18 October 2019

Ms Lenora Blumberg
Panel Member
Anti-Dumping Review Panel
GPO Box 2013
Canberra City ACT 2601

By email: ADRP@industry.gov.au

For Public File

Dear Ms Blumberg,

Review of Minister's Decision - Investigation 473 – Ammonium nitrate exported from P R China, Sweden and Thailand

I. Summary

CSBP Limited ("CSBP") is an interested party to Anti-Dumping Review Panel ("ADRP") Investigation No. 2019/107. CSBP considers that the Minister for Industry, Science and Technology ("the Minister") has made the correct and preferable decision as the Australian industry manufacturing like goods has experienced material injury from the exports to Australia at dumped prices from The People's Republic of China ("China"), Sweden and The Kingdom of Thailand ("Thailand").

CSBP requests the ADRP Panel Member to affirm the Minister's decision dated 29 May 2019 and published in ADN No. 2019/57 on 3 June 2019.

II. Grounds for appeal

The ADRP published a notice under section 269ZZI of the Customs Act to conduct a review of the decision by the Minister to publish a dumping duty notice in respect of ammonium nitrate ("AN") exported to Australia from China, Sweden and Thailand.

The notice was published on 20 September 2019.

The applications for the review of the Minister's decision were made by:

- Glencore Coal Assets Australia Pty Ltd ("Glencore");
- Downer EDI Mining – Blasting Services Pty Ltd ("DBS"); and
- Yara AB ("Yara").

The grounds of appeal raised by the appellant parties were as follows:

(a) Glencore

1. By confining its attention to 7 contracts, the ADC failed to consider whether dumped imports caused material injury to the Australian industry as a whole, contrary to the requirements of subsections 269TG(1) and (2) of the Customs Act;
2. The ADC misconstrued "price" in subsection 269TAE(1)(f) by considering only the price paid in 7 contracts and not considering whether that price represented the price in any market for AN in Australia;
3. The ADC failed adequately to consider whether, in respect of the 7 contracts it analysed, injury was caused by factors other than dumping, contrary to subsection 269TAE(2A);
4. The ADC failed adequately to consider whether, in respect of the 7 contracts it analysed, the injury identified was caused by the volume and prices of goods that are not dumped, contrary to subsection 269TAE(2A)(a);
5. The conclusion that the contract price, in the absence of dumping, would have been the import prices adjusted for the dumping margin, was not based upon facts but was based merely on allegations, conjecture or remote possibilities, contrary to subsection 269TAE(2A);
6. The correct and preferable decision, having regard to the material before the ADC, was that the Minister could not be satisfied that there was material injury to the Australian industry as a result of the dumped imports; and
7. The ADC erred in finding that it cannot "carve out" certain states from the dumping duty notice and the Minister should have exempted exports to NSW or the Pilbara from the dumping duty notice based on evidence of no material injury in those markets.

(b) DBS

1. It is not correct or preferable to find that material injury "has been" or "is being" caused to the Australian industry in that:
   (a) 'Material' injury was not caused by dumping, and if there was any injury, it can only be immaterial, insubstantial and insignificant;
   (b) Mandatory injury indicators were not considered over the injury investigation period; and
   (c) Incorrect and inappropriate application of "but for" test.

2. It is not correct or preferable to find that the exports from Sweden should be cumulated with other exports.

(c) Yara

1. Yara's exports have not caused injury to the Australian industry.
2. The effect of Yara's exports should not be cumulated with exports from China and Thailand.
3. The price effects and volume effects have not been correctly determined.
4. The injury is not material.
5. The injury is not greater than that likely to occur in the normal ebb and flow of business.

III. ADRP Conference

Prior to the commencement of ADRP Review 2019/107 the Panel Member conducted a telephone conference of the representatives from the appellant parties and the Anti-Dumping Commission ("the Commission"). The purpose of the conference was to enable the Commission to detail the basis for determining profit forgone to the Australian industry in its material injury analysis. Additionally,

the conference also provided the opportunity for the appellant parties to inquire of the Commission clarifications concerning the injury assessment to the Australian industry.

A Conference Summary dated 4 September 2019 was published by the ADRP with the Section 269ZZI Notice announcing the commencement of the review.

Certain matters identified in the written submission of the Commission as included in the conference summary are addressed below by CSBP.

IV. CSBP comments re Grounds of Appeal

(a) Glencore

The Commission confirmed at Section 9.2.1 of Report 473 that it examined 13 contract examples provided by the Australian industry co-applicants referencing price-effect injury from the dumped exports from China, Sweden and Thailand. It is recalled that the Commission established that the exports to Australia from the three countries were at the following margins of dumping:

- China – 39.3 per cent;
- Sweden – 51.1 to 61.3 per cent; and
- Thailand - 32.7 per cent.

The Commission determined significant margins of dumping for all exports of AN to Australia from China, Sweden and Thailand. Importantly, however, the Commission also identified that in the seven contracts examined the "*negotiated prices (or prices that were matched) were, on average approximately 24.3 per cent lower than the contract prices existing at the time of the negotiation*[1]".

The level of price reduction for the re-negotiated contract prices reflects the substantial margins of dumping determined for the exports from China, Sweden and Thailand. During the investigation period – when the contracts were re-negotiated – the dumped exports accounted for approximately 50 per cent of the total import volume of the Australian market (with imports from the Russian Federation at non-dumped levels accounting for 16 per cent of total imports).

Critically, the imports from China, Sweden and Thailand, in conjunction with the size of the dumping margin, were influential in price negotiations throughout the investigation period.

The Commission's material injury analysis involved a "but for" analysis. The Commission assessed the likely prices that would have occurred in the absence of dumping from China, Sweden and Thailand. It considered that where contract prices were negotiated in the absence of the dumped prices, the re-negotiated prices would have been 17.8 per cent higher than was otherwise the case. This differential was used to calculate the profits forgone for the industry on a per annum basis (taking into account negotiations that were finalised during and post the investigation period).

CSBP highlights with the Panel Member that price negotiations often occur up to twelve months (sometimes longer) ahead of the commencement of supply under the negotiated contract, or the actual arrival of any relevant subsequent imports (where the Australian industry does not match the quoted import price). The negotiated contracts are often for periods typically between two and five years. Hence the injury during the negotiation period is likely to be substantially lower than the following periods to which re-negotiated, lower prices take effect. CSBP anticipates therefore that the injury to the Australian industry would be greater in the periods post the negotiation period.

[1] Report 473, P. 79.

The Commission confirmed (in written submission to ADRP conference of 4 September 2019) that the injury post the investigation period was greater than that determined throughout the investigation period. This is consistent with CSBP's expectations surrounding the contract negotiation outcomes.

The Commission's analysis of the seven contracts where it was determined that the dumped imports from China, Sweden and Thailand caused injury to the Australian industry (whether volume or price related injury) was considered material and not in the ebb and flow of business. The Commission considered that its analysis was conservative and, had the profit forgone for post investigation period been calculated on the basis of an extrapolation of the indices in Tables 11 and 12 on P. 63 of Report 473, the profit forgone calculation would have been higher.

It is CSBP's view that had the additional contracts that were not included in the injury analysis due to the negotiations not being finalised, been included, the profit forgone calculation would have been significantly higher. CSBP contends that the contract negotiations that were not finalised were influenced by the dumped imports (i.e. from China, Sweden and Thailand) and this should have correctly been included in the Commission's assessment. The previous contract prices would not remain due to the transparency of import prices for the goods imported from China, Sweden and Thailand during and post the investigation period (i.e. the dumped import prices resulted in price reductions to all newly negotiated contracts).

The Commission's assessment of the injury to the Australian industry as material was a conservative estimate of the profit forgone due to the dumping. The Minister's decision that reflected the Commission's assessment was therefore the correct and preferable decision.

Glencore submits that the price in the seven contracts where injury from the dumping was identified was not reflective in "any market" for AN. This claim relies on the argument that "there are four distinct markets for AN in Australia". This is not the case as there exists a single Australian for AN that includes four general geographic areas within that single market. The Commission (and therefore the Minister) has not erred in this assessment of the AN market in Australia.

Glencore's third ground of appeal contends that in the seven contracts analysed the Commission's failure to consider the influence of certain "other factors". This assertion fails to demonstrate what factor the Commission should have considered, how this could have been quantified and the impact on the Commission's "profit forgone" calculations. Import prices represent the benchmark in contract negotiations and are typically referenced by contractual parties. The Minister's decision is therefore the correct and preferable decision.

It is further contended by Glencore that the selling prices of non-dumped exports were not considered in the Commission's analysis. This is not correct. The Commission did consider the impact of other imports including imports from China, Indonesia and Egypt. The Commission was satisfied that the import prices for these imports did not influence the injurious re-negotiated prices for CSBP and QNP to which injury to the Australian industry was determined. The Commission's decision (and that of the Minister) is the correct and preferable decision.

Glencore argues that it was not correct for the Commission to benchmark injury based upon non-dumped prices from China, Sweden and Thailand. Imports from the three countries during the investigation period were substantial (i.e. accounting for a little more than 50 per cent of total imports) at pricing levels that were transparent. Import prices for goods from the two further major export sources – the Russian Federation and Indonesia – were significantly higher, with the imports from the former already the subject of measures accounting for 16 per cent of imports during the investigation period. The Minister's decision to benchmark injury to the Australian industry based upon the non-dumped price of imports from China, Sweden and Thailand was reliable and was the correct and preferable decision.

CSBP has sufficiently addressed in the above that the Commissioner's assessment of injury as material to the Australian industry was conservative. The Minister's decision was therefore the correct and preferable decision.

Glencore's final ground of appeal relies upon its incorrect view that the Minister can apply anti-dumping measures (under the *Dumping Duty Act*) on a state-by-state (including territories) basis. The application of measures is on an Australia-wide basis. Injury to an Australian industry may be assessed on a regional basis however the application of the measures cannot be applied on a state by state basis. The Minister's decision in applying the measures under the Dumping Duty Act to all imports from China, Sweden and Thailand into Australia is the correct and preferable decision.

(b) DBS

DBS' first ground of appeal relies upon its view that the injury to the Australian industry, if established, was immaterial, insubstantial and insignificant.

CSBP has countered above that the injury confirmed and quantified by the Commission in the seven contracts was not immaterial, insubstantial or insignificant. The injury as assessed was calculated in a conservative manner and, as the period post the investigation period progressed the level of injury to the Australian industry from the dumping escalated.

The injury from the seven contracts could not be considered to be part of the normal ebb and flow of business as it extended across seven contracts that were due to expire and due to the price transparency of imports in the Australian marketplace, further injury would extend to additional contracts due for negotiation. DBS' claim that the mandatory injury indicators were not considered by the Commission is incorrect (refer Section 9.5 of Report 473). The Commission has also explained its use of the "but for" methodology in examining price-effect injury to the Australian industry – in light of the lengthy negotiation periods for contract renewals and the length of the contracts, this methodology is correct and preferable for the circumstances of the AN industry.

The Minister's decision that the injury to the Australian AN industry manufacturing like goods was the correct and preferable decision.

DBS' second ground relates to the cumulation of Swedish imports with imports from China and Sweden. Subsection 269TAE(2C) details the factors to be considered by the Commissioner when considering whether exports from different countries of export should be cumulated. In report 473 (Section 7.5) the Commission detailed the grounds for cumulation of the dumped exports from China, Sweden and Thailand.

DBS has not demonstrated that the grounds relied upon by the Commissioner (and hence the Minister) were an error of law or that it was inconsistent with the requirements of subsection 269TAE(2C).

CSBP considers that the Minister's decision in respect of cumulation of imports from Sweden with imports from China and Thailand is the correct and preferable decision.

(c) Yara

Yara claims that its exports to Australia have not caused injury to the Australian industry. Contrary to assertions made by Yara that its exports were to only one Australian customer, the Commission established that the Yara exports were sold to a number of mine sites in Australia. Further, as is reported at Section 7.5.1 of Report 473, CSBP has evidenced that the import prices for AN sourced

from Sweden have had a broad impact on contract negotiations across the Australian industry (contrary to Yara's claims).

The Minister's decision that established Yara's exports had a broader effect on pricing in the Australian market than only via the Australian importer of Yara's product is the correct and preferable decision.

CSBP has addressed above the correct grounds for the cumulation of imports from Sweden with those from China and Thailand.

CSBP has addressed above the final three grounds for review by Yara concerning:

- the correct basis for price and volume injury by the Commission;
- the materiality of the injury; and
- the injury from the industry was greater than the normal ebb and flow of business.

In respect of Yara's final three grounds of appeal, the Minister's decision on the determination of injury, its materiality and whether it exceeds the normal ebb and flow of business, were the correct and preferable decisions.

V. Comments re Submissions in ADRP Conference of 4 September 2019

CSBP has examined the submissions of the Commission and those from the appellants Glencore, DBS and Yara provided to the Panel Member in response to discussion points in the 4 September 2019 conference.

CSBP considers that the representations on behalf of the appellant companies are speculative concerning whether the profit forgone calculations as determined by the Commission can be considered "material" or whether the level is reflective of the normal ebb and flow of business.

CSBP has indicated in this submission (and concurs with the Commission's written submission) that the profit forgone calculation of annualised injury to the Australian industry is a conservative estimate only. Actual profit and profitability that was experienced by the Australian industry from the dumping is considered to be substantially greater than that calculated by the Commission (based on the seven contracts) once full account is taken of the price transparency of the dumped import prices across all contract renegotiations by the Australian industry.

The Commission determined that the quantified profit forgone injury was material – that is, not immaterial, insignificant or insubstantial. The seven identified contracts identified as confirming price and/or volume effect injury to the Australian industry are reflective of additional injury to the Australian industry – once account is made that the injury experienced in the investigation period is representative of only the initial injury that occurred (confirmed by the escalating profit forgone with the advancement of time).

CSBP again reiterates that the Minister's finding concerning the materiality of injury experienced by the Australian industry is the correct and preferable decision.

VI. Recommendation

CSBP considers that the grounds of appeal of each of the appellant parties do not demonstrate that the Minister has erred in her decision to impose dumping measures on exports of AN to Australia from China, Sweden and Thailand published on 3 June 2019.

CSBP requests the Panel Member to affirm the Minister's decision to impose anti-dumping measures on exports of AN from China, Sweden and Thailand.

If you have any questions concerning this submission, please do not hesitate to contact me on (08) 9411 8593 or CSBP's representative Mr John O'Connor on (07) 3342 1921.

Yours sincerely

Gerard Chan
Commercial Manager – Ammonium Nitrate