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20 March 2020

The Director
Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra
Australian Capital Territory 2600

By email

Dear Director

Preliminary Report to the Anti-Dumping Review Panel
Reinvestigation of certain findings in Investigation 473

As you know, we act on behalf of Yara AB ("Yara") in this matter.

Yara has reviewed the Preliminary Report to the Anti-Dumping Review Panel ("the Report"). At the outset, we note that the Commission has failed to take heed of our concerns regarding the usage of additional Australian industry data gathered for the purpose of the reinvestigation. Yara does not consider the Commission was empowered to do this for the reasons explained in Yara's letters of 11 February 2020 and 3 March 2020, and so considers the entire reinvestigation process to be materially flawed.

Further, Yara considers the Report continues the same practice used in the investigation of attributing injury to Yara's exports which was not caused by Yara's exports. Anti-dumping measures can only be applied against goods that are dumped and which have resultantly caused material injury to the Australian industry producing like goods. By failing to recognise the facts pertinent to Yara's exports from Sweden, the Report continues to inflate injury that is attributed to Yara's exports.

In that regard, we note:

- The material injury said to have been caused by dumping is limited to profit said to have been foregone on seven contracts which the Commission considers were impacted by the exports in the period of investigation. Throughout the ADRP process it has been confirmed that this is the totality of the material injury found under s 269TAE(1), and so is the totality of the injury which is said to justify the measures under s 269TG(1) and (2).

- On a number of occasions, Yara has queried how relevant its exports were to these seven negotiations, in light of facts disclosed about those negotiations.[1] Yara believes whatever perceived impact its exports had on these seven contracts would be nominal at most and believes its submissions to the Commission and the ADRP explain the reasons for this belief in clear terms.

- The Commission has confirmed that Yara was not party to the negotiations for these seven contracts,[2] and that Yara was not privy to these negotiations.[3] However, as of writing, the Commission has yet to address Yara's submissions in relation to each of the seven contracts in any substantive manner.

- The Commission has confirmed that none of the seven negotiations relate to "bundled" sales.[4] Indeed, the Commission has confirmed that only two contracts relating to bundles of goods and services were claimed by the Australian industry as being "injuriously" impacted by the dumped exports and has explicitly found those claims to be incorrect.[5]

- Yara has one customer in Australia. Yara has supplied this importer since November 2016, which is prior to the period of investigation. No dumping finding can be legally made prior to the period of investigation.[6] Yara's customer is expressly identified as a *"blasting services company. It supplies blasting services and bulk explosives which include AN and ammonium nitrate emulsion, in almost all cases under a contract which effectively "bundles" all the supplies and services together in one package"*.[7] Again, no negotiations for bundled sales have been found to have been injurious.

- This is supported by communications between the Commission and the ADRP:

  13. The RM requested clarification as to which of the Example(s) referred to in REP 473 XXXXX relate to XXXXX and the specific pages and sections of Confidential Attachment 15 where this was referenced.

  > *The AR clarified that this was in Example 8 referred to in Chapter 9 of REP 473 and was referenced in Section 4.3.3 of Confidential Attachment 15, pages 39 to 41. The AR clarified that this example was not included in the materiality of injury assessment.*[8]

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1 Yara's submissions to the Commission dated 21 February 2019 (EPR File No. 43), 18 March 2019 (EPR File No. 55) and 9 April 2019 (EPR File No. 62), as well as Yara's application to the ADRP dated 3 July 2019 and Yara's submission to the ADRP dated 21 October 2019.

2 Paragraph 111, Submission from Commissioner to ADRP, dated 21 October 2020.

3 Paragraph 112, *Ibid*.

4 *ADRP Conference Summary*, 6 November 2019 at para 13.

5 *Report 473 Ammonium nitrate – China, Sweden and Thailand*, page 87.

6 s 269T(2AE).

7 Letter from Downer EDI Mining-Blasting Services to the Anti-Dumping Commission, dated 4 December 2018 (EPR File No. 27).

8 *ADRP Conference Summary*, page 8.

> The section in which this disclosure is made is headlined as "Yara AB's Second Ground of Review relating to Cumulation". Again, we note the reiteration that the Australian industry was not found to be materially injured by this contract.

To date, including in the Report, the Commission has not addressed these material facts in any meaningful manner. Rather, the Commission has side-stepped these issues. For example, in responding to Ground 1 of Yara's application to the ADRP – in which these matters were raised in detail – the Commissioner responded by citing "cumulation" immediately, rather than dealing with the facts of the seven negotiations as spelled out in Yara's application.[9]

The only cited basis for cumulating the effect of the exports from Sweden with those from China and Thailand is that Yara made a bid in relation to a tender negotiation. That bid was rejected early in the process on the basis that it was undercut significantly by offers made by the Australian industry. The Commission has confirmed that this tender negotiation was "Example 8" from the Final Report. The Commission has confirmed that Example 8 was not considered to have been injuriously impacted by exports from Sweden, nor by exports from any other country subject to the measures.[10] [11]

As was the case in the investigation, the Report's conclusion that Yara's exports have caused material injury is based upon the attribution of "injury" that can factually be linked to imports from countries other than Sweden. This attribution is based upon cumulation, which is said to be justified by virtue of a single bid, that itself has been found to have been non-injurious to the Australian industry.

The Commission was asked to reinvestigate the cumulation finding by the ADRP in light of Yara's submissions to the ADRP. The Report focuses on whether it has a "discretion" when it comes to accumulating and makes wholly unexplained and incorrect assertions about the purpose of accumulation under Australian law. For the reasons Yara has already explained throughout the ADRP process, the preliminary findings in the Report are wrong.

Even if it were accepted that there was some broad and general discretion when it comes to cumulation – which there is not – the Commission has failed to explain why it is preferable to cumulate the effect of Swedish exports, given that it:

- attributes injury that has been found to have occurred in the West Australian market to Yara's exports, in factual circumstances where Yara could not have caused that injury;
- attributes loss of contracts that can be linked to specific exports to Yara's exports in circumstances where Yara did not tender for or win additional contracts;
- inflates whatever impact Yara has been found to have had under s 269TAE(1); and
- is unnecessary, based on the methodology used to determine the "impact" of exports from the subject countries on the seven contract negotiations.

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9 Letter from the Commissioner to the ADRP, dated 21 October 2019, page 21.

10 *Report 473 Ammonium nitrate – China, Sweden and Thailand*, page 87.

11 *ADRP Conference Summary*, dated 6 November 2019, page 8.

We respectfully submit that it is obviously not preferable that the effect of Yara's exports be cumulated with those from China and Thailand in these circumstances.

Yara has been fully cooperative since the commencement of the investigation in June 2018 and has engaged with the Commission with openness and transparency. As articulated in many of the above points, Yara is frustrated that the Commission has not responded in substantive detail to Yara's submissions, despite them having been made a number of occasions. Yara's exports have not caused material injury to the Australian industry; there is no basis to impose measures on Yara's exports. A proper application of the law, whether facilitated by the Commission or ordered by a court, will establish this.

Yours sincerely

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