C)(e) is concerned with identifying which goods are in competition with each other.

The Commission is of the view that, in the assessment of the conditions of competition, it would be open to the Commission to consider all genuine offers to supply ammonium nitrate. The assessment should consider whether those offers genuinely compete with offers to supply ammonium nitrate from other countries and offers to supply like goods that are domestically produced.

As outlined in section 5.3.2 of REP 473, the Commission found that, in the Australian market, ammonium nitrate is predominately sold and purchased in accordance with fixed-term contracts. These contracts are usually arranged following a tender process. Therefore, competition within the market is based on bids to supply customers in response to requests for tender.

The Commission considers that, regardless of the Commission's assessment of the bid, the fact that Yara participated in the request for tender and made bids to supply demonstrates that it has competed with other suppliers in the market for this particular tender, including suppliers that import goods from the other countries subject to Investigation 473. The Commission considers that Yara's bid was genuinely considered by the entity that made the request for tender. Yara even revised its bid prices in its negotiations with the relevant entity. This further demonstrates that Yara was a serious and determined contender and was competing with other bidding suppliers in the market for this tender.

The Commission disagrees with Yara's assertion that, because it has not been awarded this particular supply contract and because this tender was not one of the seven tenders that were found to have injured the Australian industry, it is not 'factually relevant' to the consideration of cumulation. The Commission considers that the conditions of competition assessment in section 269TAE(2C) is a separate assessment to that required under

section 269TAE(1). Therefore, the Commission considers that, regardless of the outcome of the tender, Yara's bid was a genuine offer to supply and *is* factually relevant to assessing the conditions of competition between the goods exported from Sweden and the goods exported from the other countries subject to the investigation, and the goods exported from Sweden and the goods that are domestically produced.

The Commission further disagrees with Yara's assertion that the Commission's analysis of the bid is 'inaccurate, unsupported and without merit'.

The analysis was undertaken by having regard to Yara's bid price (explicitly referenced in the bid in relation to a particular date and on particular terms) and Yara's verified data used to ascertain the normal value in respect of its goods exported to Australia from Sweden. Nevertheless, and as noted above, regardless of the Commission's assessment of the bid, the fact is that Yara participated in the request for tender and has competed with other suppliers in the market.

3.3 Conditions of competition

DBS and Yara submit that the conditions of competition between exports of the goods from Sweden and exports of the goods from China and Thailand were such that it was not appropriate to cumulate the effects of exports in assessing material injury to the Australian industry.

DBS further submits that because it was the only supplier and importer of the goods exported from Sweden, and because the exports were made in 'unique circumstances',[27] it is inappropriate to cumulate the exportations of the goods from Sweden with exports from other countries.

Section 269TAE(2C) prescribes the factors that the Minister must be satisfied of in determining whether to consider the cumulative effect of the exportations from different countries of export.

One of the factors that the Minister must consider is the conditions of competition between the exported goods from the subject countries, and the conditions of competition between the exported goods[28] and like goods that are domestically produced.[29]

The Commission observes that section 269TAE(2C) is derived from Article 3.3 of the WTO *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the Anti-Dumping Agreement).

The Commission observes that in *EC - Tube or Pipe Fittings from Brazil*, the Appellate Body found that the Anti-Dumping Agreement did not direct or guide members on how

---

[27] DBS' application to the ADRP refers.

[28] Section 269TAE(2C)(e)(i).

[29] Section 269TAE(2C)(e)(ii).

they should assess the conditions of competition between products and 'in light of the general wording of the provision and the nature of the term "appropriate", an investigating authority enjoys a *certain degree of discretion* in making that determination on the basis of the record before it' [emphasis added].[30] The Appellate Body understood the phrase 'conditions of competition' to refer to the 'dynamic relationship between products in the marketplace'.[31]

The WTO jurisprudence demonstrates that there is no settled methodology or criteria for assessing the conditions of competition as required by members under Article 3.3 of the Anti-Dumping Agreement. This is reflected in the drafting of the domestic legislation which similarly does not provide guidance on how this assessment should be undertaken, and this gives the decision-maker some flexibility and discretion when conducting the assessment.

While there is no legislated methodology for assessing the conditions of competition under section 269TAE(2C)(e), the Commission's *Dumping and Subsidy Manual* (the Manual) does provide guidance in assessing the conditions of competition between the goods exported from all relevant countries and the conditions of competition between the exported goods and like goods that are domestically produced.[32]

Therefore, in assessing the conditions of competition between the goods exported from Sweden and the goods exported from the other countries subject to the investigation, and the conditions of competition between the goods exported from Sweden and like goods produced domestically, the Commission has followed the guidance as outlined in the Manual.

As stated in the Manual, and as noted by DBS in its application to the Review Panel, an assessment of the conditions of competition may entail the following considerations:

- physical characteristics and uses of the domestic like product and imports from each of the countries whose imports may be cumulated, as well as the degree of interchangeability, fungibility, or substitutability. Considerations of customer perception, specific customer requirements and tariff classification may be relevant in this regard;
- for the purpose of analysing threat of material injury, the levels and trends in the volume of imports from each of the countries whose imports may otherwise be cumulated, either in absolute terms or relative to production or consumption in the importing country; and
- the existence of sales of the domestic like product and imports from each of the countries whose imports may otherwise be cumulated. Examples of this are:
    - through common or similar channels of distribution;

---

[30] WTO Panel Report, European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, 7 March 2003, paragraph 7.241 refers.

[31] WTO Panel Report, European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, 7 March 2003, paragraph 7.242 refers.

[32] Refer Chapter 8 of the Dumping and Subsidy Manual (November 2018).

- during the period of investigation;
- the trends in prices for the domestic like product and imports from each of the countries whose imports may be cumulated;
- the levels and trends of price undercutting by imports from each of the countries whose imports may otherwise be cumulated during the period of the dumping investigation.[33]

In relation to the goods exported from Sweden, the Commission considers that the conditions of competition are as follows:

- the goods exported from Sweden were purchased by DBS and on-sold by DBS to customers in the Australian market that also imported the goods from China and Thailand and purchased like goods from the Australian industry.[34] The Commissioner considers that this similarity in distribution channel and customers supports a finding that the goods from the subject countries are physically, functionally and commercially alike, are substitutable and used for the same end-uses in the market and therefore are directly competitive goods;
- the goods exported from Sweden and imported by DBS, and like goods purchased by DBS from the Australian industry, were sold to the same customers.[35] The Commissioner considers that this similarity in end-user demonstrates that the goods are used for the same purpose, are interchangeable and substitutable;
- DBS, members of the Australian industry and other entities, *including* other blasting services providers that import the goods from the other subject countries, all bid for a significant contract. The Commission considers that this demonstrates that the goods are physically, functionally and commercially alike and are used for the same purpose;[36] and
- the Australian industry applicants have provided evidence to the Commission that they take into consideration import prices of the goods exported from the subject countries, including the relatively low prices of the goods exported from Sweden, and that these prices have had an effect on the Australian industry's prices.[37]

Further, in Chapter 5 of REP 473, the Commission described the nature of competition in the Australian ammonium nitrate market, and found that bulk explosives and associated services providers, such as DBS, either source ammonium nitrate from the Australian industry, or import the goods from various countries, including the subject countries. The Commission found that bulk explosives and associated service providers that source ammonium nitrate from the Australian industry directly compete with other providers that import the goods, such as DBS, which also compete amongst themselves. Ammonium

---

[33] Dumping and Subsidy Manual (November 2018), pages 134 and 135 refer.

[34] As evidenced by DBS' sales listing provided in its response to the importer questionnaire.

[35] As evidenced by DBS' supply agreements with customers and suppliers, and DBS' response to the importer questionnaire.

[36] Refer Confidential Attachment 15 of REP 473 for details.

[37] Ibid.

nitrate is ultimately sold to end-users (mining and quarrying entities) which consume ammonium nitrate as a raw material in commercial explosives.

The Commission also found that ammonium nitrate is a commodity product and end users are unlikely to discern significant physical or functional differences. Given that there is little product differentiation, the Commissioner considers that the products are highly substitutable and interchangeable and therefore considers it appropriate to cumulate the exports from Sweden with exports from China and Thailand, given that these goods compete mostly on price.

The Commission further disagrees with DBS's claim that, because the goods exported from Sweden are purchased in accordance with a 'unique' arrangement, the goods should not be cumulated with goods exported from China and Thailand. The Commission considers that despite the 'unique' circumstances relevant to the exportation of the goods from Sweden, this does not mean that the goods exported from Sweden are not:

- physically like to the goods exported from China and Thailand, and like goods supplied by the Australian industry;
- sold in the same market and used for the same purpose as the goods exported from China and Thailand, and like goods supplied by the Australian industry;
- interchangeable or substitutable with goods exported from China and Thailand, and like goods supplied by the Australian industry; and
- supplied to common or similar customers that import goods from China and Thailand, and that purchase like goods from the Australian industry.

The Commission found that DBS has imported the goods at significantly dumped prices from Sweden, and at the expense of sourcing these goods from other Australian industry producers. DBS has also on-sold these goods to other entities in the market, including entities that also imported the goods from other countries.

Further, the Australian industry applicants provided evidence that the prices of the goods exported from the subject countries were jointly considered and used in deriving their bid prices when negotiating the relevant contracts discussed in the examples outlined in section 9.2.1 of REP 473.

Therefore, the Commission does not agree with Yara's and DBS' assertion that it is inappropriate to cumulate the exports from Sweden with exports from China and Thailand, based on the condition of competition between those goods, and between those goods and like goods that are domestically produced.

Lastly, the Commission remains satisfied of the remaining criteria under section 269TAE(2C), which has not been disputed by DBS nor Yara:

(a) each of the exportations considered by the Commission were subject to Investigation 473;[38]

---

[38] Section 269TAE(2C)(a).

(b) all of the investigations of those exportations resulted from an application under section 269TB of the Act lodged on the same day;[39]
(c) the dumping margin worked out under section 269TACB of the Act for each exporter is at least 2 per cent;[40] and
(d) the volume of the goods the subject of the application that have been, or may be, exported to Australian over a reasonable examination period, which in this case the Commission determined to be the investigation period, from the country of export and dumped is not taken to be negligible.[41]

Based on this, the Commissioner considers that it is appropriate to consider the cumulative effect of the dumped exports from China, Sweden and Thailand.

3.4 Preliminary reinvestigation finding

The Commissioner finds that it is appropriate to consider the cumulative effect of the exportations of the goods from China, Sweden and Thailand given the conditions of competition between those goods and the conditions of competition between those goods and like goods that are domestically produced.

[39] Section 269TAE(2C)(b)(i).

[40] Section 269TAE(2C)(c).

[41] Section 269TAE(2C)(d).

4 CONCLUSION

As required by section 269ZZL(2), the Commission has conducted a reinvestigation of the reviewable decision in accordance with the Review Panel's requirements under section 269ZZL(1).

As a result of this reinvestigation, the Commissioner has not found reasons that would result in a materially different decision from the reviewable decision. Accordingly, as the Commissioner is of the view that the findings the subject of reinvestigation should be affirmed, he affirms the findings as outlined in chapters 2 and 3 of this report in accordance with section 269ZZL(3)(a).

This report sets out the reasons for the Commissioner's decision in accordance with section 269ZZL(3)(d).

5 ATTACHMENTS

Confidential Attachment 1	Materiality of injury to the Australian industry