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21 October 2019

Ms L Blumberg
Member
Anti-Dumping Review Panel
c/- Anti-Dumping Review Panel Secretariat
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By email

Dear Member

Review 2019/107 – ammonium nitrate exported from Sweden, China and Thailand
Submission of Yara AB

This submission is made on behalf of Yara AB ("Yara") in accordance with Section 269ZZJ of the *Customs Act 1901* ("the Act").

Contents

A Introduction

Yara's application outlines five grounds of review, each relating to different facets of the material injury finding in Report 473. At a high-level, Yara believes the findings in that report strain and ultimately snap the boundaries of the anti-dumping system. Simply put, the conclusion that Yara's exports of ammonium

nitrate ("AN") had caused material injury to the Australian industry was built upon conjecture, speculation and a denial of facts that tended to show otherwise, as further discussed in this submission.

B First ground - Yara's exports have not caused material injury

The pre-initiation conference has confirmed our understanding that the material injury finding is based solely on the alleged effect of the subject exports on seven contract negotiations. Yara's application explains why, factually, it is incorrect to find that Yara's exports have had any effect on those seven negotiations. There are a number of reasons for this, including the fact that Yara did not export products to Western Australia, where many of the supposed effects took place. Yara has been making this point consistently from the time the Statement of Essential Facts was first published, and has never been presented with any information or substantive explanation that would help it identify what "effect" was being attributed to its exports specifically.

As further explained in Yara's application, we have great difficulty with the concept that the kind of effects Report 437 cites are relevant effects of exportation as referred to in s 269TAE.[1] Generally, none of the examples appear to relate to instances of direct competition between the subject goods and the Australian industry. For many of the examples, any competitive interaction is implied via circumstance, rather than via evidence. There is, in most cases, not even a suggestion that the relevant Australian industry member was at risk of losing business to the subject exports. Even more concerning, the strength of the supposed effects are very limited.

For example, two of the examples deal with circumstances where the Australian industry member has chosen to offer a price either *"having regard"* to (Example 1) or *"based"* on (Example 4) some form of import price data. The term "having regard" does not speak of a strong link between the imports and the price offer, rather, it would suggest that the price offer was merely one of a number of considerations had by CSBP in formulating its position in the negotiation referred to in Example 1. In the case where the price was based on an alleged "import parity price" ("IPP") the price was then revised through the process of negotiation – we would be surprised if those revisions were upward, as this would be contrary to the trajectory of the vast majority of price negotiations over the span of human history. Further, with respect to Example 4, the selection of an IPP-based price as the initial offer indicates that QNP actually thought such a price was a desirable (i.e. non-injurious) outcome in the context of the market, and the revisions down from that point suggest the customers' own pricing expectations were based on considerations other than imports. In either case the effect of imports, if any, is diffuse.

The worst example of this, however, is Example 7. In this case, QNP made spot sales at prices that the Commission itself *"considers"* to be close to an IPP. Noting that QNP was not verified, this would appear to be the sum total of the Commission's information regarding these sales. Because the price is considered to be "close" to an IPP it is concluded by the Commission that there is sufficient basis for determining that imports from Sweden have, in some way that has not been articulated by either QNP or the Commission, caused those prices to be lower than they otherwise would have been. There is no actual "effect" here, nor is there any evidence of QNP trying to achieve higher prices on such sales.

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1 As referred to in s 269TAE(2C) of the Act.

Orica, CSBP and QNP are free to decide how they approach their commercial relationships. The fact that they chose to set price offers in consideration of import prices is not an "effect" of the exportations subject to the investigation. We disagree fundamentally that the anti-dumping mechanism can be co-opted to address what is essentially the Australian industry's commercial decisions. It is not enough to find some nexus between the applicants' prices and those from the subject countries – the exportation of the goods needs to affect the Australian industry injuriously. The Report simple does not represent a credible case that the effect of Yara's exports were materially injurious to the Australian industry.

C Second ground – the effect of Yara's exports should not be cumulated with exports from China and Thailand

It is only possible to cumulate the effects of exports from different countries where, *inter alia*, it is appropriate having regard to the conditions of competition between those goods and the conditions of competition between those goods and like goods that are domestically produced.[2] In Yara's application we have explained why the conditions of competition between Yara's exports and those from Thailand and China, as well as the conditions of competition between Yara's exports and the AN produced by the Australian industry, render it inappropriate to cumulate the effects of Swedish exportations with the other subject goods. Accordingly, it was not the correct decision to do so.

In addition to this, there is no practical reason why the "effects" of different exports needed to be cumulated, noting:

- It is clear that the Commission has formed some view regarding *which* exports from *which* countries have impacted each of the seven contracts. This is addressed in Yara's first ground in its application for review, which we will not repeat for expediency's sake.

- It is further clear from the Commission's explanation of its calculations that the effect of exports on each of the seven contracts has been separately determined, apparently in Column Z of Workbook 1 of Confidential Attachment 17.[3]

Accordingly, it would be relatively easy for the Commission to consider the effects of Swedish exports separately from those from China and Thailand. Further, in these circumstances, there is no benefit to cumulating the effect of exports from each of the countries. A much more accurate picture could be drawn by not doing so. Cumulating the effect of Swedish exports with those from China and Thailand cannot be correct or preferable, because it results in a legal finding that Yara's exports have caused the [CONFIDENTIAL TEXT DELETED – percentage] of additional profit foregone when the evidence and the calculations of that "injury" do not support such an outcome.

We would note, further to this, that Section 269TAE(2C)(a) cites that the exportations the effect of which is sought to be cumulated must be subject to an investigation. The Report does not explain how this requirement was met. Exports subject to an investigation are clearly those that occur during the

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2 Section 269TAE(2C)(e)(i) and (ii) of the Act.

3 *ADRP Conference Summary 2019/107 – Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand*, Attachment 1, page 2.

investigation period. They cannot be exports prior to the exportation period. This is because no finding can be made that goods exported prior to the investigation period were dumped;[4] and so any effect of pre-investigation period exportations cannot be relevant to a finding that dumping has caused injury in the investigation period. As the Report deals with two of the applicant's uses of datasets rather than the direct impact of exportations, we query to what degree this data related to exports subject to the investigation. The inclusion of such effects in the analysis would be incorrect.

D Third ground – price effects and volume effects have not been correctly determined

It is to be recalled that the "injury" that is said to necessitate the imposition of the measures is not a tangible thing. In each instance of the seven contracts, the Report has considered either an alternate outcome to that which was the case during the period of investigation ("POI") or has speculated as to what may be the outcome following the POI. The intent is to model the outcome that would occur in circumstances where the "effects" discussed above had not occurred.

The outcome of such an analysis can be impacted significantly by the methodology adopted. This is precisely why economists frequently disagree about the implications of the same data-sets. In a perfect world, we would be given the opportunity to review the underlying data and the Commission's workings. Understandably that is something that is not possible in the real world. That said, there are glaring assumptions in the Report that, when considered, highlight how conjectural the whole exercise is.

The purpose of the undumped price is to model the outcome of the negotiations if the exportations had no effect on the negotiations. Firstly, we would note that the undumped price is not fit for that purpose. In circumstances where the applicant merely "had regard" to an import price in setting its prices, or the price offer was further negotiated between parties, there is simply no rational way to suggest the undumped price is properly representative of any possible market-driven outcome.

Further, there has been no consideration of whether the undumped price is actually something achievable within the context of the market. The Report is not illuminated by evidence from the other parties to the negotiation, or verified information from one of the two applicants said to be injured. It does not consider whether there was any downward pressure on the prices in the market due to other factors such as oversupply of AN in the Australian market, imports from sources not subject to the investigation, and competition between members of the Australian industry. Given this, the probative value of the undumped price is negligible. The Report may as well have used the price of AN from 1984 as its proxy.

Similarly, the "volume effects" assume that the volumes of product would have gone to the Australian industry member in the absence of the imports, or would have been awarded at the price at which the Australian industry member quoted, without further negotiation with the customer.

Yara reiterates its view that the quantification of these price and volume effects are purely speculative and conjectural and so do not meet the requirements of s 269TAE(2AA). If the Commission does not have a basis to make injury finding of fact, then no measures can be imposed.

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[4] s 269T(2AE) of the Act.

E Fourth ground – the injury is not material

The impact of the supposed "effects" of exportation of the goods was quantified in the form of "profit foregone". The profit foregone figure was determined to be [CONFIDENTIAL TEXT DELETED – percentage] of the applicants' aggregated POI profit. Meaning, in effect, if the aggregated profit in the POI was 100, the Report's finding is that, but for the effects of the subject imports, it would have been [CONFIDENTIAL TEXT DELETED – number]. This is the purported basis for the finding that the injury was material to the Australian industry.

It does not withstand scrutiny.

The Commission has confirmed the impact occurred either in the POI or in the 12 months following the POI ("post-POI"). The POI impact was [CONFIDENTIAL TEXT DELETED – percentage] of the aggregated profit during the POI, whereas the post-POI profit foregone was [CONFIDENTIAL TEXT DELETED – percentage] of the aggregated POI profit. The [CONFIDENTIAL TEXT DELETED – percentage] number simply does not reflect the fact that following the POI the Australian industry would still be making sales and still be making profitable sales. The Commission confirmed that the post-POI extended to 12 months after the end of the POI – by failing to consider profitable sales over this additional 12 month period the materiality of the "profit foregone" is inflated.

By way of example, if we assume the applicants' aggregated profit in the post-POI was the same as in the POI:

	POI	Post-POI	Total
Profit	100	100	200
Profit foregone (% of profit)	[CONFIDENTIAL TEXT DELETED – percentage]	[CONFIDENTIAL TEXT DELETED – percentage]	[CONFIDENTIAL TEXT DELETED – percentage]

Seen in this light, the injury is much less than the [CONFIDENTIAL TEXT DELETED – percentage] figure would otherwise indicate. This would be essentially [CONFIDENTIAL TEXT DELETED – percentage] per applicant, or [CONFIDENTIAL TEXT DELETED – percentage] per Australian industry member over 24 months. Again, this is a percentage of the margin, so if the margin was 20, the profit foregone would be [CONFIDENTIAL TEXT DELETED – percentage]. This is immaterial, insubstantial and insignificant and is no proper basis for the imposition of measures.[5]

The above numbers are abstracted and based on assumptions that may be proved incorrect in light of actual evidence. But so too is the finding in Report 473. Obviously the underlying "effect" that has led to the above "profit foregone" margins are dependent on the assumption discussed in relation to Yara's third ground. However, the profit foregone figures themselves are equally based on a dearth of evidence and simplistic assumption.

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5 As noted in Yara's application, the *Ministerial Direction on Material Injury* states that material injury requires that material injury is injury which is not immaterial, insubstantial or insignificant.

In particular, the bulk of the "profit foregone" apparently occurred after the POI. Yet the Report infers that that the Commission either did not seek, was not given, or failed to consider any information from this post-POI period. The reason for this is not clear. The POI ended 31 March 2018; we are told the post-POI injury would have occurred in the 12 months following; the final recommendation was made to the Minister on 18 April 2019. There was ample time over the span of the investigation to seek further information about the post-POI period to ground the injury determination in contemporaneous facts. Apparently, for some reason, this did not occur. As a result, the post-POI injury is fictive. It has no bearing to what actually occurred in that period – it does not reflect actual prices, costs, profits or sales volumes during that period. It cannot be maintained that this injury has been "caused" to the Australian industry, because it is not grounded in any evidence.

For example, Orica was in the process of bringing its mothballed capacity at Yarwun back on-line in 2018, adding some additional 250,000 MT capacity to the Australian market.[6] This is reflected in the Report, which states:

> *In late 2017, Orica decided to re-commission the mothballed production capacity at Yarwun in order to supply increasing customer demand in Queensland, and in order to meet its contractual supply obligations in WA due to production issues at the Burrup plant. However, Orica advised the Commission that it can take up to 6 months for the production plant to be operating at full capacity.*[7]

If this timeline is accurate, this means that in the post-POI period Orica had an additional 250,000 MT capacity. If the market size in the POI was approximately 2,000,000 MT, this adds an additional 12.5% capacity to the Australian market in the post-POI period, which the Commission's calculations do not reflect in any form. Similarly, QNP had significant shut-downs in in the first half of FY19 (i.e. during the post-POI period) which simply are not reflected in the material injury finding.[8] Because information regarding the post-POI period has not be referred to in the Report, it is possible that there were other significant changes of circumstance that simply are not considered in the material injury finding.

Ultimately, we do not believe that the injury that Report 473 claims the Australian industry had suffered was properly material so as to require the imposition of measures. Beyond that, however, we do not believe the [CONFIDENTIAL TEXT DELETED – percent] profit foregone can properly be considered to be "injury". It is assumptive in nature, and based on a lack of evidence or consideration of the Australian industry during the period when the bulk of it was said to occur. It is not injury, it is not material, and it was no basis upon which to impose the measures against Yara's exports.

6 Per the submission of the Moncourt Group of 17 August 2018 (EPR File No 11), at page 5.

7 Page 67.

8 As referenced in Yara's submission dated 18 March 2019 (EPR File No. 55), at page 3.

F Fifth ground – the injury is not greater than that likely to occur in the normal ebb and flow of business

The injury that has been suffered is quantified as [CONFIDENTIAL TEXT DELETED – percentage] of the applicants' aggregated profit in the POI. As noted in Yara's application, the *Ministerial Direction on Material Injury* requires that the injury suffered by the Australian industry needs to be greater than that likely to occur in the normal ebb and flow of business. As the Report shows, the profit variations faced over the injury analysis period were as shows in Table 1 below:[9]

	2014-15	2015 - 16	2016 - 17	POI
Orica	100	75.4	59.5	48.5
Change from prior year		- 24.6%	- 21.1%	- 18.5%
CSBP	100	147.6	173.7	174.9
Change from prior year		47.6%	17.7%	0.7%
QNP	100	112.7	108.6	82.2
Change from prior year		12.7%	- 3.6%	- 24.3%

Table 1.

The variations in actual profit are clearly significant across the injury analysis period. This represents the normal ebb and flow of business for the Australian industry producing like goods. The profit foregone has only a nominal impact on these variations. Being conservative, if we were to assume an equal distribution of the [CONFIDENTIAL TEXT DELETED – percentage] profit foregone in the POI (i.e [CONFIDENTIAL TEXT DELETED – percentage]) the differences would be as shown in Table 2:

	2014-15	2015 - 16	2016 - 17	POI ([CONFIDENTIAL TEXT DELETED – percentage])
Orica	100	75.4	59.5	[CONFIDENTIAL TEXT DELETED – number]
Change from prior year		- 24.6%	-21.1%	[CONFIDENTIAL TEXT DELETED – percentage]
CSBP	100	147.6	173.7	[CONFIDENTIAL TEXT DELETED – number]
Change from prior year		47.6%	17.7%	[CONFIDENTIAL TEXT DELETED – percentage]
QNP	100	112.7	108.6	[CONFIDENTIAL TEXT DELETED – number]
Change from prior year		12.7%	- 3.6%	[CONFIDENTIAL TEXT DELETED – percentage]

[9] As adapted from page 63 of the Report.

Table 2.

Where the POI results are compared in Table 1 and Table 2, it is clear that that addition of the profit foregone in Table 2 matters little to each applicants' overall position. The results shown in Table 2 are certainly within well within the usual variations exhibited in the ebb and flow of business established over the injury analysis period.

However, as we know, only [CONFIDENTIAL TEXT DELETED – percentage] of the profit foregone relates to the POI. For that reason, relying on the [CONFIDENTIAL TEXT DELETED – percentage] overstates the variations in the POI. If we focus just on that [CONFIDENTIAL TEXT DELETED – percentage], the result is even smaller. Again, assuming an equal distribution of the profit foregone (so, [CONFIDENTIAL TEXT DELETED – percentage] per applicant), the results are as shown in Table 3:

	2014-15	2015 - 16	2016 - 17	POI [CONFIDENTIAL TEXT DELETED – percentage]
Orica	100	75.4	59.5	[CONFIDENTIAL TEXT DELETED – number]
Change from prior year		- 24.6%	-21.1%	[CONFIDENTIAL TEXT DELETED – percentage]
CSBP	100	147.6	173.7	[CONFIDENTIAL TEXT DELETED – number]
Change from prior year		47.6%	17.7%	[CONFIDENTIAL TEXT DELETED – percentage]
QNP	100	112.7	108.6	[CONFIDENTIAL TEXT DELETED – number]
Change from prior year		12.7%	- 3.6%	[CONFIDENTIAL TEXT DELETED – percentage]

Table 3.

In this case, the results are almost indistinguishable from those actually achieved in the POI, as per Table 1. We note that the Direction posits the "normal ebb and flow" requirement to be an additional consideration in ascertaining that injury is "material". Specifically, the Direction states:

> *…I would expect it to be shown 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.*

Given this, if it is accepted, contrary what we have said in Grounds 1 through 4 that the Australian industry suffered injury as a result of the subject imports, that injury is not greater than that likely to occur in the normal ebb and flow of business.

Accordingly, it was not correct for the Commissioner to recommend the imposition of measures. The Commissioner is required by law to comply with the Direction.[10] The Commissioner did not do so, and accordingly the injury determination included in Report 473, and the recommendations arising from that determination, cannot be considered to be correct or preferable. As per the foregoing, the injury found was not greater than that likely to occur in the normal ebb and flow of business, and so was not material. As a result, it was not the correct decision to impose measures under s 269TG(1) or 269TG(2), as it could not be established that material injury had been suffered by the Australian industry.

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Thank you for your consideration of this submission.

We respectfully submit that you must recommend the revocation of the reviewable decision under Section 269ZZK(1)(b) of the Act, and the substitution of a decision to the effect that no measures be imposed against Yara's exports of AN from Sweden. Yara's exports cannot be found to have caused material injury to the Australian industry in accordance with the disciplines and evidentiary requirements put in place by the Act.

Yours sincerely

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10 Section 269TA(1).