Australian Government
Anti-Dumping Review Panel

ADRP Report No. 107

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

July 2020

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ABF	Australian Border Force
ABS	Australian Bureau of Statistics
ADA	World Trade Organisation Anti-Dumping Agreement
ADC	Anti-Dumping Commission
AN	Ammonium Nitrate
ADN	Anti-Dumping Notice
AUD	Australian Dollar
Appellate Body	Appellate Body of the World Trade Organisation
BHP	BHP Billiton Iron Ore Pty Ltd
China	The People's Republic of China
CSBP	CSBP Limited
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
First Conference	Conference held with ADC and the Review Panel Applicants on 4 September 2019
Second Conference	Conference held with the Original Industry Applicants on 15 October 2019
Third Conference	Conference held with the ADC on 6 November 2019
Fourth Conference	Conference held with the ADC and Yara on 7 November 2019
Fifth Conference	Conference held with the ADC on 24 January 2020
Sixth Conference	Conference held with the ADC on 5 May 2020

Seventh Conference	Conference held with the Review Panel Applicants and the Original Industry Applicants on 11 May 2020
Eighth Conference	Conference held with the ADC on 18 May 2020
Ninth Conference	Conference held with Orica on 19 May 2020
DBS	Downer EDI Mining – Blasting Services Pty Ltd
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
Frontier Report	Report by Frontier Economics dated 10 December 2018, provided by BHP on 13 December 2018
FOB	Free on board
GAAP	Generally accepted accounting principles
Glencore	Glencore Coal Assets Australia Pty Ltd
Goods	Ammonium Nitrate
IDD	Interim dumping duty
Injury Direction	Ministerial Direction on Material Injury, 2012
Investigation No. 473	The investigation into the alleged dumping of Ammonium Nitrate exported to Australia from China, Sweden and Thailand
IPP	Import parity pricing
Orica	Orica Australia Pty Ltd
Original Industry Applicants	CSBP, Orica and QNP collectively, being the original applicants to Investigation No. 473
Original Injury Analysis Period	The injury analysis period, being from 1 April 2014
Original Investigation period / IP	The investigation period for the purpose of assessing dumping, being 1 April 2017 to 31 March 2018
Manual	Dumping and Subsidy Manual November 2018
Minister	The Minister for Industry, Science and Technology

NIP	Non-injurious price
Post – Investigation Period / post-IP	1 April 2018 to 31 March 2019
Preliminary Reinvestigation Report	Preliminary Reinvestigation Report of Certain Findings in Report 473 dated 6 March 2020
QNP	Queensland Nitrates Pty Ltd
CIO Regulation	*Customs (International Obligations) Regulation 2015*
Reinvestigation Report	Reinvestigation Report of Certain Findings in REP 473 dated 20 April 2020
Reinvestigation Request	The request made to the Commissioner on 19 November 2019 to reinvestigate various findings in REP 473 under s.269ZZL(1) of the Act
REP 473	The report published by the ADC in relation to the alleged dumping of Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand and dated 18 April 2019
Review Panel	Anti-Dumping Review Panel
Review Panel Applicants	Glencore, DSB and Yara collectively, being the three applicants in Review No. 107
Reviewable Decision	The decision of the Minister published on 3 June 2019 to publish a dumping duty notice in respect of Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand
Rio Tinto	Rio Tinto Procurement (Singapore) Pte Ltd
SCM	Agreement on Subsidies and Countervailing Measures
SEF 473	Statement of Essential Facts
Thailand	The Kingdom of Thailand
USP	Unsuppressed selling price

WTO	The World Trade Organisation
Yara	Yara AB

Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology ("Minister") to publish a dumping duty notice pursuant to s.269TG(1) and (2) of the *Customs Act 1901* ("the Act") in respect of Ammonium Nitrate ("the Goods") exported from the People's Republic of China ("China"), Sweden and the Kingdom of Thailand ("Thailand") ("the Reviewable Decision"). The applicants for the review were:

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

2. For the reasons set out in this report, I have rejected the grounds of review of Glencore, DBS and Yara and consider that the Reviewable Decision is the correct and preferable decision. Accordingly, I recommend that the Minister affirm the Reviewable Decision.

Introduction

3. Glencore, DBS and Yara applied under s.269ZZC of the Act for a review of the Reviewable Decision.

4. Notice of the Reviewable Decision was published on the Anti-Dumping Commission ("ADC") website on 3 June 2019.[1]

5. The Senior Member of the Anti-Dumping Review Panel ("the Review Panel") directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

6. The applications were accepted and notice of the proposed review, as required by s.269ZZI, was published on 20 September 2019.

[1] ADN 2019/57.

Background

7. On 25 June 2018, the Commissioner of the Anti-Dumping Commission ("the Commissioner") initiated an investigation into the alleged dumping of the Goods exported to Australia from China, Sweden and Thailand ("Investigation No. 473").[2]

8. The investigation followed an application made by CSBP Limited ("CSBP"), Orica Australia Pty Ltd ("Orica") and Queensland Nitrates Pty Ltd ("QNP") (collectively, "the Original Industry Applicants") dated 29 March 2018 under s.269TB(1) of the Act.[3] The application sought the publication of a dumping duty notice in respect of the Goods exported to Australia from China, Sweden and Thailand. Subsequent to receiving further information (the last of which was received on 21 May 2018) and having considered the application, the ADC decided not to reject the application and initiated Investigation No. 473 on 25 June 2018. The investigation period for the purpose of assessing dumping in Investigation No. 473 was 1 April 2017 to 31 March 2018 ("the Original Investigation period"). 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 is from 1 April 2014.

9. The final report to the Minister was made by the ADC in ADC Report 473 ("REP 473"). The ADC recommended to the Minister that a Dumping Duty Notice be published in respect of the Goods exported to Australia from China, Sweden and Thailand. The Minister accepted the recommendations and a Dumping Duty Notice under subsections 269TG(1) and (2) of the Act was published on 3 June 2019.[4]

Conduct of the Review

10. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the Reviewable Decision, if they are satisfied that the decision is the correct or preferable one, or revoke it and substitute a new specified decision. In undertaking the review s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if

[2] ADN No. 2018/103.
[3] EPR 473, document #1.
[4] ADN No. 2019/57.

it were the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

11. Subject to certain exceptions,[5] the Review Panel is not to have regard to any information other than relevant information pursuant to s.269ZZK, i.e. information to which the ADC had regard or ought to have had regard when making its findings and recommendations to the Minister.

12. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information.

13. A conference was held prior to initiation of the review on 4 September 2019 ("the First Conference") with the ADC, Yara, DBS and Glencore pursuant to s.269ZZHA(3) of the Act. The purpose of this conference was to obtain further information and seek clarifications from the ADC and a better understanding of the reasons for the finding relating to materiality of injury in REP 473. Further, the purpose of this conference was to provide an opportunity to the three applicants in Review No. 107, being Yara, DBS and Glencore ("the Review Panel Applicants"), to comment on such clarifications and information provided by the ADC, in relation to their relevant grounds of review, in their respective applications for review before the Review Panel. A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the First Conference Summary"), simultaneously with the public notice initiating the review.

14. A conference was held pursuant to s.269ZZHA of the Act on 15 October 2019 with the Original Industry Applicants for the purpose of providing the Original Industry Applicants to Investigation No. 473, with information disclosed to the Review Panel Applicants by the ADC during the First Conference and provide them an opportunity to respond to that information ("the Second Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Second Conference Summary").

[5] See s.269ZZK(4).

15. The time for submissions by interested parties under s.269ZZJ of the Act is 30 days after the publication of the notice under section 269ZZI. As the Public Notice was given on 20 September 2019 the time for submissions expired on 21 October 2019. Submissions were received in this period from:

    - The ADC;
    - Glencore;
    - DBS;
    - Yara;
    - Orica;
    - QNP;
    - CSBP;
    - BHP Billiton Iron Ore Pty Ltd ("BHP"); and
    - Rio Tinto Procurement (Singapore) Pte Ltd ("Rio Tinto").

    Non-confidential versions of the submissions were made publicly available on the Review Panel's website.

16. A further conference was held pursuant to s.269ZZHA of the Act on 6 November 2019 with the ADC for the purpose of obtaining further information and clarification from the ADC related to (1) Confidential Attachment 17 to REP 473; and (2) Yara's Second Ground of review relating to cumulation ("the Third Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Third Conference Summary").

17. A further conference was held pursuant to s.269ZZHA of the Act on 7 November 2019 with the ADC and Yara for the purpose of obtaining further information, of providing Yara with information relating to the ADC finding with regard to Yara's Second Ground of review relating to cumulation, and of providing Yara with an opportunity to respond to that information ("the Fourth Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Fourth Conference Summary").

18. After reviewing the applications, submissions and other relevant information, on 19 November 2019, pursuant to s.269ZZL of the Act, I requested the ADC to reinvestigate various findings in REP 473 ("Reinvestigation Request"). I requested the ADC's report in this regard to be completed by 17 February 2020. The ADC in a letter dated 13 February 2020, requested an extension to provide the reinvestigation report, which was granted by the Review Panel for a period of 46 days to 3 April 2020. The period to provide the reinvestigation report was further extended by 15 days to 20 April 2020 in a letter from the Review Panel dated 3 April 2020. The Reinvestigation Request and correspondence relating to the extensions were made publicly available.

19. A further conference was held pursuant to s.269ZZHA of the Act on 24 January 2020 with the ADC for the purpose of obtaining further information and clarification relating to the ADC finding with regard to Glencore's Fourth Ground of review ("the Fifth Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Fifth Conference Summary").

20. A copy of the report of the Reinvestigation of Certain Findings in REP 473 was received on 20 April 2020 ("Reinvestigation Report"), is attached as Attachment A.1 to this report. In the Reinvestigation Report there is reference to the ADC's preliminary findings in the reinvestigation which were published on 6 March 2020 in the ADC's Preliminary Report, Reinvestigation of Certain Findings in Report 473 ("Preliminary Reinvestigation Report"). Interested parties were invited to lodge submissions concerning the ADC's preliminary findings, which the ADC took into consideration in the Reinvestigation Report.

21. A further conference was held pursuant to s.269ZZHA of the Act on 5 May 2020 with the ADC for the purpose of seeking clarification from the ADC and a better understanding of the reasons for the finding relating to "the reassessment of the materiality of injury with regard to profit foregone", in the Reinvestigation Report ("the Sixth Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Sixth Conference Summary").

22. A further conference was held pursuant to s.269ZZHA of the Act on 11 May 2020 with the Review Panel Applicants and the Original Industry Applicants for the purpose of putting the clarifications and information provided by the ADC during the Sixth Conference, to the Review Panel Applicants as well as the Original Industry Applicants in ADC Investigation No. 473, and to provide all parties with an opportunity to comment thereon ("the Seventh Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Seventh Conference Summary").

23. A further conference was held pursuant to s.269ZZHA of the Act on 18 May 2020 with the ADC for the purpose of seeking clarification and further information from the ADC in regard to the written submission of Orica relating to the Seventh Conference ("the Eighth Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Eighth Conference Summary").

24. A further conference was held pursuant to s.269ZZHA of the Act on 19 May 2020 with Orica for the purpose of providing Orica with the opportunity to comment on the ADC's clarifications and comments relating to the Eighth Conference ("the Ninth Conference"). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act ("the Ninth Conference Summary").

25. Subsection 269ZZK(3) of the Act requires the Review Panel to make its report to the Minister within 30 days after receiving the reinvestigation report under s.269ZZL(2), in this instance the relevant date being 20 May 2020. It should be noted that the report was not delivered to the Minister on this day partly due to the necessity of the Panel to hold four conferences after receipt of the Reinvestigation Report, but in the main part due to the unforeseen personal circumstances of the Reviewing Member.

26. In conducting this review, I have had regard to the applications (including documents submitted with the applications) and to submissions received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information. I have also had regard to REP 473 and documents and information relevant to the review which was referenced in REP 473, including the Statement of Essential Facts ("SEF 473") and to documents referenced in SEF 473. I have also

had regard to relevant information obtained at the conferences and conclusions reached at the conferences based on relevant information, and to the report of the Commissioner provided under s.269ZZL(2).

Grounds of Review

27. The grounds of review relied upon by the applicants, which the Review Panel accepted in the public notification of the review, are as follows:

Glencore

- Ground 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 s.269TG(1) and (2) of the Act;

- Ground 2: The ADC misconstrued "price" in s.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 ammonium nitrate in Australia;

- Ground 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 s.269TAE(2A);

- Ground 4: The ADC failed to adequately 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 s.269TAE(2A)(a);

- Ground 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 on facts but was based merely on allegations, conjecture or remote possibilities, contrary to s.269TAE(2AA);

- Ground 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 dumped imports;

- Ground 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 notice based on evidence of no material injury in those markets.

DBS

- Ground 1: It is not correct or preferable to find that material injury "has been" or "is being" caused to the Australian industry in that:

  i. 'Material' injury was not caused by dumping, and if there was any injury, it can only have been immaterial, insubstantial and insignificant;

  ii. Mandatory injury factors were not considered over injury investigation period;

  iii. Incorrect and inappropriate application of "but for" test;

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

Yara

- Ground 1: Yara's exports have not caused injury to the Australian industry;

- Ground 2: The effect of Yara's exports should not be cumulated with exports from China and Thailand;

- Ground 3: The price effects and volume effects have not been correctly determined;

- Ground 4: The injury is not material;

- Ground 5: The injury is not greater than that likely to occur in the normal ebb and flow of business.

Consideration of Grounds

Glencore

28. In the discussion below I consider Glencore's seven grounds of review.

Ground 1: Failure to consider whether dumped imports caused material injury to the Australian industry as a whole

Glencore's Arguments

29. Glencore contends that by confining its attention to seven contracts, the ADC failed to consider whether dumped imports caused material injury to "the Australian industry as a whole", contrary to the requirements of s.269TG(1) and (2) of the Act, as interpreted in *Swan Portland Cement Limited and Cockburn Cement Limited v Minister for Small Business and Customs* ("*Swan Portland Cement*").[6]

30. Glencore contends that injury is not caused to the Australian industry "as a whole" merely because five contracts were negotiated by reference to the prices of dumped imports, and two sales were lost to imports at dumped prices. According to Glencore it was necessary for the ADC to consider whether it was possible to extrapolate from that finding to a finding that dumped imports had an impact on the Australian industry as a whole. Glencore referred to the Dumping and Subsidy Manual (November 2018) ("the Manual")[7] which stated that the ADC needed to consider whether those seven contracts were "sufficiently representative of the industry concerned".

31. Glencore submits that that step was not taken and in particular, the ADC nowhere expressly or impliedly considered: (a) whether the seven contracts were representative of the price impact of dumping on the industry as a whole; (b) the volumes covered by the seven contracts in the context of volumes sold by the Australian industry as a whole in the investigation period; (c) the circumstance that the seven contracts related exclusively to QNP and CSBP and did not include any

[6] [1991] FCA 49.
[7] The Manual, page 22.

contracts of Orica or Dyno Nobel (who, according to Glencore, between them, accounted for "60% of the Australian market)".[8]

32. Glencore contends that the seven contracts it relied on were what remained after the ADC had excluded seven other sets of contracts on the basis that these did not involve any impact of dumping on price; and after the Australian industry had already been given an opportunity to supply additional information in support of its injury and causation claims. In other words, according to Glencore, there is no reason to believe that, outside these seven contracts, dumping had any impact on price.[9]

33. Glencore contends that the relevant issue is whether material injury has been suffered by the industry as a whole; not whether injury (not demonstrated to have been suffered by the industry as a whole) is material in the context of the profits of the industry as a whole. According to Glencore, were it otherwise, it would be open to the Minister to publish a dumping notice simply because the price in one very large contract has been impacted by dumping, where the profit impact of that contract is material in the context of the industry's profits as a whole.[10]

ADC's Position

34. In Section 9.6 of REP 473 the ADC found that, "profit forgone (on an annual basis), relative to the applicants' (i.e. CSBP's, Orica's and QNP's) aggregated profit in the investigation period, was material to the Australian industry as a whole when taking into consideration the relative share of the total production volume during the investigation period that the applicants comprised"[11] [emphasis added]. In the footnote to this finding the ADC explained that in determining the materiality for the industry as a whole, it had regard to the applicants' share of the total Australian

[8] Glencore referred to the submission of BHP dated 15 March 2019. During the Third Conference the ADC was requested to comment on the accuracy of the statement in Glencore's application of review that Orica and Dyno Nobel between them accounted for 60 per cent of the Australian market, which was different to the percentage of total Australian production in Worksheet 3 of Confidential Attachment 17. The ADC stated that it did not know the basis of Glencore's information, pointing out that Glencore's reference was to the "Australian market" while the ADC's figure was based on production volumes. See Third Conference Summary.
[9] See Glencore's application for review, para 12.
[10] See Glencore's application for review, para 13.
[11] See Section 9.6 of REP 473, at page 91.

industry's production volume, and during the Original Investigation Period ("the IP"), the applicants accounted for 78 per cent of the total Australian industry's production volume.[12] The ADC's assessment and calculations related to this were in Confidential Attachment 17 to REP 473, which I reviewed.

35. The ADC addressed Glencore's submissions during the investigation that it had not accounted for significant regional differences in its assessment of material injury resulting in a disproportionate adverse effect in NSW. The ADC also referred to *Swan Portland Cement,* where Lockhart J noted that the term 'Australian industry' refers to the industry as a whole stating that, the expression "Australian industry" in the context of the anti-dumping legislation "refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria". The ADC stated that this was "the normal practice of the Commission when undertaking an assessment of injury and causation, as described in the Manual."[13]

36. The ADC stated further that in its view and consistent with Lockhart J's comments in *Swan Portland Cement,* it is not required to establish that all the industry applicants or members of the Australian industry were injured from dumped imports. Further, the ADC referred to the Ministerial Direction on Material Injury, 2012 ("the Injury Direction") which, "contemplates that there may be instances where injury is confined to a specific region of Australia and this may still amount to material injury to the Australian industry as a whole." In this regard the Injury Direction states:

> *In considering cases with regional implications I direct that you bear in mind that an industry's vulnerability to dumped or subsidised imports may be confined to a specific region of Australia. Injury may be occurring in the part of the industry located in that region, without directly affecting the rest of the Australian industry. In this circumstance it is still possible to take account of regional injury of this kind and, in appropriate circumstances, to judge such injury to be material to the industry as a whole*.[14]

[12] See Footnote 150 on page 91 of REP 473.
[13] See Section 9.7 of REP 473, page 91.
[14] Injury Direction, page 3.

37. In the ADC's s.269ZZJ submission it reiterated that the Commissioner does not agree with Glencore's suggestion that, by having regard to seven examples of contract negotiations, the ADC failed to consider whether dumping caused material injury to the Australian industry as a whole.[15] The ADC refers to REP 473, where the Commissioner submits that the Minister is not required to establish that all the industry applicants or members of the Australian industry were injured from dumped imports, and that the Minister is instead required to consider whether material injury has been or is being caused to the Australian industry by the dumped goods as a whole.[16] The ADC made reference again to the comments of Justice Lockhart in *Swan Portland Cement* in support of this view, that were referred to in REP 473 and repeated above.[17]

38. The ADC submitted that in relation to the examples of contract negotiations that the ADC referred to in assessing the materiality of injury, the affected Australian industry applicants are part of the Australian industry and comprise a significant proportion of the total production and profit of the Australian industry and are therefore sufficiently representative of the Australian industry as a whole. The ADC further submitted that it considered that it is open to the Minister to determine materiality in the context of profits of the industry as a whole, given that the Act does not prescribe a mandatory or indicative methodology for conducting such an assessment.[18]

39. The ADC referred to its Economic Framework for Injury and Causation Analysis which states that the central link between the injury indicators (such as prices and volumes) is the loss of profits to the Australian industry, and that the injury analysis should draw a link between the factors causing injury (such as dumping) and the

[15] See ADC's s.269ZZJ submission, paragraph 54.
[16] Section 9.7 of REP 473, page 91.
[17] See *Swan Portland Cement* at [39]. The ADC also stated that in that case, Justice Lockhart at [38], also noted (with approval) Wilcox J's finding in the lower court that 'the words "Australian industry"…referred to the industry in particular goods in Australia as a whole; but….this did not require that material injury be caused or threatened to each individual participant in the industry'. [emphasis added]
[18] See ADC's s.269ZZJ submission, paragraphs 56 – 57.

impact on the Australian industry through to its impact on profit.[19] Given this, the ADC determined the materiality of the injury to "the Australian industry as a whole" by having regard to the profit forgone as a percentage of the total profit of the Australian industry.[20]

40. The ADC also stated that it is not precluded from looking at individual contracts or supply agreements in its injury assessment. It referred to s.269TAE(1) of the Act which it contends is broad and does not constrain the ADC in what it may or may not have regard to in assessing whether material injury to an Australian industry has been or is being caused.[21]

41. The ADC noted that in Chapter 9 of REP 473, the ADC had explained the methodology it used to determine that the injury caused by dumping is material when considering the profit forgone (caused by dumping) as a percentage of the Australian industry's profit. The ADC stated that it also provided a step by step outline of the methodology it adopted at the First Conference, at which Glencore was one of the participants. It stated that based on the assessment outlined in Chapter 9 of REP 473 and Confidential Attachment 17, and contrary to Glencore's assertions, the ADC found that material injury to the Australian industry as a whole has been caused by dumped goods exported from China, Sweden and Thailand.[22]

Other Submissions

42. QNP in its s.269ZZJ submission pointed out that the ADC did not conclude that there was no injury to the Australian industry in NSW or the Pilbara, but that the ADC concluded that the Australian industry "as a whole" had suffered from injury that was material during the IP. It stated that the injury analysis involved markets that may be described as "regional based upon location, however, the Commission's analysis involved the total Australian AN market".[23]

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[19] Available at https://www.industry.gov.au/sites/default/files/acd_injury_and_causation_framework_overview.pdf, page 4 refers.
[20] See ADC's s.269ZZJ submission, paragraph 58.
[21] See ADC's s.269ZZJ submission, paragraph 59.
[22] See ADC's s.269ZZJ submission, pages 12 – 13.
[23] See Section V of QNP's s.269ZZJ submission, page 4.

43. Orica submitted in its s.269ZZJ submission that the Minister's decision is the correct and preferred decision on material injury to the Australian industry producing like goods.[24]

44. CSBP in its s.269ZZJ submission challenged Glencore's submission that the price in the seven contracts where injury from the dumping was identified was not reflective in "any market" for the Goods, relying on the argument that "there are four distinct markets for ammonium nitrate in Australia". CSBP contended that there exists a single Australian market for the Goods that includes four general geographic areas within that single market and that the ADC (and therefore the Minister) has not erred in this assessment of the AN market in Australia.[25]

Consideration

45. In addition to the ADC's response to Glencore's concerns addressed in REP 473 and in its s.269ZZJ submission, both of which are referred to above, the ADC in its written response to the first clarification request during the First Conference (relating to Confidential Attachment 17) addressed in detail its methodology in determining whether injury in the form of revenue and profits foregone was material to the "Australian industry as a whole". It was noted that the profit forgone for each example, determined as a percentage of the applicants' aggregated profit, was then adjusted or multiplied by the ratio of the relevant applicants' production volume to the Australian industry's total production volume (i.e. the aggregated production volume of five ammonium nitrate manufacturers) in the IP.[26]

46. During the Third Conference the ADC provided further clarification as to why the profit foregone as a percentage of the three industry applicants' aggregated profit was multiplied in each example, by the proportion of the applicants' share of total Australian industry production to obtain the materiality of injury to the whole Australian industry. The ADC explained that the multiplier was to ensure that in each example the profit foregone was representative of materiality to the Australian industry as a whole, not just the three applicants, thus ensuring that the numbers were not inflated by the appearance that the ADC was ignoring the other two

[24] See Section IV(c)(i) of Orica's s.269ZZJ submission, page 7.
[25] See Section IV(a) of CSBP's s.269ZZJ submission.
[26] See First Conference Summary.

industry members. The ADC clarified further that the ratio was applied on a transaction basis because the percentage of total Australian production differed for some examples because of the regional breakdown of the market and because not all industry players competed with each other in all regions.[27]

47. It is clear from the detailed methodology referred to above that, contrary to Glencore's contentions, the ADC was careful to ensure that its finding of material injury was in respect of the Australian industry "as a whole". This is evidenced by the fact that that the ADC particularly took into consideration (on a transaction by transaction basis) the relative share of the total production volume the applicants comprised, of the total Australian industry's production volume, which was in fact a significant portion, and found that the assessment of materiality of injury was therefore sufficiently representative of the Australian industry as a whole.

48. It should be noted that in the reinvestigation of the finding relating to materiality of injury, discussed in more detail below under Yara's Fourth and Fifth Grounds of review, the ADC changed its quantitative methodology with regard to the application of the profit foregone injury to the "industry as a whole" to a qualitative methodology. It did not multiply the profit forgone by the proportion of the Original Industry Applicants' share of the total Australian industry production volume, on a transaction by transaction basis, as was done in Confidential Attachment 17 to REP 473. The ADC was satisfied in its reinvestigation that a qualitative assessment of the materiality of the profit forgone was appropriate in circumstances where it did not have the profit data for the other Australian industry manufacturers, bearing in mind that high percentage of total Australian production that the three Original Industry Applicants represented. I consider that this change in methodology to determine the applicability of the materiality to the 'industry as a whole' to be reasonable, bearing in mind that:

    - Arising out of the First Conference, Glencore had particularly questioned the necessity of the ADC undertaking the step of applying the ratio to each example;[28] and

[27] See Third Conference Summary.
[28] See First Conference Summary.

- The ADC had subsequently clarified that a qualitative methodology could be considered to be an acceptable alternate methodology for assessing materiality of the injury in respect of profits foregone in respect of 'industry as a whole', bearing in mind the high percentage of total production that the three Original Industry Applicants' production represented (that is, 78 per cent).[29]

49. I note that both Glencore and the ADC have referred to *Swan Portland Cement* in support of their respective positions. However, there appears to be nothing in the ADC's finding that is inconsistent with Lockhart J's judgment in *Swan Portland Cement.* The ADC's finding would appear to be quite consistent with Lockhart J's comments that the authority it is not required to establish that all the applicants or members of the Australian industry were injured from dumped imports. The finding would also appear to be in line with the Injury Direction which, "contemplates that there may be instances where injury is confined to a specific region of Australia and this may still amount to material injury to the Australian industry as a whole." I also note that there is nothing in the ADC's finding that is contrary to the discussion of market segment analysis in the Manual.[30]

50. I agree with the ADC that it would not appear to be precluded from looking at individual contracts or supply agreements, with reference to s.269TAE(1) of the Act, which is indeed broad and does not appear to constrain the ADC in what it may or may not have regard to in assessing whether material injury to an Australian industry has been or is being caused. While there may have been other methodologies for the ADC to conduct its analysis and determine if the finding of material injury in respect of the seven contracts was applicable to the Australian industry as a whole, it cannot be said that the ADC did not thoroughly consider and analyse this complex issue, as reflected in its initial finding in REP 473 and Confidential Attachment 17, as further clarified in the First and Third Conferences, and then as reinvestigated and reflected in the Reinvestigation Report.

51. In my view, Glencore has not demonstrated that the ADC failed to consider whether dumped imports caused material injury to the "Australian industry as a whole", contrary to the requirements of s.269TG(1) and (2) of the Act, and as interpreted in

[29] See Third Conference Summary.
[30] See the Manual, pages 21 – 22.

Swan Portland Cement. Glencore has not shown that the ADC's finding in this regard was not the correct or preferable decision and Glencore's First Ground of review in this regard therefore fails.

52. It should be noted that this consideration does not relate to the ADC's finding of materiality of injury, which is the subject of other grounds of review by Glencore, as well as the other two Review Panel Applicants, discussed in more detail below under Yara's Fourth and Fifth Grounds of review.

Ground 2: Misconstrued "price" in section 269TAE(1)(f)

Glencore's argument

53. Glencore contends that the ADC misconstrued "price" in s.269TAE(1)(f) by considering only the price paid in seven contracts and not considering whether that price represented the price in any market for ammonium nitrate in Australia. Glencore submits that this is related to Ground 1.

54. Glencore submits that in determining whether material injury had been caused to the Australian industry because of dumped imports, the ADC was entitled under s.269TAE(1)(f) to consider the price effects of dumped imports on the price paid for like goods produced or manufactured in the Australian industry.[31]

55. Glencore contends that the ADC's identification of material injury is premised entirely on the price effects of dumped imports in the context of the seven particular contract negotiations it analysed. According to Glencore, although volume effects and profit effects are also referred to, these effects are simply a consequence of the price effects identified in the context of those seven contracts.[32]

56. Glencore contends that in confining its identification of injury to the price impact on these seven contracts alone, the ADC erred. It contends that for the purposes of s.269TAE(1)(f), "price" refers to the price or prices of the Goods set, by the forces of supply and demand, in the market or markets that comprise the Australian industry.[33]

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[31] See Glencore's application for review, paragraph 15.
[32] See Glencore's application for review, paragraph 16.
[33] In this regard Glencore makes reference to *Swan Portland Cement* at 145-146.

57. Glencore submits that REP 473 discloses that there are four distinct markets for the Goods in Australia and that in those circumstances, the price the ADC needed to consider was the price or prices for which ammonium nitrate was being sold by members of the Australian industry in these markets. Glencore submits that this is not necessarily the same as the actual price in a selection of contracts, and only if the price in one or more of the relevant markets was impacted by dumped imports could it be said that dumping had an effect on price within the meaning of s.269TAE(1)(f). According to Glencore, the ADC failed to consider this question because it failed entirely to link the prices paid in the seven contracts which it analysed with the price paid for goods in any one of the four markets in which the Australian industry made sales.[34]

ADC's Position

58. In its s.269ZZJ submission the ADC stated that as outlined in Chapter 9 of REP 473, the Commissioner maintains that the relevant examples of prices negotiated are relevant to the price paid in the relevant market and that those prices were depressed by the dumped goods. The ADC submitted that the affected Australian industry members do not operate in a vacuum and that they sell the Goods in their respective markets. The ADC submitted that therefore the Commissioner considered that the negotiated contracted price represented the price paid for like goods produced by the relevant Australian industry member and sold in that particular market in Australia. The ADC considered that this approach is consistent with the comments of Justice Lockhart in *Swan Portland Cement,* as referred to by Glencore. For these reasons, the ADC submitted that the Minister did not err in considering the price paid for the exported goods, pursuant to s.269TAE(1)(f).[35]

Other Submissions

59. Orica submitted in its s.269ZZJ submission that the ADC's assessment of the relevant price in the negotiated contracts was the correct and preferable decision. It submitted that the ADC had available to it each of the applicants' Confidential Appendix A4 information and was satisfied that the pricing evidenced was the correct and representative pricing. Further it noted that many customers conduct

[34] See Glencore's application for review, paragraph 19.
[35] See ADC s.269ZZJ submission, paragraphs 62 - 64.

competitive tender processes to determine their future supplier, and that the price determined through such an approach is the market price influenced by import parity at that time.[36]

60. CSBP in its s.269ZZJ submission refers to Glencore's submission in respect of its Ground 2 that the price in the seven contracts where injury from the dumping was identified was not reflective in "any market" for the Goods. It states that this claim relies on the argument that "there are four distinct markets for AN in Australia", but submits that this is not the case as there exists a single Australian market for AN that includes four general geographic areas within that single market. CSBP contends that the ADC (and therefore the Minister) has therefore not erred in this assessment of the AN market in Australia.[37]

Consideration

61. I considered Glencore's contention that in confining its identification of injury to the price impact on only the seven contracts, the ADC erred, in that for the purposes of s.269TAE(1)(f), "price" refers to the price or prices of the goods set, by the forces of supply and demand, in the market or markets that comprise the Australian industry.

62. I set out relevant excerpts from *Swan Portland Cement* (which was referred to by Glencore) relating to "price":

> *……. "Price" is an economic concept that is referable to a market, not an industry. The market forces of supply and demand set a "price" for goods. Therefore to find the price it is necessary to look at the market or markets that comprise the "Australian industry". As a result the Minister may have to consider different prices for s 269TAE(1)(e)(i) and different answers to the "differences between" (i) and (ii) of s 269TAE(1)(e). This is not inconsistent with the Customs Act. Section 23 of the Acts Interpretation Act 1901 (Cth) makes it clear that, unless the contrary intention appears, words in the singular number include the plural. The "price" in s 269TAE(1)(e) can easily be read (and often will be read) as "prices". Of course this may lead the Minister to determine that one market within the industry is being injured*

[36] See Section IV(c)(ii) of Orica's s.269ZZJ submission.
[37] See Section IV(a) of CSBP's s.269ZZJ submission.

> *while others are not being injured, due to different pricing structures. The present case is an example of that difference of injury but as I have said, such a situation may still lead, in certain cases, to a determination by the Minister that the Australian industry is being materially injured*.[38]

63. While *Swan Portland Cement's* reference to "price" is in relation to s.269TAE(1)(e), and Glencore's submission is in relation to s.269TAE(1)(f), the reference would seem to be equally applicable. Section 269TAE(1)(f) states:

> the effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the price paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia.

64. I do not consider that Glencore has shown that the ADC erred in confining its identification of injury due to the price impact on only the seven contracts, for the purposes of s.269TAE(1)(f), particularly with reference to Lockhart J's statements relating to price. Section 269TAE(1) states that the Minister "may have regard to" certain matters in determining whether material injury is being caused to an Australian industry because of the dumped exports, including the effect that the exports have on the price of domestically produced goods (s.269TAE(1)(f)). In its analysis and determination of material injury and causation in REP 473, the ADC did in fact "have regard to" the effect of the dumped goods on price of a much wider range of sales than just the seven contracts as set out in its "Price effects" analysis in Section 8.3 (in regard to the 'Economic Condition of the Australian Industry' in Chapter 8) and Section 9.3 (in regard to the causation analysis in Chapter 9). In Chapter 8 the ADC had regard to the Original Industry Applicants' prices on an aggregated basis from 1 April 2014 to 31 March 2018. The ADC found as a result of its analysis that the majority of the Original Industry Applicants' sales made during the IP were in accordance with fixed-term contracts that were negotiated before the IP with the base prices and margins effectively "locked-in" for the term of the contract. The ADC then examined additional examples provided by the applicants (in supplementary submissions) that pertained to negotiations for fixed-term contracts that were affected by the prices and increasing volumes of the Goods

[38] See *Swan Portland Cement* at [44].

exported from the subject countries during the IP. This led to the causation analysis in Chapter 9 in respect of the thirteen identified examples and relevantly for this ground of review, the price effects analysis in Section 9.3, and ultimately the ADC's identification of injury due to the price impact on only the seven contracts.

65. While the ADC's 'finding' of material injury caused by dumping in respect of price effects, may have been limited to the seven examples, its analysis (and volume of sales that it had "regard to") that led to its finding was much broader and was comprehensive. Nothing in the ADC's finding on price effects would appear to me to be contrary to Lockhart J's statements relating to "price" in *Swan Portland Cement* (as referenced by Glencore) or contrary to Mortimer J 's statement in *GM Holden Ltd v Commissioner of the Anti-Dumping Commission (GM Holden)* referencing Lockhart J's comments relating to price:

> *As Lockhart J goes on to observe in Swan Portland Cement 28 FCR 135 at 145 that, when the Minister is determining the question of "material injury" within the meaning of s 269TEA, and may examine price, that is not to say considerations of the "market" are irrelevant, to the contrary. Once price has to be considered, it will be set by the market, and as markets within an industry may differ, so may prices, and in that way the Minister may have to consider different price impacts in order to determine whether an injury, across an industry, is material*.[39]

66. I am not persuaded by Glencore's arguments that the ADC misconstrued "price" in s.269TAE(1)(f), or that its analysis was not in accordance with the relevant subsection. Glencore's Second Ground of review therefore fails.

[39] [2014] FCA 708 at [135].

Ground 3: Failure to adequately consider whether injury was caused by factors other than dumping

Glencore's Arguments

67. Glencore contends that the ADC failed adequately to consider whether, in respect of the seven contracts it analysed, injury was caused by factors other than dumping, contrary to s.269TAE(2A).

68. Glencore submits that the ADC accepted in REP 473 that there were factors other than dumping that may have caused injury to the Australian industry. Specifically, it acknowledged that excess capacity in the domestic market and competition between manufacturers in the Australian industry may have caused injury in the form of price depression.[40]

69. However, according to Glencore when it came to the seven contracts under consideration, the ADC put these other factors to one side on the basis that it had found a causal link between dumping and price depression and Glencore contends that this was impermissible.[41]

70. Glencore submits that the causal link that the ADC refers to is simply the fact that, in the seven negotiations in question, CSBP or QNP matched, or were requested to match, import prices (or, in the two cases of lost sales, the contract was lost to an importer selling at dumped prices). In other words, according to Glencore, in these seven contract negotiations, the dumped prices were used as a benchmark.[42]

71. Glencore submits that the mere fact that dumped prices were used as a negotiating benchmark did not absolve the ADC of the obligation, imposed by s.269TAE(2A), to consider whether the prices actually paid in these seven contracts were the result of factors other than dumping. Glencore submits that it remained necessary to analyse whether the other factors (which the ADC acknowledged might have been operative) were sufficient to keep prices at or below the prices of dumped imports. According to Glencore, this required a counterfactual consideration of what

[40] See Glencore's application for review, paragraph 20.
[41] See Glencore's application for review, paragraph 21.
[42] See Glencore's application for review, paragraph 22.

customers would have paid in the absence of the dumped imports. Glencore states that such counterfactual analysis was provided by Frontier Economics in a 10 December 2018 report provided by BHP on 13 December 2018 ("Frontier Report"),[43] which opined that in the absence of dumped imports, prices would have fallen anyway because of the fall in demand for AN in Australia in 2017 and the existence of overcapacity.[44]

72. Glencore submits that even without a counterfactual analysis, a first step would have been to consider whether prices in the seven contracts were the same as the prices for other contracts negotiated during the IP, and that matter was not considered at all.

73. According to Glencore, it was apparent that the ADC assumed that in the absence of dumping the price negotiated would have been the import price adjusted for the dumping margin, described as the "undumped price". Glencore submits that the ADC further assumed that the profit foregone based on this "undumped price" isolates the effect of dumping. It contends that the basis for these assumptions is nowhere explained and that the entire approach is flawed because it assumes what it needs to prove.[45]

74. Glencore submits that these flaws are underscored by the requirements of the Manual which states that where a coincidence analysis is not possible, an alternate method such as a "but for" analysis can be used, but in accordance with World Trade Organisation ("WTO") jurisprudence it "will require a 'compelling explanation' as to why causation exists notwithstanding the absence of any co-incidence". Glencore refers to the Manual which provides:

> *Parties submitting information to demonstrate injury based on 'but for' grounds must provide, and explain, the evidence on which this claim rests. For example, how they estimated the effects of the dumping by using suitable accounting methods and counterfactual analysis. It is not sufficient*

[43] Opinion of Preliminary Affirmative Determination, a report commissioned and submitted by BHP Billiton Iron Ore Pty Ltd, Document #032 of EPR 473.
[44] See Glencore's application for review, paragraphs 23 – 24.
[45] See Glencore's application for review, paragraph 26.

to simply assert such an effect as this will not meet the evidentiary requirement.[46]

75. Glencore contends that the ADC has transgressed these important requirements by assuming, without explanation, that customers would have paid a different price in the absence of the dumped imports.

ADC's Position

76. In its s.269ZZJ submission, the ADC states that it disagrees with Glencore's suggestion that it failed to adequately consider whether injury was caused by factors other than dumping. The ADC submits that in undertaking its injury analysis, it assessed thirteen examples provided by the Original Industry Applicants, as outlined in section 9.2.1 of REP 473. It points out that out of the thirteen examples, six examples did not or could not demonstrate that injury (in the form of price depression or loss of sales volumes) was caused by dumping. Therefore, the ADC did not include these examples in its assessment of injury, including in the 'but for' or counterfactual assessment.[47]

77. The ADC points out that in relation to the remaining seven examples, the Original Industry Applicants provided data and information in support of their claims that dumping caused injury to the Australian industry, and it considered that this information demonstrated a link between dumping and its effect on the Australian industry's prices and volumes. Therefore, the ADC contends that its 'but for' or counterfactual assessment is based on these examples and the evidence provided in relation to these.[48]

78. The ADC in its s.269ZZJ submission also addresses Glencore's reference to the Frontier Report and submits that it presents an 'opinion' and not a counterfactual or estimate of actual pricing achieved in the absence of dumping. The ADC states that nevertheless, it observes that this report supports the ADC's approach in assessing injury to the Australian industry, in that it advocates for an approach that requires a comparison between outcomes that have occurred as a result of dumping (the

[46] See the Manual, page 131.
[47] See ADC's s.269ZZJ submission, paragraph 66 – 67.
[48] See ADC's s.269ZZJ submission, paragraph 68.

factual) to those that would have occurred in the absence of dumping (the counterfactual).[49]

79. The ADC states that contrary to Glencore's intimations, it considers that the average of the 'undumped prices' determined by the ADC is not unreasonable when compared to the Australian industry's unsuppressed selling price ("USP").[50]

80. The ADC stated that it also disagrees with Glencore's suggestion that the "first step would have been to consider whether prices in the seven contracts were the same as the prices for other contracts negotiated during the investigation period". The ADC referred to the explanation in REP 473 that the Original Industry Applicants have had to reduce their prices to secure contracts or renew existing contracts, which is supported by the evidence provided by the Original Industry Applicants.[51]

81. The ADC stated that it is reasonable, based on all relevant facts and evidence, and based on the significance of the dumping margins determined in respect of the Goods exported from China, Sweden and Thailand, that the prices in the absence of dumping would have been higher. Further, the ADC submits that the counterfactual assessment presented at Section 9.2.2 of REP 473 outlines the methodology adopted by the ADC in estimating the prices in the absence of dumping. Based on this assessment, the ADC considered that, while there appears to be factors other than dumping that have caused reductions in the Australian industry's prices, dumping has still caused a significant reduction in prices.[52]

Other submissions

82. CSBP in its s.269ZZJ submission contends that Glencore's assertion in its third ground of review fails to demonstrate what factor the ADC should have considered, how this could have been quantified and the impact on the ADC's "profit forgone" calculations. CSBP submits that import prices represent the benchmark in contract

[49] See ADC's s.269ZZJ submission, para 69.
[50] The ADC refers to its explanation in Section 11.3 of REP 473, that the USP is the price that the Australian industry might reasonably sell its product in a market unaffected by dumping. This price was based on CSBP's, QNP's and Orica's prices.
[51] See ADC's s.269ZZJ submission, paragraph 71.
[52] See ADC's s.269ZZJ submission, paragraph 72.

negotiations and are typically referenced by contractual parties, and that the Minister's decision in this regard is therefore the correct and preferable decision.[53]

83. Orica submits in its s.269ZZJ submission that Glencore's application has not demonstrated that any factors other than dumping were material to the Australian industry's performance during the IP. Orica submits that the ADC adequately and sufficiently assessed the injury from the dumping as material. It submits that whilst injury from other factors may be present, the ADC (and the Minister) must only be satisfied that the injury from the dumping was material. It submits that the ADC did assess that other factors were at play in part in their injury assessment and discussed this in REP 473, but concluded that the impact caused by dumped goods from the countries the subject of the investigation was material.[54]

84. BHP in its s.269ZZJ submission submitted that the commercial behaviour of ammonium nitrate producers and resellers has been primarily driven by domestic competition and capacity factors including investments in new domestic production capacity, for example Orica's significant investment in the new Burrup plant, rather than the availability of imports. BHP submitted that its experience as an ammonium nitrate buyer is that competition between domestic producers is the overwhelmingly dominant factor affecting prices in the domestic industry.[55]

Consideration

85. In this ground of review, Glencore is in effect challenging the ADC's use of the "but for" analysis in determining causation in respect of the seven contracts that it analysed in relation to causation and its assessment of whether injury was caused by factors other than dumping.

86. Reference to the Manual in this regard is relevant:

> *Alternate analytical methods: Where no coincidence has been found, or a 'coincidence analysis' has not been possible, the Commission may accept an alternate analytical method—such as a 'but for' analysis—when examining causation. Any alternate method will be required to be evidence*

[53] See Section IV(a) of CSBP's s.269ZZJ submission, page 4.
[54] See Section IV(c)(iii) of Orica's s.269ZZJ submission.
[55] See BHP's s.269ZZJ submission, page 1.

based. The Commission will conduct such investigations in accordance with the WTO jurisprudence which requires that any other method, other than the coincidence analysis described above, will require a 'compelling explanation' as to why causation exists notwithstanding the absence of any coincidence.

Under a 'but for' analytical method it may be possible to compare the current state of the industry to the state the industry would likely have been in if there had been no dumping. Such analysis also inquires about the likely effects of the dumping or subsidisation alone. Parties submitting information to demonstrate injury based on 'but for' grounds must provide, and explain, the evidence on which this claim rests. For example, how they estimated the effects of the dumping by using suitable accounting methods and counterfactual analysis. It is not sufficient to simply assert such an effect as this will not meet the evidentiary requirement.[56]

87. Before determining if the ADC in its "but for" analysis complied with the requirements set out in the Manual, reference should be made to WTO jurisprudence in regard to a methodology used by an authority in its injury and causation analysis.

88. *In United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*,[57] (*US – Hot-Rolled Steel)*, the Appellate Body stated:

> *We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made*.[58]

89. The Appellate Body in *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*[59] *(EC – Tube or Pipe Fittings)* in

[56] The Manual, page 131.
[57] WT/DS184/AB/R.
[58] Appellate Body Report, *US – Hot-Rolled Steel,* para. 224.
[59] WT/DS219/AB/R.

addressing the conduct of the causality and non-attribution analysis by an investigating authority under Article 3.5 reiterated its basic view that "provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury."[60]

90. The Panel in *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*[61] *(EU – Fatty Alcohols (Indonesia))* rejected the argument that the EU Commission had acted inconsistently with Article 3.5 in the investigation at issue by not using quantitative assessment tools or a basic quantitative method in its non-attribution analysis regarding the economic crisis. According to the Panel, Article 3.5 contained no such requirement:

> *As both parties acknowledge, Article 3.5 does not prescribe a particular methodology for separating and distinguishing the injurious effects of the dumped imports from other known factors*.[62]

91. WTO jurisprudence appears to allow a wide discretion to an anti-dumping authority in determining its methodology relating to causation and the non-attribution analysis. That said, it is important to emphasise that any determination must rest on a sufficient factual basis allowing the Commissioner to draw reasoned and adequate conclusions.

92. With this principle in mind, I turn to the ADC's price effects analysis in regard to causation in Section 9.2 of REP 473 and in particular to its discussion and explanation of its "but for" analysis in Section 9.2.2 of REP 473.

93. In accordance with the Manual, the ADC explains why a 'coincidence analysis' was not possible or appropriate in the particular circumstances:

> *As noted in Chapters 7 and 8 of this report, the Commission found that the majority of the applicants' sales during the investigation period were made in accordance with contracts negotiated several years prior to the investigation period, and, in some instances, before the volume of the goods exported*

[60] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189.
[61] WT/DS442/R.
[62] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.179.

from China, Sweden and Thailand increased substantially. Therefore, the applicants' selling prices and volumes observed during the investigation period mostly reflect the contract terms, including prices and volumes, negotiated and agreed to before the investigation period.[63]

94. The ADC then proceeds to discuss in detail its methodology, and the data and evidence on which it based its "but for" analysis, including its rationale for its finding of causation (notwithstanding the absence of coincidence) and its reasoning for concluding that any difference between the negotiated price and 'undumped' price only reflected the difference due to dumping. The ADC explains why it only used seven out of the thirteen examples, since six examples did not or could not demonstrate that injury (in the form of price depression or loss of sales volumes) was caused by dumping. It explains how its consideration of the data and information provided by the Original Industry Applicants in support of their claims, demonstrated a link between dumping and its effect on the Australian industry's prices and volumes.[64] The ADC's rejection of six of the thirteen contracts for its "but for" analysis (based on lack of causation) and its detailed reasoning for inclusion of each of the seven contracts (based on causation) detracts from Glencore's contention that ADC failed adequately to consider whether, in respect of the seven contracts it analysed, injury was caused by factors other than dumping, contrary to s.269TAE(2A).

95. In Section 9.2.2 of REP 473 the ADC acknowledged that there could be factors other than dumping that led to price depression and lower negotiated contract prices. It went on to state:

Therefore, in relation to the examples that the Commission is satisfied that the applicant had provided sufficient information to link the price reduction to matching pricing of the dumped goods from a particular country, or matching pricing at import parity, the Commission considered what each applicant's price might have been in the absence of dumping.

In each case, the Commission only adjusted the import prices for the dumping margin – all other variables were held constant to ensure a proper

[63] Section 9.2 of REP 473, page 70.
[64] See Section 9.2 of REP 473, pages 70 – 78, and Confidential Attachment 15.

comparison between the final price offers, or the actual prices that the applicants matched, and the 'undumped' prices. Therefore, any difference between the negotiated price and the 'undumped' price would only reflect the difference due to dumping and not any other factors.[65]

96. The ADC then went on to explain in detail its methodology and the data on which its analysis was based, concluding as follows:

> *The Commission found that 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. To quantify the effect of dumping only, the Commission compared the negotiated prices adjusted for dumping (the 'undumped' price) to the negotiated prices. The Commission found that, on average, the prices adjusted for dumping are approximately 17.8 per cent higher than the negotiated prices.*
>
> *Based on the assessment above, the Commission considers that, while there appear to be factors other than dumping that have also caused the reductions in prices, dumping has still caused a significant reduction in prices*.[66]

97. The ADC's detailed assessment of pricing and the counterfactual analysis was at Confidential Attachment 16 (which I reviewed). Based on this assessment, I consider that the ADC's finding that while there appeared to be factors other than dumping that have caused reductions in the Australian industry's prices, dumping still caused a significant reduction in prices, to be reasonable. I consider the ADC's analysis to be based on facts, to be comprehensive, and its conclusions reasonable. Further, I consider that the ADC's 'but for' analysis meets the requirements in the Manual referred to above, in that:

- is has been shown to be evidence- based;
- a 'compelling explanation' explanation has been provided as to why causation exists notwithstanding the absence of any coincidence;

[65] See Section 9.2.2 of REP 473, page 78.
[66] See Section 9.2.2 of REP 473, pages 78 – 79.

- the evidence on which the finding are based have been explained; and
- the effects of the dumping have been estimated by using suitable accounting methods and counterfactual analysis.

98. I do not consider that Glencore has demonstrated that the ADC failed adequately to consider whether, in respect of the seven contracts it analysed, injury was caused by factors other than dumping, contrary to s.269TAE(2A).

Ground 4: Failure to adequately consider whether the injury identified was caused by the volume and prices of goods that are not dumped

Glencore's arguments

99. Glencore contends that the ADC failed adequately to consider whether, in respect of the seven contracts it analysed, the injury identified was caused by the volume and prices of goods that are not dumped, contrary to s.269TAE(2A)(a).

100. Glencore contends that not all imports into Australia during the IP were from the countries the subject of Investigation 473. As well as China, Sweden and Thailand, imports came from other countries such as Indonesia and Russia, and the market share of these other imports was between 3 and 5.6 per cent over the injury analysis period.[67]

101. Glencore contends that in accordance with s.269TAE(2A)(a), the ADC was required to consider whether the injury it identified was caused by the volume and prices of goods that are not dumped. According to Glencore it was apparent from the ADC's analysis of three particular contract negotiations (Examples 4, 6 and 7) that it failed to do this. Glencore contended that the negotiating benchmark used in these examples was not confined to dumped imports but to imports generally. It was not clear to Glencore whether import parity pricing ("IPP") in these examples referred to parity with all imports (which would be its natural meaning) or was confined to dumped imports.[68]

[67] Glencore made reference to page 57 of REP 473 in this regard.
[68] For details of Glencore's concerns with each of these examples see paragraph 31 of Glencore's application for review, pages 5 – 6.

102. Glencore submits that in each of these examples, the ADC failed to consider whether the contract price would have been the same in any event because of the benchmark set by undumped imports.

ADC Position

103. The ADC in its s.269ZZJ submission disagrees with Glencore's assertion that it has not considered whether the injury was caused by the volume and prices of goods that are not dumped. The ADC submits that the information obtained by it indicates that the market share of imports from countries not subject to the investigation has decreased over the injury analysis period, from 5.6 per cent in 2014-15, to 3 per cent in 2017-18, and that the market share of the imports from China, Sweden and Thailand increased over the same period to comprise 3.1 per cent of the total volume in 2017-18.[69]

104. The ADC submitted further that it found that the exports from the subject countries during the IP comprised 74 and 73 per cent of the total import volume into Western Australia and Queensland respectively.[70] Further it submitted that the volumes imported into Western Australia are via Fremantle and therefore directly supply the ammonium nitrate market that CSBP and its customers supply.[71]

105. The ADC further stated that the contracts Glencore refers to in paragraph 31 of its application relate to supply in Queensland and submits that the import volumes into Queensland (via Gladstone) in the relevant period were predominately imports from China and Sweden, and that the prices of the Goods from the subject countries, particularly from Sweden, were the lowest import prices in the period. Therefore, the ADC contends that the dumped goods had a significant and greater impact on QNP's prices relative to other imports into Queensland.[72]

Other submissions

106. CSBP in its s.269ZZJ submission challenges Glencore's contention that the selling prices of non-dumped exports were not considered in the ADC's analysis. It submits

[69] The ADC made reference to REP 473, page 57 in this regard.
[70] See ADC's s.269ZZJ submission, paragraph 76.
[71] The ADC made reference to Confidential Attachment 11 of REP 473 in this regard.
[72] The ADC made reference to Confidential Attachments 15 and 16 of REP 473 in this regard.

that the ADC did consider the impact of other imports including imports from China, Indonesia and Egypt. CSBP states that the ADC 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 and contended that the ADC's decision (and that of the Minister) was the correct and preferable decision.[73]

107. Orica in its s.269ZZJ submission states that exports from China, Sweden and Thailand accounted for more than 50 per cent of total AN imports in the IP. It states further that remaining imports were from the Russian Federation (16 per cent) and Indonesia (27 per cent), with the balance from other countries. Orica points out that the imports from the Russian Federation are the subject of measures and the higher-priced imports from Indonesia were by Orica to supplement its local production and could not be considered injurious to the Australian industry. Orica submits that it is only the imports from China, Sweden and Thailand that were injurious to the Australian industry during the IP. It submits that the Commissioner did consider the impact of imports from other sources and was satisfied that the exports at dumped prices had caused material injury to the Australian industry, and that the Minister's decision therefore was the correct and preferable decision.[74]

Consideration

108. I reviewed the relevant spreadsheets and documents referred to by the ADC in REP 473 and in its s.269ZZJ submission, with particular regard to the examples referred to and challenged by Glencore in its application for review. I confirmed the ADC's submission that the information indicates that the market share of imports from countries not subject to the investigation has decreased over the injury analysis period, and that the market share of the imports from China, Sweden and Thailand increased over the same period. I reviewed Confidential Attachment 11, with specific reference to the worksheet entitled, "Import Vol by State", and confirmed the high percentage of exports from the subject countries during the IP (74 and 73 per cent of the total import volume) into Western Australia and Queensland respectively.

[73] See Section IV(a) of CSBP's s.269ZZJ submission, page 4.
[74] See Section IV(c)(iv) of Orica's s.269ZZJ submission, page 7.

109. After reviewing the relevant documents I decided, however, to request a conference with the ADC for clarification of how the IPP calculation in each of the three examples (4,6 and 7) referred to by Glencore in paragraph 31 of its application for review, was influenced by both the dumped and undumped imports, respectively. I also sought greater clarification as to how the ADC took into consideration whether the injury was caused by prices of goods that are not dumped (that is, "the other imports") and how the ADC came to the conclusion that the dumped goods had a significant and greater impact on QNP's prices relative to other imports into Queensland in each particular example, as contended in the ADC's s.269ZZJ submission.

110. During the Fifth Conference the ADC clarified how the IPP was derived, supported by spreadsheets and other documentation, in respect of the three examples referred to by Glencore in its application for review. It was clear from the information provided by the ADC during the Fifth Conference that in the various examples where IPP was relevant, the major portion of prices used in the average related to imports from the subject countries and those prices relevant to imports from the non-subject countries were significantly higher than the average. Therefore the effect of imports from other countries was only to increase the IPP. Where the effect was lost volume rather than a reduction in pricing, the IPP was not relevant. The ADC was satisfied, based on evidence that this lost volume was directly displaced by dumped imports.[75]

111. The ADC was able to demonstrate that in its analysis it had taken into consideration the volume and prices of goods that were not dumped, and had considered how those undumped imports had affected the IPP calculation that was used in the relevant negotiations. It was clear from the analysis and supporting spreadsheets and documents that the substantially higher volume and lower prices of dumped imports in each example had a more substantial influence on the "landed ammonium nitrate price" in the IPP calculation, than the other imports used in the negotiations of the relevant examples referred to by Glencore. This led the ADC to conclude that the dumped goods had a significant and greater impact on prices relative to other imports.

[75] See detailed discussions in Fifth Conference Summary.

112. In light of the above discussion, I consider that the ADC's analysis and conclusions are reasonable and that Glencore has not demonstrated that the ADC failed adequately to consider whether, in respect of the seven contracts it analysed, the injury identified was caused by the volume and prices of goods that are not dumped, contrary to s.269TAE(2A)(a). Glencore's Fourth Ground of review therefore fails.

Ground 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 on facts but was based merely on allegations, conjecture or remote possibilities

Glencore's arguments

113. Glencore contends that 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 on facts but was based merely on allegations, conjecture or remote possibilities, contrary to s.269TAE(2AA).

114. Glencore submits that even if the use of dumped prices as a benchmark supports a conclusion that the prices paid in these contracts were impacted by the existence of dumped imports, it does not follow that the parties would otherwise have settled on the "undumped" price – as opposed to, say, the non-injurious price, or indeed some other price. According to Glencore, the supposition that, but for the existence of dumped imports, customers would have paid the "undumped" price is nothing more than conjecture, contrary to s.269TAE(2AA).[76]

ADC position

115. In its s.269ZZJ submission the ADC refutes Glencore's claims and maintains that the relevant Australian industry applicants have provided evidence to demonstrate a causal relationship between the dumped imports and the injury to the Australian industry. The ADC refers to Chapter 9 of REP 473, where it was noted in relation to the seven examples, that the relevant Australian industry applicants provided data

[76] See Glencore's application for review, paragraph 34.

and information in support of their claims that dumping caused injury to the Australian industry. Therefore, the ADC contends that contrary to Glencore's claims, the Commissioner considers that the ADC's assessment of the Australian industry's prices is not based on allegations, conjecture or remote possibilities.[77]

116. Further the ADC contends that in relation to the 'undumped' price determined and used by the ADC in its 'but for' or counterfactual assessment, it is important to observe that the main reason the ADC undertook the 'but for' or counterfactual assessment was to quantify the effects of dumping on the Australian industry's prices. The ADC submits that the assessment of prices in the absence of dumping is explained in Section 9.2.2 of REP 473, and is based on the information and data provided by the relevant Australian industry applicant in relation to each example referred to in the assessment. Further, it submits that the assessment of prices in the absence of dumping is detailed and considers all information available before the ADC, as demonstrated in Confidential Attachment 16 to REP 473. Therefore, the ADC submits that the ADC's assessment of prices is not based on conjecture, as claimed by Glencore.[78]

117. Further, the ADC points out that:

> *Contrary to Glencore's intimations, the Commissioner considers that the average of the 'undumped prices' determined by the Commission is not unreasonable when compared to the Australian industry's unsuppressed selling price (USP). As explained in section 11.3 of REP 473, the USP is the price that the Australian industry might reasonably sell its product in a market unaffected by dumping. This price was based on CSBP's, QNP's and Orica's prices*.[79]

118. The ADC concludes that it is reasonable, based on all relevant facts and evidence, and based on the significance of the dumping margins determined in respect of the Goods exported from China, Sweden and Thailand (39.3 per cent, 51.1 per cent and 32.7 per cent respectively), that the prices in the absence of dumping would have been higher.

[77] See ADC's s.269ZZJ submission, paragraphs 79 – 80.
[78] See ADC's s.269ZZJ submission, paragraphs 81 – 82.
[79] See paragraph 70 of the ADC's s.269ZZJ submission.

Other submissions

119. CSBP in its s.269ZZJ submission submits that imports from the three subject countries during the IP were substantial at pricing levels that were transparent. CSBC contends that the 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.[80]

120. Orica in its s.269ZZJ submission contends that it was reasonable for the ADC to conclude that in the absence of dumping the relevant contract price would be influenced by import prices at non-dumped levels. It contends that Glencore did not furnish any information during the investigation to suggest a price other than a non-dumped price would influence the level of the negotiated contract price. It therefore submits that the Minister's decision in respect of the contract price that the Australian industry could achieve in the absence of dumping is the correct and preferable decision.[81]

Consideration

121. There appears to be two aspects to Glencore's claims in regard to the ADC's findings related to this ground of review, that Glencore challenges as being "nothing more than conjecture":

    - firstly, that the prices in the contracts were impacted by the existence of dumped imports, and

    - secondly, that the parties would have settled on the "undumped" price.

122. In Chapter 9 of REP 473, the ADC sets out how, in respect of the relevant seven examples, it came to the conclusion, based on data and information provided by the Original Industry Applicants in support of their claims, that dumping caused injury to the Australian industry. The ADC analysed the data with respect to each of the examples, as set out in Confidential Attachment 15, taking into consideration for its injury analysis only those seven examples where a causal link was established. Confidential Attachment 15 consists of a detailed description in narrative and

[80] Section IV(a) of CSBP's s.269ZZJ submission, page 4.
[81] Section IV(c)(v) of Orica's s.269ZZJ submission.

tabular form of all the contract negotiations in all the examples that the ADC examined, outlining the detailed information provided by the applicants and other interested parties throughout the investigation. Particular reference was made to the submissions by the Original Industry Applicants including the supporting information provided subsequent to each of their submissions.[82] Besides the detailed narrative outlining the various negotiations in each example, Confidential Attachment 15 also included references to the actual supporting documents for each of the examples that purported to demonstrate where the relevant applicant "lowered their prices in response to the dumped goods to secure supply contracts, or where they matched IPP as customers cited the availability and pricing of imported ammonium nitrate".[83] Confidential Attachment 15 and the supporting documents also outlined how the IPP was calculated for the purpose of the negotiations, which was further clarified by the ADC in the Fifth Conference, with particular reference to the "landed ammonium nitrate price" in each particular example, and how it was influenced by both the dumped and undumped imports, respectively.[84]

123. The ADC describes in Section 9.2.2 of REP 473 its analysis and assessment of prices in the absence of dumping, based on the information and data provided by the relevant Australian industry applicant in relation to each example, as well as all other information available to it. The ADC's detailed assessment of pricing and its counterfactual analysis is contained in Confidential Attachment 16, which I reviewed. I also noted the ADC submission that the Commissioner considers that the average of the 'undumped prices' determined by the ADC, "is not unreasonable when compared to the Australian industry's unsuppressed selling price (USP)."

124. Having reviewed the relevant sections of REP 473, Confidential Attachment 15 (and supporting documents referred to and included therein), Confidential Attachment 16 as well as clarifications and relevant information provided during the Fifth Conference, which all set out in detail the basis of the ADC's analysis and calculations leading to its findings, I consider that the ADC's analysis is based on fact, is comprehensive and its conclusions are reasonable in the circumstances.

[82] Reference was made in particular to Documents #013, #016 and #019 of EPR 473.
[83] Quoted passage from introductory remarks (Section 1) of the ADC in Confidential Attachment 15, page 1.
[84] See Fifth Conference Summary.

125. I do not consider that Glencore has demonstrated that the ADC's conclusion that the contract price, in the absence of dumping, would have been the import prices adjusted for the dumping margin, was contrary to s.269TAE(2AA) of the Act.

Ground 6: The Minister could not be satisfied that there was material injury to the Australian industry as a result of dumped imports

126. Glencore contends that 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 dumped imports.

127. There are five components to this ground of review as contended to by Glencore, each of which will be discussed and considered separately below.

First Component – Only Evidence of Injury Relates to Seven Contracts and Satisfaction not Reached that Prices Affected by Dumped Imports

Glencore's arguments

128. Glencore contends that the only evidence of any injury caused to the Australian industry from dumped imports was the injury said to arise in the seven contract negotiations analysed in REP 473, and that even in the context of those seven negotiations, the Minister could not be satisfied that the contract price was affected by the price of dumped imports. Glencore contends that these lower prices would have been offered or demanded in any event, for the following reasons:

    a. prices would have been expected to fall in the absence of dumped imports due to fall in demand of AN and overcapacity of AN production.[85]

[85] Reference in this regard was made to page 13 of the Frontier Report's counterfactual analysis, which refers to the fall in demand for ammonium nitrate in Australia throughout 2017 and overcapacity in ammonium nitrate production. In this regard Glencore also refers to the ADC's acknowledgment in REP 473 of the role of overcapacity and competition between Australian producers in keeping prices down, and other evidence to support that view, including Glencore's submission of 17 March 2019; BHP's submission of 10 August 2018; and Moncourt's submissions of 17 August 2018.

b. It is inherently unlikely that dumped imports could have had any credible impact on price, because there were structural impediments to importing large amounts of ammonium nitrate into Australia.[86]

ADC's Position

129. In its s.269ZZJ submission the ADC stated that it considers that it is reasonable, based on all relevant facts and evidence, and based on the significance of the dumping margins determined, that the Australian industry's prices and volumes, in certain instances, have been affected by the dumped goods and that this has caused material injury to the Australian industry.

130. Further, the ADC reiterated that, given the circumstances of this case, it was open to the ADC to use a 'but for' analysis in assessing injury and causation. It was pointed out that the ADC assessed thirteen examples of contract negotiations submitted by the Australian industry applicants in support of their claims that the Goods dumped during the IP affected pricing and volumes. The ADC submitted that it considered that it was open to it to have regard to these and that is not precluded from assessing individual contracts in assessing injury and causation, noting that s.269TAE(1) of the Act is broad in terms of the matters the Minister may have regard to in assessing whether material injury to an Australian industry has been or is being caused.[87]

131. The ADC also disagreed with Glencore's claim that the dumped goods did not have any effect on price because there are impediments to importing ammonium nitrate into Australia, and in this regard referred to Section 9.5.3 of REP 473 where it addressed these claims.

132. The ADC found that most explosives manufacturers and associated services providers in Australia have established import supply chains. Further, the importers of the dumped goods directly compete with other explosives manufacturers that source ammonium nitrate from the Australian industry. Therefore, the price that the Australian industry producers offer their customers has to be competitive and at

[86] According to Glencore these impediments were summarised on page 86 of REP 473 and elaborated in the Frontier Report and Glencore's 10 December 2018 submission.
[87] See ADC's s.269ZZJ submission, paragraph 87.

parity with import prices otherwise their customers will not be competitive with the explosives manufacturers that import ammonium nitrate into Australia.[88]

133. Further, the ADC obtained information that an import parity price is often referred to in negotiations of contract prices.[89] Regardless of the total volume of the Goods imported into Australia, the Commissioner considered that the existence of the Goods from the countries subject to the investigation at significantly dumped prices in the IP resulted in the industry applicants reducing their prices to secure contracts, or losing volumes in competition with importers offering the Goods at dumped prices. The Commissioner also considered that imports do not need to replace the entirety of the Goods supplied by Australian industry to cause price-related injury to the Australian industry.

Other submissions

134. CSBP in its s.269ZZJ submission submitted that the imports from China, Sweden and Thailand, in conjunction with the size of the dumping margins, were influential in price negotiations throughout the IP.[90]

135. QNP in its s.269ZZJ submission noted that most large negotiations are long-term in nature (i.e. often up to five years) with negotiations commencing at least one year prior to the period of supply. According to QNP the contract negotiations are often protracted and call upon available market data (including "to a large extent the only publicly available data - import pricing"). It pointed out that once a contract is agreed, the impact of that negotiated contract extends for the full contract period.[91]

Consideration

136. I consider that the ADC's contention that it was open to it to use a 'but for' analysis and that it was not precluded from assessing individual contracts in assessing injury and causation, is reasonable, noting in particular, the broadness of s.269TAE(1) of the Act. The 'but for' analysis has been addressed in some detail in the consideration of Glencore's Third Ground of review.

[88] See ADC's s.269ZZJ submission, paragraph 89.
[89] In this regard the ADC referred to Confidential Attachment 15 of REP 473.
[90] See CSBP's s.269ZZJ submission, section IV(a).
[91] See QNP's s.269ZZJ submission, section III(IV).

137. I reviewed the documents that Glencore referred to in support of its contentions relating to this component of the Sixth Ground of review. I also reviewed Confidential Attachment 15 of REP 473 from which it was apparent that an import parity price is often referred to in negotiations of contract prices and was clearly a factor in affecting pricing (and in some instances volume) in the relevant seven examples in respect of which the ADC found causation. I find that the Commissioner's consideration that the existence of the Goods from the countries subject to the investigation at significantly dumped prices in the IP, resulted in the industry applicants reducing their prices to secure contracts, or losing volumes in competition with importers offering the Goods at dumped prices, to be reasonable. I have also noted the ADC's response to Glencore's claim that the dumped goods did not have any effect on price because there are impediments to importing the Goods into Australia, with reference to Section 9.5.3 of REP 473 and the ADC's s.269ZZJ submission, which I consider to be reasonable.

138. I do not consider that Glencore has demonstrated that the lower prices would have been offered or demanded in any event or that that the dumped goods did not have any effect on price, because there are impediments to importing ammonium nitrate into Australia,.

<u>Second Component – No basis for extrapolating that dumped imports had any price effect (or related volume of profit effect) on the Australian industry as a whole</u>

Glencore's arguments

139. According to Glencore, once it is recalled that these seven contracts are not the entirety of the Australian industry, and that in the balance of the market or markets in which the Australian industry competes the ADC was unable to make any finding that dumped imports had an impact on price, there is no basis for extrapolating that dumped imports have had any price effect (or related volume or profit effect) on the Australian industry as a whole.

ADC's position

140. In response to Glencore's contention, the ADC in its s.269ZZJ submission, referred to its previous statements in response to Ground 1 of Glencore's application of review. The ADC also referred to the Injury Direction which states that there is no

minimum standard that is used to determine whether dumped imports have a sufficient share of the Australian market to cause material injury.[92]

141. In referring back to its submissions in response to Ground 1 of Glencore's ground of review the ADC noted that it had explained the methodology it used to determine that the injury caused by dumping is material to the industry as a whole when considering the profit forgone (caused by dumping), having provided a step by step outline of the methodology it adopted in the First Conference convened by the Review Panel on 4 September 2019, at which Glencore was one of the participants.[93]

Other submissions

142. The Original Industry Applicants in their s.269ZZJ submissions all challenged Glencore's contentions relating to the applicability of the ADC's finding of material injury in respect of profits foregone to the Australian industry "as a whole" as set out in the above discussion of Ground 1 of Glencore's application for review.

Consideration

143. This component of Ground 6 rests on Glencore's contention that because the ADC was unable to make any finding that dumped imports had an impact on price in respect of the relevant seven contracts, there is no basis for extrapolating that dumped imports have had any price effect (or related volume or profit effect) on the Australian industry as a whole.

144. Firstly, as discussed above in respect of the first component of this ground of review, Glencore has not demonstrated that the ADC was unable to make a finding that dumped imports had an impact on price in respect of the relevant seven contracts. It has already been found that it was open to the ADC to use a 'but for' analysis in assessing injury and causation, and that it was not precluded from

[92] See ADC's s.269ZZJ submission, paragraphs 91 – 92.
[93] It should be noted that in its reinvestigation of the finding of materiality of injury relating to the profit foregone, the ADC changed its methodology in determining that injury caused by dumping in respect of profit foregone of the Australian industry applicants was material, with respect to the Australian industry as a whole. See last paragraph of Section 2.2.1 of the Reinvestigation Report (page 14) and Confidential Attachment 1 thereto, as well as my consideration of this reinvestigated finding under Yara's fourth and fifth grounds of review.

assessing individual contracts in assessing injury and causation, noting the broadness of s.269TAE(1) of the Act. Further, the ADC was able to show from information collected from the Original Industry Applicants that an import parity price is often referred to in negotiations of contract prices and, further, that the Commissioner considered that the existence of the Goods from the countries subject to the investigation at significantly dumped prices in the IP resulted in the Original Industry Applicants reducing their prices to secure contracts, or losing volumes in competition with importers offering the Goods at dumped prices, at least in respect of the seven relevant examples.

145. Secondly, and in any event, the issue of the applicability of the material injury finding to the "industry as a whole" has already been comprehensively addressed in the discussion of Ground 1 of Glencore's application for review. I do not consider that Glencore has demonstrated that the ADC failed to consider whether dumped imports caused material injury to the "Australian industry as a whole", contrary to the requirements of s.269TG(1) and (2) of the Act, and as interpreted in *Swan Portland Cement*, or contrary to the Injury Direction.

146. The second component of Glencore's Sixth Ground of review therefore fails.

Third Component – Positive evidence that dumped imports did not have a price impact

Glencore's arguments

147. Glencore contends that there was positive evidence that dumped imports did not have a price impact, that included the following:

    a. In its 17 March 2019 submission, Glencore identified examples of recent negotiations with Australian AN producers which resulted in pricing well below import prices as a result of competition between Australian producers.[94]

    b. There are seven instances where the ADC positively found price depression or loss of sales volumes could not be said to have been caused by dumping.

[94] EPR 473, document #51.

c. The ADC's own findings included an analysis of the Goods imported by Orica and Dyno Nobel from China during the IP, and found that these exportations did not influence CSBP or QNP's price negotiations or volumes in even the seven contracts which the ADC found were impacted by dumping.

ADC's position

148. The ADC in its s.269ZZJ submission refers to Section 9.5.7 of REP 473, where it addressed the examples provided by Glencore in its submission dated 17 March 2019 and points out that the ADC did not in fact attribute the injury to dumping in relation to these examples, based on the information available at the time REP 473 was prepared. The ADC points out that this does not inevitably lead to the conclusion that dumping did not cause injury in the other instances where contracts were negotiated or renegotiated.[95]

149. The ADC addressed the issue of the Goods imported by Orica and Dyno Nobel from China during the IP in Section 9.5.2. of REP 473, finding that these exportations did not influence CSBP or QNP's price negotiations or volumes in the seven contracts which the ADC found were impacted by dumping.

Consideration

150. I find this component of Glencore's Sixth Ground of review to be somewhat puzzling. I do not consider that any of the examples provided by Glencore of what it characterises as "positive evidence" that dumped imports did not have a price impact, detracts from the ADC's finding that the dumped goods had an impact on the prices and volume (in certain instances), in respect of the seven examples where the injury was found to be causally linked to the dumping, in particular:

    a. It is clear from REP 473 and Confidential Attachment 15 that the ADC did not in fact attribute the injury to dumping in relation to the examples that Glencore identified in its 17 March 2019 submission.

    b. The seven instances Glencore refers to where the ADC positively found price depression or loss of sales volumes that could not be said to have

[95] See ADC's s.269ZZJ submission, paragraph 94.

been caused by dumping, were specifically acknowledged by the ADC not to be part of its injury analysis.

c. The ADC was correct to exclude the imports by Orica and Dyno Nobel from China from the injury analysis, and the ADC's finding that these exportations did not influence CSBP or QNP's price negotiations or volumes in the seven contracts which the ADC found were impacted by dumping, was appropriate and relevant.

151. The third component of Glencore's Sixth Ground of review therefore fails.

Fourth Component – Other identified circumstances stood in the way of any finding that the Australian industry had suffered material injury as a result of dumping

Glencore's arguments

152. Glencore contends that other identified circumstances stood in the way of any finding that the Australian Industry had suffered material injury as a result of dumping, particularly the following two factors:

a. The relative market share held by the dumped imports, being between 2.7 and 3.1 per cent of the market during the injury analysis period. Glencore contends that it is inherently unlikely that imports to that extent could influence prices in a market, particularly given the structural impediments mentioned above.

b. The proportionate rate of increase of dumped imports, compared to the increase of sales by the Australian industry. Glencore submits that Article 3.2 of the WTO Anti-Dumping Agreement ("ADA") provides that "the investigation authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing member". Glencore contends that here, not only is the increase of dumped imports not significant (being only 0.4 per cent) but also, it is not as large in relative terms as the increase in sales by the Australian industry (being 3 per cent).[96]

[96] See Glencore's application for review, paragraph 43, page 8.

ADC's position

153. In its s.269ZZJ submission the ADC pointed out that it had examined injury indicators in terms of volume effects in Section 8.2 of REP 473, which included a consideration of whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption. The ADC pointed out that it found that there was an increase in the volume of dumped goods from the countries subject to the investigation in the IP of 19.1 per cent, in absolute terms, which the ADC considered to be a substantial increase. Based on this, the Commissioner maintains that there has been an increase in the volume of dumped imports of the Goods from the subject countries.[97]

154. In Section 8.2 of REP 473, the ADC points out that in accordance with Australian legislation (and the Injury Direction) which gives effect to the ADA, an examination of injury indicators in terms of volume effect includes a consideration of whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption.[98] [emphasis by the ADC]

Other submissions

155. BHP in its s.269ZZJ submission submitted that the subject exports to Australia represented a very small proportion (around 3 per cent) of total ammonium nitrate sales, and were not sufficient to displace a meaningful volume of domestic production.[99]

156. CSBP in its s.269ZZJ submission pointed out that imports from the three countries during the IP were substantial, accounting for a little more than 50 per cent of total imports.

Consideration

157. In its first argument relating to this component, Glencore refers to the relative market share held by the dumped imports, being between 2.7 and 3.1 per cent of the market during the injury analysis period. Glencore contends that it is "inherently unlikely" that imports to that extent could influence prices in a market, particularly

[97] See ADC's s.269ZZJ submission, paragraphs 94-95.
[98] See Section 8.2.3 of REP 473, page 59.
[99] Reference was made to Section 1 of BHP's 10 August 2018 submission to the ADC.

given the structural impediments mentioned above, but does not provide positive evidence to demonstrate that this particular circumstances stood in the way of any finding that the Australian industry had suffered material injury as a result of dumping. It is particularly noted that in this regard the Injury Direction states:

> *I note that in cases where the dumped or subsidised imports hold a small share of the Australian market, it may be difficult to demonstrate material injury. I direct that no minimum standard should be used to determine whether dumped or subsidised imports have a sufficient share of the Australian market to cause material injury*.[100]

158. With regard to Glencore's second argument relating to the proportionate rate of increase of dumped imports compared to the increase of sales by the Australian industry and the reference to Article 3.2 of the ADA, the ADC points out that there was an increase in the volume of dumped goods from the subject countries in the IP of 19.1 per cent in absolute terms, which the ADC considered to be a substantial increase. In Section 8.2 of REP 473, the ADC correctly points out that in accordance with Australian legislation (and the Injury Direction) which gives effect to the ADA, an examination of injury indicators in terms of volume effect includes a consideration of whether there has been a significant increase in dumped imports, <u>either</u> in absolute terms or relative to production or consumption [emphasis by the ADC]. WTO jurisprudence confirms that is quite clear from the first sentence of Article 3.2 of the ADA (as referred to by Glencore) that the particular methodology for evaluating the volume of imports is not prescribed and that an investigating authority may opt to rely on any one of the methods referred to (or more than one, if it so chooses) for its analysis under that provision.[101]

159. I therefore do not consider Glencore's arguments relating to this fourth component of Glencore's Sixth Ground of review to be persuasive.

<u>Fifth Component – any injury that was suffered by the Australian industry as a whole was not material</u>

[100] See Ministerial Direction on Material Injury, 2012.
[101] See Appellate Body report in *Korea - Anti-Dumping Duties on Pneumatic valves from Japan (WT/DS504/AB/R), para 5.202*.

160. Since this fifth component of Glencore's Sixth Ground of review is similar to grounds of review of both DBS and Yara, I will address all these claims together under both Yara's Fourth Ground of review (that the injury is not material) and Yara's Fifth Ground of review (that the injury is not greater than that likely to occur in the normal ebb and flow of business).

Ground 7: Error in ADC finding that it cannot "carve out" certain states from the dumping duty notice

Glencore's Arguments

161. Glencore contends that 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 notice based on evidence of no material injury in those markets.

162. Glencore submits that the ADC identified in REP 473 four distinct AN markets in Australia, namely, NSW (Hunter Valley), Queensland (Bowen Basin), and two markets in WA (Kalgoorlie and the Pilbara). Glencore had explained in its 17 March 2019 submission that:

    a. AN destined for one regional market does not typically enter other regional markets;

    b. none of the seven contracts comprising the alleged material injury related to the NSW market; and

    c. dumped imports made up less than 1 per cent of the NSW market.[102]

163. Glencore's submission concluded that the NSW market warranted separate consideration if the ADC proposed to impose duties. It made a similar point with regard to the Pilbara, where it was impossible to identify any imports at all that were not made by the Australian industry.

164. According to Glencore, the ADC addressed this submission by asserting that it is not possible to "carve out" certain states from the dumping notice. Glencore

[102] EPR 473, document #51.

contends that this assertion is wrong in law, stating that as Lockhart J explained in *Swan Portland Cement,* at 146:

> *The 'price' in s 269TAE(1)(e) can easily be read (and often will be read) as 'prices'. Of course this may lead the Minister to determine that one market within the industry is being injured while others are not being injured, due to different pricing structures…[O]nce it is accepted that there may be different levels of injury determined under s 269TAE(1)(e), then it is logical that different levels of dumping duty may have to be imposed on a foreign exporter depending on the market in which the goods are dumped… There is no reason in s 8 [of the Anti-Dumping Act] why the Minister has to impose one level of dumping duty. The Minister has the power to impose different levels of dumping duty in particular cases depending on the injury or injuries involved.* [emphasis added by Glencore]

165. Glencore explained that those comments were made in a context where the market for cement clinker in Western Australia was different to the market elsewhere in the industry, and further submitted that Lockhart J's construction is consistent with s.33(3A) of the *Acts Interpretation Act 1901* (Cth), which provides:

> *Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) with respect to particular matters (however the matters are described), the power shall be construed as including a power to make, grant or issue such an instrument with respect to some only of those matters or with respect to a particular class or particular classes of those matters and to make different provision with respect to different matters or different classes of matters*.

166. Glencore submits that dumping duty notices discriminate all the time between exporters of the same goods, for example, by imposing different duties on different exporters or on exporters from different countries, and there is no reason why the Minister cannot discriminate according to the destination of the export. Glencore contends that it therefore follows that there was the power to publish a dumping notice which did not apply, or imposed different duties, in respect of the Goods

exported to NSW or the Pilbara, and that the power should have been exercised so as to exclude from the dumping notice any exports into those two markets.

ADC's position

167. In its s.269ZZJ submission the ADC counters Glencore's arguments. It submits that the full extract of Lockhart J's comments in *Swan Portland Cement*, does not support exempting NSW or the Pilbara region from the notice. The ADC points out that Lockhart J's comments appear only to be directed at imposing different levels of dumping duty, not the exemption of certain regions from a dumping duty notice, and sets out the relevant extract:

> *…The "price" in s.269TAE(1)(e) can easily be read (and often will be read) as "prices". Of course this may lead the Minister to determine that one market within the industry is being injured while others are not being injured, due to different pricing structures. The present case is an example of that difference of injury but as I have said, such a situation may still lead, in certain cases, to a determination by the Minister that the Australian industry is being materially injured.*
>
> *Thirdly, once it is accepted that there may be different levels of injury determined under s.269TAE(1)(e) then it is logical that different levels of dumping duty may have to be imposed on a foreign exporter depending on the market in which the goods are dumped. Section 8 of the Anti-Dumping Act allows dumping duty to be imposed pursuant to s.269TG of the Customs Act declaration equal to the amount by which the amount of the export price of the goods is less than the amount of the normal value of the goods. The level of dumping duty may be varied in accordance with s.8(5) but s.s8(5A) must be taken into account when this is done. There is no reason in s.8 why the Minister has to impose one level of dumping duty. The Minister has the power to impose different levels of dumping duty in particular cases depending on the injury or injuries involved.*[103] [Emphasised portions are those omitted from Glencore's extracts from Lockhart J's judgement.]

[103] See ADC's s.269ZZJ submission, paragraph 101.

168. The ADC submits that as it had previously stated in its s.269ZZJ submission and in REP 473, it is not required to establish that all the applicants or members of the Australian industry were injured from dumped imports, and that it is instead required to consider whether material injury has been or is being caused to the Australian industry by the dumped goods "as a whole". The ADC considered that Justice Lockhart's comments that 'the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria', supports this view.[104]

169. Further, the ADC contends that the Commissioner cannot recommend the imposition of dumping duties on a regional basis, for example by 'carving out' NSW, as there is no mechanism in the Act or Dumping Duty Act by which to do this. Further, it submits that the Injury Direction contemplates there may be instances where injury is confined to a specific region of Australia and this may still amount to material injury to the Australian industry as a whole. The ADC states that the Commissioner does not consider this statement implies that the Minister may impose differential duties to a specific region. Further the ADC points out that this is in contrast to the explicit power of the Minister to impose dumping duties in respect of goods and like goods exported from a particular country or by a particular exporter as provided for in s.269TP of the Act.[105]

170. The ADC also notes that because there were no cooperating exporters from China and Thailand, the ADC could not determine separate dumping duty margins in respect of individual exporters from China and Thailand. The ADC could only determine a separate rate for Yara, an exporter from Sweden, which exported to most states in Australia.[106]

171. For these reasons, the Commissioner submits that the Minister did not err in not exempting exports to NSW or the Pilbara region.

[104] See ADC's s.269ZZJ submission, paragraph 102.
[105] See ADC's s.269ZZJ submission, paragraphs 103-104.
[106] See ADC's s.269ZZJ submission, paragraph 105.

Other submissions

172. Both QNP and Orica in their s.269ZZJ submissions pointed out that the ADC did not conclude that there was no injury to the Australian industry in NSW or the Pilbara, but that the ADC concluded that the Australian industry "as a whole" had suffered from injury that was material during the IP.

173. QNP contended that the injury analysis involved markets that may be described as regional based upon location, however, the ADC's analysis involved the total Australian AN market. Further, QNP submitted that the ADC indicated in REP 473 that there is no mechanism within the Dumping Duty Act that permits the Minister to apply measures on a state-by-state basis and further submitted that the imposition of measures (as suggested by Glencore on a state basis) would be a different consideration to analysing injury to an Australian industry on a regional basis.[107]

174. Orica pointed out that the ADC was not requested to investigate regional dumping during the conduct of Investigation No. 473, and that the ADC was satisfied that the imports from China, Sweden and Thailand had caused and threatened injury that was material to the Australian industry “as a whole”. Orica submitted further that there was no prospect of isolating the injury to regions within Australia once the injury to the whole of the Australian industry had been established, and that the Minister’s decision was the correct and preferable decision.[108]

175. CSBP in its s.269ZZJ submission submitted that Glencore’s final ground of appeal relied 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, whereas the application of measures is on an Australia-wide basis.[109]

Consideration

176. There appears to be two aspects to Glencore’s Seventh Ground of review:

- Firstly, that there was evidence that there was no material injury from dumped imports in NSW or the Pilbara; and

[107] See Section V of QNP’s s.269ZZJ submission, page 4.
[108] See Section IV(c)(vii) of Orica’s s.269ZZJ submission.
[109] See Section IV(a) of CSBP’s s.269ZZJ submission.

- secondly, the Minister should have therefore exempted exports to those markets from the dumping notice.

177. It was made clear by the ADC (in REP 473 and its s.269ZZJ submission), that it did not find that there was "no injury" in NSW or the Pilbara. The ADC found that material injury had been or is being caused to the Australian industry by the dumped goods "as a whole". This is consistent with Lockhart J's comments in *Swan Portland Cement* that 'the expression "Australian industry" in the context of the anti-dumping legislation refers to an industry viewed throughout Australia "as a whole" and does not refer to a part of that industry, whether the part be determined by geographic, market or other criteria'. This finding of the ADC is also consistent with the Injury Direction which, "contemplates that there may be instances where injury is confined to a specific region of Australia and this may still amount to material injury to the Australian industry as a whole."[110] This was discussed and considered in respect of Glencore's First Ground of review.

178. I also agree with the ADC (and the Original Industry Applicants) that in any event there appears to be no mechanism in the Act or Dumping Duty Act for the Commissioner to recommend the imposition of dumping duties on a regional basis, for example by 'carving out' NSW. This is in contrast to the explicit power of the Minister to impose dumping duties in respect of goods and like goods exported from a particular country or by a particular exporter as provided for in s.269TP of the Act, which provides:

> *A notice under subsection 269TG(2), 269TH(2), 269TJ(2) or 269TK(2) in respect of a kind of goods, may, without limiting the generality of those provisions be expressed to apply to:*
>
> *(a) goods of the kind exported from a particular country; or*
>
> *(b) goods of that kind exported by a particular exporter.*

179. On reviewing the full extract of Lockhart J's comments in *Swan Portland Cement*, I agree with the ADC that it does not support exempting NSW or the Pilbara region from the notice, and appears only to be directed at imposing different levels of

[110] See Injury Direction, page 3.

dumping duty, as provided for in s.269TP of the Act, and not the exemption of certain regions from a dumping duty notice.

180. I therefore do not consider that Glencore has demonstrated that the ADC erred in finding that it cannot "carve out" certain states from the dumping duty notice and that the Minister should have exempted exports to NSW or the Pilbara from the dumping notice based on evidence of no material injury in those markets. Glencore's Seventh Ground of review therefore fails.

DBS

181. DBS's grounds of review are considered below:

Ground 1: It is not correct or preferable to find that material injury "has been" or "is being" caused to the Australian industry

182. DBS contends that it is not correct or preferable to find that material injury "has been" or "is being" caused to the Australian industry in that:

    1. 'Material' injury was not caused by dumping, and if there was any injury, it can only have been immaterial, insubstantial and insignificant;

    2. Mandatory injury factors were not considered over injury investigation period; and

    3. There was an incorrect and inappropriate application of the "but for" test.

183. I will separately consider DBS' three sub-grounds of review under Ground 1.

'Material' injury was not caused by dumping, and if there was any injury, it can only have been immaterial, insubstantial and insignificant

DBS' Arguments

184. DBS contends that 'material' injury was not caused by dumping, and if there was any injury, it can only have been immaterial, insubstantial and insignificant.

185. The first part of DBS' above contention relating to causation will be discussed under this sub-ground of review. The second part of this contention relating to the

materiality of the injury will, however, be discussed and considered together with similar claims by Glencore and Yara under Yara's Fourth and Fifth Grounds of review.

186. DBS submitted that based on the wording of s.269TG(1) and (2), material injury must have been caused by dumping, in the period in which injury is assessed. DBS contends that the impacts of dumping in a future period are legally irrelevant, except in the case of a finding of threat of material injury, which has not been made in this case.

187. DBS submitted that a finding that the dumped imports caused material injury is not maintainable in circumstances where the industry is so dominant in the market,[111] and is so profitable, and where the imports are so minimal, and where the factors causing injury are admitted not to have been dumping-related except in the case of seven contracts, being contracts that were newly entered into over a 22 month period of economic activity that was otherwise unaffected by imports.

188. DBS submitted that other factors, such as breakdowns, are referenced as having impacted on the Australian industry. DBS challenges the ADC's causation finding in REP 473 based on only seven examples that were considered appropriate for an injury assessment, out of a total of thirteen examples provided by the Original Industry Applicants.

189. DBS also challenged the 'but for' analysis where the ADC considered what the specific industry applicant's price would have been in the absence of dumping for each contract example and the conclusion that, while there appeared to be factors other than dumping that also caused the reductions in prices, dumping still caused a significant reduction in prices.[112] DBS submitted that there were no other indications that material injury had been suffered as a result of the imports under investigation,

[111] Reference is made to Table 6 of REP 473 (page 57) which indicates that the industry applicants collectively represented 94 per cent of the sales of ammonium nitrate in the Australian market in the period of investigation, and that imports from the countries subject to this investigation constituted 3.1 per cent of the Australian market in totality. DBS submitted that a fair proportion of those imports were imported by the Australian industry itself.

[112] Reference was made to REP 473, page 79.

nor did it appear that the ADC based its injury conclusions on any other factors or evidence.[113]

190. DBS states that the high level of competition between the Australian industry members themselves was discussed by the ADC at Section 9.5.7 of REP 473. According to DBS this competition arose from certain applicants trying to expand their territory and markets into other areas traditionally claimed by other manufacturers, and the onset of higher capacity in the Australian industry because of the establishment of a new production facility at Burrup (Yara Pilbara Nitrate, or "YPN"). DBS submits that when examining price levels and price changes, that pricing was largely affected by the competition between the applicants themselves,[114] and it is more likely that the highly competitive nature of the Australian industry is a far more important determinant of prices. DBS also submits that it is simply not possible for importers to ship high volumes of ammonium nitrate into Australia and reliability of supply being another important factor, which importers are less able to guarantee.[115]

191. DBS also submitted that REP 473 does not establish precisely whose "import prices" are being referred to when alleged "import price parity" demands were made by the customers concerned, that is, whether they were only those of the countries under investigation, or of other countries as well, or whether they included the Australian industry's own imports.[116] DBS submitted that the other factors that it has referred to must have caused injury to the Australian market to a greater extent than the impact of import prices on prices under seven contracts. Further, it submitted that these other factors extended to the production situation of the Australian industry applicants and to all their other sales and contracts over the 22 month period, whereas the impact of import prices only applied to seven contracts, and where the impact was admitted not to be to the exclusion of other factors.

192. For the above reasons DBS requested the Review Panel to determine that REP 473 does not substantiate the accusation that injury was caused by dumped imports.

[113] Reference was made to REP 473, page 90.
[114] In this regard DBS refers to Moncourt's submission published 20 August 2018 and Glencore's submission dated 17 March 2019. See EPR 473, Document #11 & #051.
[115] See DBS' application for review, page 7.
[116] Ibid.

ADC's position

193. The ADC in its s.269ZZJ submission disagreed with DBS' assertions relating to causality.

194. The ADC referred to its findings in REP 473 and its explanation for considering that a 'coincidence analysis' was not appropriate in the particular circumstances, and setting out its approach to assessing injury and causation. The ADC noted that the Act does not prescribe a mandatory or indicative methodology for conducting such assessment and that according to the Manual an alternate analytical method, such as a 'but for' analysis (or counterfactual) could be undertaken when examining causal effects.[117]

195. The ADC referred to the assessment of the thirteen examples of contract negotiations submitted by the Original Industry Applicants in support of their claims that the Goods dumped during the IP affected pricing and volumes, outlined in Section 9.2.1 of REP 473. The ADC submitted that it was open to the Minister to have regard to these, that is, the Minister was not precluded from assessing individual contracts for the purposes of determining injury and causation, noting that s.269TAE(1) of the Act is broad in terms of the matters the Minister may have regard to when determining whether material injury to an Australian industry has been or is being caused. Further, the ADC contended that, given the nature of the sales in the Australian ammonium nitrate market, it was appropriate for the Commissioner to assess the examples provided by each Australian industry applicant in relation to specific occurrences of injury experienced during contract negotiations in order to determine whether material injury had been caused by dumping.[118]

196. The ADC clarified that in determining whether material injury was caused by dumping, the Commissioner only considered injury factors within the injury analysis period, being from 1 April 2014 and did not consider the impacts of dumping for a future unspecified period, as evidenced in the ADC's methodology adopted in REP 473.[119]

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[117] See ADC's s.269ZZJ submission, paragraphs 10 – 15.
[118] See ADC's s.269ZZJ submission, paragraphs 16 and 17 and the documents referred to therein.
[119] See ADC's s.269ZZJ submission, paragraphs 18.

197. For these reasons, the ADC maintained that material injury to the Australian industry had been caused by dumped goods exported from China, Sweden and Thailand.

Consideration

198. The first issue raised by DBS under this sub-ground is that based on the wording of s.269TG(1) and (2), material injury must have been caused by dumping, in the period in which injury is assessed. DBS contends that the impacts of dumping in a future period are legally irrelevant, except in the case of a finding of threat of material injury, which has not been made in this case. The ADC clarified that in determining whether material injury was caused by dumping, the Commissioner only considered injury factors within the injury analysis period, being from 1 April 2014 and did not consider the impacts of dumping for a future unspecified period. The ADC in this regard has referred to the Act which does not define the injury analysis period or prescribe a minimum or maximum period for an injury analysis.[120] The ADC has emphasised repeatedly at the First Conference, in its s.269ZZJ submission and in the Reinvestigation Report, that the injury experienced, in terms of price depression, actually occurred in the investigation period as the industry applicants were responding to the pricing of dumped goods in the IP, when negotiating contracts for future supply. The ADC has submitted that the calculation of the profits foregone in both the IP and the post - investigation Period ("post-IP") was in fact the 'quantification' of the price and volume effects of the price depression that occurred in the investigation period, for the purpose of determining the materiality of the injury. I consider that the ADC's explanation and characterisation of the calculation of profits foregone in the post-IP to be reasonable, and do not consider DBS' characterisation of this calculation as "the impacts of dumping in a future period" to be correct or its conclusion of legal irrelevance to be persuasive.

[120] See also discussion of this issue in Section 2.2.1 of the Reinvestigation Report together with reference to WTO jurisprudence, which has determined that the ADA 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 has determined that an anti-dumping authority may investigate price effects of imports in an injury investigation period, which may be different to the investigation period for dumping. This issue is considered in more detail with regard to the reinvestigated finding related to materiality of injury under Yara's fourth and fifth grounds of review.

199. DBS challenges the ADC's causation finding in REP 473 based on only seven examples that were considered appropriate for an injury assessment. DBS also challenges the 'but for' analysis where the ADC considered what the specific industry applicant's price would have been in the absence of dumping for each contract example and the conclusion that, while there appeared to be factors other than dumping that also caused the reductions in prices, dumping still caused a significant reduction in prices. I have already found, in respect of Ground 3 and in respect of both the first and second components of Ground 6 of Glencore's application for review, that it was open to the ADC to use a 'but for' analysis and that it was not precluded from assessing individual contracts in assessing injury and causation, noting the broadness of s.269TAE(1) of the Act. The ADC explained in detail in REP 473 its consideration of the data and information provided by the Original Industry Applicants in support of their claims, its methodology for assessing causation, its reasons for the rejection of six of the thirteen contracts for its 'but for' analysis (based on lack of causation), its detailed reasoning for the inclusion of each of the seven contracts (based on causation) and its consideration that this information demonstrated a link between dumping and its effect on the Australian industry's prices and volumes.

200. I do not consider that there is sufficient substance in DBS' submission that a finding that the dumped imports caused material injury, "is not maintainable in circumstances where the industry is so dominant in the market, and is so profitable, and where the imports are so minimal". In this regard it should be noted that the Injury Direction states that there is no minimum standard that is used to determine whether dumped imports have a sufficient share of the Australian market to cause material injury.[121]

201. With regard to DBS' contentions that other factors impacted price, such as overcapacity and the high level of competition between the Australian industry members themselves, I noted that the ADC addressed these issues and considered all parties' submissions in this regard in Section 9.5 of REP 473. In its conclusion on this issue, the ADC considered that two of these factors, namely excess capacity in the Australian market and competition between Australian industry producers, may also have caused injury to the Australian industry during the injury analysis period,

[121] See Injury Direction, page 3.

but referred to the Injury Direction that provides that dumping need not be the sole cause of injury to the industry. The ADC points out that the examples used in the assessment of material injury were those where a causal link was demonstrated between the Australian industry's price offers and dumped goods exported to Australia, and that the ADC did not include the examples of contract negotiations in its assessment of injury where no causal link is evident between the dumped goods exported to Australia and price depression.[122] As an illustration of this, the ADC refers to Example 9 which was not included in the injury assessment since competition appeared to be from other Australian industry producers, and in this instance, the ADC did not attribute injury to dumping.[123] I reviewed all the relevant submissions and supporting documents relating to the negotiations of the various examples, particularly Confidential Attachment 15 to REP 473, and do not consider that DBS' arguments to be persuasive or that it has been demonstrated that, in respect of the seven relevant contracts, 'other factors' impacted price to the extent that it detrimentally affected the causal link between the dumping and injury.

202. I considered DBS' concerns that it was not established by REP 473 precisely whose "import prices" are being referred to when alleged IPP demands were made by the customers concerned, and whether they were only those of the countries under investigation, or of other countries as well, or whether they included the Australian industry's own imports. This was similar to the issue raised by Glencore in respect of three examples (4, 6 and 7) in its Fourth Ground of review, which led me to hold the Fifth Conference and request clarifications from the ADC with regard to the IPP calculation in the various relevant examples. It was apparent from the ADC's analysis and supporting spreadsheets and documents, that the substantially higher volume and lower prices of dumped imports in each example had a more substantial influence on the "landed ammonium nitrate price" in the IPP than the other imports, used in the negotiations of the relevant examples referred to by Glencore. This had led the ADC to conclude that the dumped goods had a significant and greater impact on prices relative to other imports.[124] I considered that the ADC's analysis and conclusions were reasonable with regard to Glencore's Fourth Ground of review, which consideration is also applicable to this sub-ground

[122] See Section 9.5.8 of REP 473, pages 89 – 90.
[123] See Section 9.5.8 of REP 473 and Confidential 15 thereto.
[124] See Fifth Conference Summary.

of review of DBS relating to the causal link between the dumped imports and the price effects.

203. DBS also expressed concern as to whether the IPP included the Australian industry's own imports. The issue of the Australian industry's own imports was addressed in Section 9.5.2 of REP 473 where the ADC noted that both Orica and Dyno Nobel had imported the Goods from China during the IP. The ADC found that these exportations of the Goods from China, which were imported by Dyno Nobel and Orica did not influence CSBP's nor QNP's price negotiations or volumes, as outlined in their respective examples.[125]

204. I reiterate the principles of WTO jurisprudence relating to causality and non-attribution analysis that I referred to in the consideration of Glencore's Third Ground of review, that is as expressed in: *US – Hot-Rolled Steel*,[126] *EC – Tube or Pipe Fittings*,[127] and *EU – Fatty Alcohols (Indonesia*).[128]

205. In light of the above discussion, I do not consider that DBS has demonstrated that that the ADC did not take into account 'other factors' in its analysis of injury and causation, nor has it been demonstrated that the ADC erred in its finding that the 'material' injury was caused by dumping.

Mandatory injury factors were not considered over injury investigation period

DBS arguments

206. DBS contends that mandatory injury factors were not considered over the injury investigation period.

207. DBS refers to the fact that the ADC extended the IP for the purposes of determining whether material injury had been caused to the Australian industry (and, resultantly, whether material injury was caused by dumping) to a date some time prior to the

[125] See Sections 9.2.1 and 9.5.2 of REP 473 and Confidential Attachment 15 thereto.
[126] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (WT/DS184/AB/R)*.
[127] *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (WT/DS219/AB/R).
[128] European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia (WT/DS442/R).

publication of SEF 473 on 25 February 2019. DBS stated that it was assumed that this extended-out the period of consideration to 22 months, although the precise extent of that extension is not made clear in Report 473.[129]

208. DBS states that WTO jurisprudence establishes that the injury factors under Article 3.4 of the ADA are mandatory, and that each of them must be evaluated over the period of investigation, such that reasoned, objective conclusions can be drawn by the investigating authority concerned, and in a manner that is consistent with the ADA.[130]

209. DBS submits that in the present case it seems to be self-evident that the ADC has undertaken a traditional analysis of injury during a twelve-month IP. According to DBS it then extended-out that period, as it was entitled to do, to take into account a consideration of certain negotiations and their culmination). DBS contends that in the extended part of the period the required analysis of each of the Article 3.4 factors has not been accomplished.[131]

210. DBS referred to the Panel report in *Argentina – Definitive Anti-Dumping Duties On Poultry From Brazil*[132] *("Argentina – Poultry Anti-Dumping Duties")* which states:

> *…there is a prima facie case that an investigating authority fails to conduct an "objective" examination <u>if it examines different injury factors using different periods</u>. Such a prima facie case may be rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds (because, for example, data for more recent periods was not available for certain injury factors).*[133]
> [emphasis added by DBS]

211. Therefore, DBS submitted that the ADC has not properly undertaken the exercise of assessing whether material injury has been caused to the Australian industry overall, in all relevant respects of that consideration. DBS submits that it was

[129] It should be noted that it was subsequently clarified during the First Conference that the post-IP extended to twelve months after the IP. See First Conference Summary.
[130] See DBS' application for review, page 8.
[131] See DBS' application for review, page 9.
[132] *Argentina – Definitive Anti-Dumping Duties on Poultry From Brazil*, (WT/DS241/R).
[133] Ibid, para 7.283.

necessary to accompany the price reduction analysis engaged in by the ADC with a consideration of: profitability/profits; output; market share; productivity; return on investments; utilization of capacity; factors affecting domestic prices; and effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and to undertake this consideration over the extended period and not just within a shorter twelve month period.[134]

212. In summary, DBS submits that the ADC should have considered all factors that are relevant to the economic condition of the Australian industry within the same time period. DBS contends that the recommendations made to the Minister in REP 473 were therefore not based on the nature and degree of "positive evidence" required, and did not involve an "objective examination", contrary to the requirements of Article 3.1 of the ADA.

ADC position

213. In response to this sub-ground of review, the ADC states in its s.269ZZJ submission, that, "for the publication of a dumping duty notice under s.269TG(2), the Minister must be satisfied, among other things, that because of the dumping, material injury to an Australian industry producing like goods has been or is being caused or is threatened".[135] According to the ADC this requires it to undertake an assessment of the material injury to industry in accordance with s.269TAE of the Act, and with regard to the Injury Direction.

214. Further, the ADC stated that pursuant to the Act, it assessed all the relevant industry factors in Chapter 8 of REP 473, and that this assessment was undertaken using information and data obtained from the Australia industry applicants and other sources identified in Chapter 8 of REP 473. The ADC pointed out further that factors and indices that are relevant to demonstrate the consequent impact of dumped imports on the Australian industry will vary depending on the nature of the allegations and the industry itself and that as noted in Chapters 7, 8 and 9 of REP 473, the ADC did not consider it appropriate to undertake a coincidence analysis

[134] See DBS' application for review, page 10.
[135] See ADC's s.269ZZJ submission, paragraph 21.

where the majority of sales are reflective of contract terms negotiated many years prior to the IP.[136]

215. In assessing whether there was a causal relationship between the dumped imports and the injury to the Australian industry, the ADC submitted that it narrowed its assessment to the injury factors as claimed by the Original Industry Applicants, and assessed whether there was sufficient evidence to establish a causal relationship between the dumped imports and the claimed injury, mainly in the form of price depression, reduction in revenue and reduction in profit. The ADC submits that there was no error in the analysis of the relevant injury factors, pursuant to s.269TAE and for the purposes of the publication of a notice under s.269TG(2).[137]

Other submissions

216. Orica in its s.269ZZJ submission stated that the ADC has made it clear that injury in the form of price depression that it identified (which was significant) "occurred in the investigation period". Orica further pointed out that in quantifying this injury, to assess its materiality, the ADC had regard to the profit forgone on an annualised basis (emphasis added) in the post-IP.[138] Orica contends that the ADC's submission confirms that the profit forgone calculation is based upon some sales occurring within the IP and some post-IP but that "nevertheless", the price depression and lost sales volumes occurred as a consequence of negotiations that occurred in the IP. Orica claims that DBS does not demonstrate where the Minister (or Commissioner) has created an error of law in the assessment of material injury to the Australian industry and contends that that the finding of the Minister is consistent with the legislative requirements and the Injury Direction.

217. QNP also referred to long-term nature of contracts with negotiations commencing at least one year prior to the period of supply. It noted that the contract negotiations are often protracted and call upon available market data (including to a large extent, import pricing). It points out further, that once a contract is agreed, the impact of that

[136] See ADC's s.269ZZJ submission, paragraphs 22-25.
[137] See ADC's s.269ZZJ submission, paragraph 26.
[138] Orica noted that the injury sustained by the Australian Industry goes beyond the 12-month horizon and extends for the duration of the respective contract, which typically have 3-5 year terms. Therefore, Orica considered the ADC's approach in this regard to be conservative.

negotiated contract extends for the full contract period. Therefore QNP submits that the presence of the dumped imports during the IP is supportive of the evidence that the impact of the dumped pricing extends for periods well in advance and post the IP.[139]

Consideration

218. DBS' main contention under this sub-ground of review is that the ADC should have examined all the mandatory injury factors over the extended period (including the post-IP) and not just within the shorter twelve-month IP.

219. It is apparent from REP 473 that the ADC assessed all the relevant industry factors, as set out in Chapter 8 of REP 473, but as pointed out by DBS, this did not extend to post-IP period, other than in respect of profit foregone.

220. In REP 473 the ADC explained in detail the particular circumstances of the industry with regard to long-term contracts and the reasons why a 'coincidence analysis' was not appropriate in the circumstances. In accordance with the Manual, the ADC undertook an alternate analytical method, the 'but for' analysis (or counterfactual) when examining causal effects. The ADC provided a well-reasoned justification for the use of the 'but for' (or counterfactual) analysis, which resulted in the consideration of profit foregone in the IP and post-IP. I have already found, in respect of various other grounds of review, that it was open to the ADC to use a 'but for' analysis and further that the ADC was not precluded from examining individual contracts in its assessment of injury and causation, noting the broadness of s.269TAE(1) of the Act and the wider discretion with regard to the methodology than can be used in the injury and causation analysis.

221. The ADC explained in detail in REP 473, elaborated upon in various conferences, in its s.269ZZJ submission and finally in the Reinvestigation Report, its consideration of the data and information provided by the industry applicants in support of their claims, and the methodology for assessing causation and materiality, using the 'but for' analysis. This ultimately resulted in the ADC's consideration of the 'profits foregone' in both the IP and the post-IP.

[139] See QNP's s.269ZZJ submission, section IV.

222. During the First Conference it became apparent from the ADC's clarifications that the injury experienced, in terms of price depression, actually occurred in the investigation period as the Original Industry Applicants were responding to the pricing of the dumped goods in the IP, when negotiating contracts for future supply. The ADC explained that the calculation of the profits foregone in both the IP and the post-IP was in fact the 'quantification' of the price and volume effects of the price depression that occurred in the investigation period, for the purpose of determining the materiality of the injury.[140] The ADC clarified that in quantifying the materiality of the injury, the ADC had regard to profit forgone in the IP and post-IP, given that some sales occurred in the IP and other sales commenced post-IP, in accordance with the negotiated or re-negotiated contracts, entered into during the IP. The ADC pointed out that regardless of this, the price at which these sales occur has been affected or influenced by the dumping that occurred in the IP. In terms of lost volumes and the quantification of profit forgone in relation to these volumes, the ADC took into consideration the period in which the sales volumes in relation to the relevant industry applicant's bid would have occurred; however, the negotiations for these volumes were still influenced by dumping which occurred during the IP.[141]

223. The above explanation clarifies that the analysis and calculation of "profit foregone" in the post-IP was not a consideration of a mandatory economic factor in an extended injury analysis period, as contended by DBS, but rather, and as repeatedly articulated by the ADC, it was the 'quantification' of the price and volume effects of the price depression (the actual injury) that occurred in the investigation period, resulting from the negotiations. This methodology was relevant to the particular circumstances of the industry in that negotiations resulted in fixed-term supply contracts being entered into, with base prices and minimum volumes fixed during the term of the contract (often three to five years).

224. Therefore, I do not consider that there is a sound basis for DBS's contention that ADC should have considered all mandatory factors that are relevant to the economic condition of the Australian industry within the same time period, being the post-IP, particularly since it was made quite clear that a coincidence analysis was

[140] See Section 9.6 of REP 473 and Confidential Attachment 17 thereto as well as the First Conference Summary for a detailed explanation of the ADC's methodology.
[141] See ADC's written response to Question 2 in the First Conference Summary.

inappropriate for the causation and injury analysis, in the particular circumstances of the industry, and that it was open to the Commissioner to use a 'but for' analysis.

225. I refer to the above-quoted passage in *Argentina – Poultry Anti-Dumping Duties* referred to by DBS in its arguments.[142] I do not consider that the ADC's analysis and calculation of profit foregone in the post-IP can be considered to be an "examination" of a "different injury factor using different periods", for the reasons discussed above. However, even if it could be so considered and a *prima facie* case could be established, I note that it is stated in the passage that such a *prima facie* case may be rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds. I consider that the ADC has in any event comprehensively and reasonably demonstrated that its assessment of the profit foregone in the post-IP was justifiable on the basis of objective grounds, as a result of the particular circumstances existing in the ammonium nitrate market relating to the negotiation of fixed-term contracts.[143]

226. I do not consider that DBS' arguments with regard to this sub-ground of review are persuasive. DBS has not demonstrated that the ADC should have examined all the mandatory injury factors over the extended period including the post-IP.

Incorrect and inappropriate application of "but for" test

DBS arguments

227. DBS contends that there was an incorrect and inappropriate application by the ADC of the "but for" test to determine the effects on the Australian industry's prices of the dumped imports, as applied by the ADC. DBS refers to the explanation of the use of this test in REP 473 and submits that this test is inappropriate in a number of respects, each of which is related to the others:

- it assumes that all other things remain equal;
- it therefore disregards an assessment of other injury factors; and

[142] See DBS' application, page 9.
[143] See reference to the Panel Report in *Argentina – Definitive Anti-Dumping Duties On Poultry From Brazi*l, (WT/DS241/R), para 7.283.

- it does not take into account multiple causes of injury.[144]

228. In this regard DBS draws attention to the following statement in REP 473:

> *The Commission considers that two of these factors discussed above, namely excess capacity in the Australian market and competition between Australian industry producers may also have caused injury to the Australian industry during the injury analysis period; however, the Ministerial Direction on Material Injury provides that dumping need not be the sole cause of injury to the industry*.[145]

229. DBS submits that in adopting a "but for" test, the ADC made no allowance for other factors that it equally felt had some implications for the prices that were ultimately agreed. DBS submits that while dumping does not have to be the sole cause of the injury, "correlation" cannot be equated to "causation".[146]

230. Thus, for this reason as well, DBS considers that the decision was not correct or preferable, on the basis that it was not holistically arrived at in the manner required by law.

ADC position

231. In its s.269ZZJ submission the ADC disagrees with DBS' claims with regard to the 'but for' test and contends that it is open to the ADC to undertake a 'but for' assessment given the circumstances of this particular case. The ADC submits that the Act does not prescribe a mandatory or indicative methodology for conducting assessments of injury and causation. The ADC refers to the Manual and the ADC's Economic Framework for Injury and Causation Analysis[147] which outline that under a 'but for' (counterfactual) analytical method, it may be possible to compare the current state of the Australian industry to the state the Australian industry would likely have been in the absence of dumping.

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[144] See DBS' application for review, page 11.
[145] See REP 473, page 89-90.
[146] Section 269TAE(2A) of the Act.
[147] The ADC noted that this document is available at: https://www.industry.gov.au/sites/default/files/acd_injury_and_causation_framework_overview.pdf .

232. The ADC pointed out that in undertaking a 'but for' assessment in Investigation 473, it compared the actual prices achieved by the Australian industry with counterfactual prices, or prices in the absence of dumping. It submitted that as stated in Sections 9.2.1 and 9.2.2 of Chapter 9 of REP 473, the ADC only had regard to examples where there was evidence that the prices and volumes of the Australian industry were affected by dumping.[148] Therefore, the ADC did not include in its assessment of injury (including in the 'but for' or counterfactual assessment), the six examples that did not or could not demonstrate that injury (in the form of price depression or loss of sales volumes) was caused by dumping.[149]

233. The ADC further submitted that for those examples where there was evidence that the dumped prices did affect the Original Industry Applicants' prices, it then determined what those prices would have been in the absence of dumping (referred to as the counterfactual or 'but for' assessment), as outlined in section 9.2.2 of REP 473. The ADC contends that, importantly, the 'but for' assessment was informed by and based on evidence provided by each Australian industry applicant that directly linked the dumped goods to the Australian industry's prices. This included copies of contracts and price offers, correspondences between the Australian industry applicants and their customers, and Australian Bureau of Statistics ("ABS") and other trade data used by the applicants, including documentation relevant to other market intelligence relating to competitor pricing in the Australian market, including pricing based on imports of the Goods from some countries subject to the investigation.[150] The ADC stated that it also obtained positive evidence that in certain circumstances the customer had insisted that the Australian industry match an import parity price based on dumped pricing from a particular country the subject of the investigation. The ADC stated that the Commissioner considered that this information demonstrated a causal relationship between the dumped imports and the injury to the Australian industry.[151]

234. The ADC explained further that based on the assessment outlined in section 9.2.2 of REP 473, it found that the negotiated prices (or prices that were matched) were,

[148] The ADC pointed out that out of the 13 examples provided by the Original Industry Applicants, six examples did not or could not demonstrate that injury (in the form of price depression or loss of sales volumes) was caused by dumping.
[149] See ADC's s.269ZZJ submission, paragraph 33.
[150] Reference was made to Confidential Attachment 15 of REP 473.
[151] See ADC's s.269ZZJ submission, paragraphs 34-36.

on average, approximately 24.3 per cent lower than the contract prices existing at the time of the negotiation. To quantify the effect of dumping only, the ADC compared the negotiated prices adjusted for dumping (the 'undumped' price) to the negotiated prices, and found that, in the absence of dumping, the Australian industry's prices would be on average approximately 17.8 per cent higher than the negotiated prices. According to the ADC this is the best estimate, quantitatively, of the effect of dumping on the Australian industry's prices, based on all relevant facts and evidence before the ADC during the investigation. The ADC states that the Commissioner considers that this approach is conservative, as it only assesses the relevant contracts where prices have been affected by dumping, assesses the degree to which dumping has affected these prices, and has not attributed factors other than dumping to the price reductions.[152]

235. The ADC submits that therefore it considers that, while there appear to be factors other than dumping that may also have contributed to the reductions in prices, dumping has still caused a significant reduction in prices which resulted in material injury to the Australian industry, noting that dumping need not be the sole cause of injury.[153] Therefore, the ADC contends that DBS' claim that it did not take into consideration other factors that may have caused injury is incorrect.

Other submissions

236. CSBP in its s.269ZZJ submission submitted that in light of the lengthy negotiation periods for contract renewals and the length of the contracts, this use of the "but for" methodology in examining price-effect injury to the Australian industry is correct and preferable for the circumstances of the AN industry.

Consideration

237. I have already found, in respect of various other grounds of review, that it is open to the Commissioner to use a 'but for' (or counterfactual) analysis in the particular circumstances of the industry with regard to the negotiation of fixed term contracts. [154]In addition, it should be noted that, as pointed out by the ADC, the Act does not

[152] See ADC's s.269ZZJ submission, paras 37-38.
[153] The ADC made reference to the Injury Direction in this regard.
[154] In this regard reference is made to the consideration of: Glencore's Third Ground of review; the first and second components of Glencore's Sixth Ground of review; and the first sub-ground of DBS' First Ground of review.

prescribe a mandatory or indicative methodology for conducting assessments of injury and causation.

238. I consider that the ADC's explanation of the use of the 'but for' test in REP 473 and as clarified in detail in its s.269ZZJ submission is comprehensive and effectively addresses the concerns and claims of DBS in this sub-ground of review. I consider that the 'but for' analysis is based on facts and data provided by each industry applicant, as well as information and data obtained from other sources, including importers, exporters, end-users and Australian Border Force ("ABF") data. In addition, as discussed above, a number of the issues raised by DBS with regard to the 'but for' test have been addressed elsewhere in this report.[155]

239. I am therefore not persuaded by DBS' arguments in support of its contention that there was an incorrect and inappropriate application by the ADC of the "but for" test to determine the effects on the Australian industry's prices of the dumped imports, as applied by the ADC. In addition, it has not been demonstrated that the ADC's use of the 'but for' methodology was in any way contrary to Australian legislation, the Manual or the Injury Direction. This sub-ground of review therefore fails.

Ground 2: Incorrect cumulation of exports from Sweden

240. DBS contends that it is not correct or preferable to find that the exports from Sweden should be cumulated with other exports and submitted that in arriving at this finding REP 473 has incorrectly conflated the concept of "competition" per se with the different concept of the "conditions of competition" under s.269TAE(2C).

241. This ground of review of DBS will be considered together with Yara's Second Ground of review below, due to the overlap of their respective claims relating to cumulation.

[155] See consideration of: Glencore's Third Ground of review; the first and second components of Glencore's Sixth Ground of review; and the first sub-ground of DBS' First Ground of review.

YARA

242. In addressing Yara's grounds of review and for reasons that will become clear in the discussion below, I consider it appropriate to address Ground 2 of Yara's application for review before addressing Ground 1.

Ground 2: The effect of Yara's exports should not be cumulated with exports from China and Thailand

243. This ground of review of Yara will be considered together with Ground 2 of DBS' application for review because of the similarities. Both Yara and DBS contend that the decision to cumulate the effects of exports from Sweden by Yara with those of China and Thailand for the purposes of the material injury determination under s.269TAE(1) of the Act is not the correct or preferable decision.

244. One of the requirements of cumulation under s.269TAE(2C) is that the Minister should be satisfied that it is "appropriate to consider the cumulative effect of those exportations, having regard to the conditions of competition between those goods, and the conditions of competition between these goods and like goods that domestically produced.[156] Both Yara and DBS submit that it was not the correct decision to cumulate the effect of the Goods from Sweden, Thailand and China, having regard to the conditions of competition, as required by s.269TAE(2C)(e).

245. Yara submits that the law does not assume that a cumulative consideration of the effect of the exportation of the Goods from different countries is something that will arise as a matter of course, but rather an option that is open to the Minister if certain conditions precedent are met. Yara contends that, even where those conditions are met, the Minister may still opt not to consider the cumulative effect of exportations from different countries of export.[157]

246. Yara submits that REP 473 isolates the effect of the exports to the seven negotiations and in each instance, the effect, be it a price effect or a volume effect, can be linked to exportations from specific countries or importations generally. Yara

[156] See s.269TAE(2C)(e) of the Act.
[157] See Yara's application for review, page 13.

submits therefore that there is no need to consider the "cumulative" effect of the exports and that the preferable decision is not to do so.[158] DBS submits that the Minister should consider the cumulative effect of those exports only if “appropriate” to do so in the context of s.269TAE(2C).[159]

247. DBS refers to the ADC finding in REP 473:

> *The Commission considers that the goods exported from Sweden compete with goods exported from China and Thailand, and like goods that are domestically produced given that these goods are sold to the same or similar customers and are interchangeable in end-use applications*.[160] [underlining by DBS]

DBS submits that the conditions of competition between exports from Sweden and exports from other countries and the Australian industry’s sales are “demonstrably different” and both DBS and Yara set out in their respective applications for review what they consider to be “the unique circumstances” surrounding the exportation of the Goods from Sweden during the IP,[161] summarised as follows in Yara's submission to the ADC dated 5 December 2018:

> *Yara's exports were:*
>
> [redacted]
>
> - *For the benefit of the Australian industry producing like goods.*
>
> [redacted]

[158] Ibid.
[159] See DBS’ application for review, page 13.
[160] See REP 473, page 51.
[161] Yara referred to its submissions to the ADC dated 27 September 2018 and 5 December 2018 in which the circumstances regarding Yara's exports to Australia were explained and DBS also refers to its submission to the ADC dated 19 March 2019. See Documents #018, #028 and #059 of EPR 473.

- *To Yara's knowledge, do not directly compete with imports from China of Thailand, nor with the production of the Australian industry.*[162]

248. In its application for review Yara refers to REP 473's specific rejection of Yara's submission regarding cumulation and addresses in turn the various points made in REP 473 in this regard.[163] Of relevance, is Yara's submissions relating to a bid to supply a certain customer. Yara refers to REP 473 where it is stated:

> *... the Commission has information that Yara has competed, at dumped prices, directly with certain Australian industry members for a significant contract during the investigation period* ...[164]

249. Yara considered this to be mere speculation and states definitively that it has not been awarded this supply contract and has not made exports under this supply contract. It submits that the ADC has not conducted an investigation such that it can actually state prices offered were "at dumped prices". Yara reiterates what was stated in its submission dated 5 December 2018, that the feedback from the customer was that Yara's price offer was simply not competitive with those offered by members of the Australian industry.[165]

250. Yara reiterated the following, arising from its counterarguments in respect of REP 473:[166]

- Yara did not export any product to the Western Australian market.
- Yara did not compete to supply any entity in the West Australian market.
- It is apparent that CSBP did not consider data regarding Yara's prices when negotiating prices in examples 1, 2 and 3.
- With regard to QNP, example 5 and example 6 (second negotiation) relate to scenarios where QNP's offer was rejected, and the customer sought supply from export sources. Yara submitted that these could not have been Yara,

[162] Yara refers to page 8 of its submission to the ADC of 5 December 2018 (Document #028 of EPR 473), page 14 of Yara's application for review.
[163] See Yara's application for review for the details of these arguments, pages 15 – 17.
[164] See REP 473 at page 50.
[165] See Yara's application for review, page 15.
[166] See Yara's application for review, pages 16 – 17.

because Yara only had one customer in Australia and its relationship with that customer existed prior to the period of investigation.

- With regard to example 4, 6 (second negotiation) and 7, Yara submitted that did not compete for supply of these contracts.

- The prices which Yara exported its product to Australia were derived due to specific circumstances and were not on offer to the market generally.

251. Yara submitted that it is therefore inappropriate to cumulate the effect of the exports from each of the subject countries, because doing so:

    - attributes injury that has been found to have occurred in the West Australian market to Yara's exports, in factual circumstances in which Yara could not have caused that injury;[167]

    - attributes loss of contracts to Yara's exports in circumstances where Yara did not tender for or win any additional contracts; and

    - is unnecessary, because the information before the ADC allows it to ascertain the impact of different countries' exports on each of the seven examples that form the basis of the injury finding.[168]

252. Yara submits that ultimately, REP 473 appears to take the position that as long as there is some degree of competition between the exports from the subject countries, as well as between those exports and the sale of goods of the same kind produced by the Australian industry, then it will be appropriate to cumulate the effect of the exports from the subject country. Yara contends that on the plain text of the Act, that is clearly not the case, and that the conditions of competition are the jumping off point for considering whether it is appropriate to cumulatively assess the effect of exports.

253. Yara submits that s.269TAE(2C)(e) refers to the "effect of the exportations", and as it suggested, ascertaining the effect of the exportation on the price paid for the

[167] According to Yara, REP 473 considers that the divide between the east and west market is significant when it comes to determining the USP and it is equally significant when determining the impact of the goods from Sweden.
[168] See Yara's application for review, page 17.

Goods produced by the Australian industry and on the relevant economic factors of the Australian industry is fundamental to a determination under s.269TAE(1). Yara submits that if the exports have not had an effect on the Australian industry, then they cannot be considered to have caused the Australian industry injury, material or otherwise.

254. Besides emphasising the unique circumstances of the Swedish exports, DBS also referred to the fact that ammonium nitrate exported from Sweden was relevant to only two of the thirteen contract examples employed in the causal link analysis. It pointed out that those examples (8 and 9) were not deemed relevant to the injury assessment.[169]

255. DBS submits that the conditions of competition as related to imports from Sweden were demonstrably different to the conditions of competition that applied to exports from China and Thailand and to the sales of the Original Industry Applicants, and that they should not be cumulated with the exports from the other countries for the purposes of arriving at an injury finding.

ADC Position

256. The ADC in its s.269ZZJ submission disagrees with DBS and Yara's claims.

257. The ADC referred to the Manual which sets out what an assessment of the conditions of competition may entail.[170] The ADC then set out what it considered to be the conditions of competition in relation to the Goods exported from Sweden, analysing and assessing each such conditions of competition, with reference to the guidelines of the Manual.[171]

258. The ADC further referred to Chapter 5 of REP 473, where the ADC described the nature of competition in the Australian ammonium nitrate market, and had found that bulk explosives and associated services providers, such as DBS, either source the Goods from the Australian industry, or import the Goods from various countries, including the subject countries. The ADC found that the bulk explosives and associated services providers that source the Goods from the Australian industry

[169] See DBS' application for review, page 15.
[170] See ADC's s.269ZZJ submission, paragraph 44, and the Manual, pages 134 - 35.
[171] See ADC's s.269ZZJ submission, paragraph 45.

directly compete with other providers that import the Goods, such as DBS, which also compete amongst themselves.[172]

259. The ADC disagreed with Yara's claim that it was "mere speculation" that Yara had competed directly with certain Australian industry members for a significant contract during the IP.[173] The ADC found that [redacted][74] The ADC further stated that [redacted][75] The ADC disagreed with Yara's claim that, because it had not been awarded this contract, it was irrelevant to the ADC's consideration of conditions of competition. Further, the ADC considered that Yara's claim that the ADC has "not conducted an investigation such that it can actually state prices offered were at dumped prices"[176] to be incorrect and referred to the ADC's assessment at Confidential Attachment 2 to the ADC's submission which, the ADC contended, demonstrated that Yara's bids were at significantly dumped prices.

260. The ADC also found that ammonium nitrate is a commodity product and end users are unlikely to discern significant physical or functional differences. The Commissioner therefore considered that the products are highly substitutable and interchangeable and therefore considered it appropriate to cumulate the exports from Sweden with exports from China and Thailand, given that these goods all compete on price.[177]

261. The ADC further disagreed with DBS' and Yara's claims that, because the Goods exported from Sweden are purchased in accordance with [redacted] the Goods should not be cumulated with goods exported from China and Thailand. The ADC found that DBS has imported the Goods at significantly dumped prices from Sweden in accordance [redacted]

[172] See ADC's s.269ZZJ submission, paragraph 46.
[173] See ADC's s.269ZZJ submission, paragraph 122.
[174] [redacted] were provided at Confidential Attachment 1 to the ADC's s.269ZZJ submission.
[175] Reference was made to Confidential Attachment 15 to REP 473 in this regard.
[176] The ADC referred to Yara's application for review, page 16.
[177] See ADC's s.269ZZJ submission, paragraph 47.

[redacted] The ADC submitted that the Commissioner does not consider that the [redacted], precluded the ADC from considering the cumulative effect of the Goods exported from Sweden. According to the ADC s.269TAE(1) specifically allows the determination of material injury to an Australian industry because of *any circumstances* in relation to the exportation of the goods to Australia from the country of export. This encompasses the "unique circumstances" relevant to the Goods exported from Sweden.

262. Therefore, the Commissioner did not agree with the 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.[178]

263. The ADC drew the Review Panel's attention to the Minister's satisfaction of the remaining criteria under s.269TAE(2C) of the Act, which had not been disputed by DBS and submitted that the Minister made the correct or preferable decision to consider the cumulative effect of the dumped exports from China, Sweden and Thailand.[179]

Other Submissions

264. CSBP in its s.269ZZJ submitted that DBS had not demonstrated that the grounds for cumulation relied upon by the Commissioner (and hence the Minister) were an error of law or that it was inconsistent with the requirements of s.269TAE(2C).[180]

265. Orica in its s.269ZZJ submission submitted that the ADC addressed the requirements for cumulation of the dumped exports and was satisfied that each of the requirements of s.269TAE(2C) had been met. Further Orica submitted that having also considered that the Goods (from exporters in China, Sweden and Thailand) and the Goods produced by the Australian industry (i.e. the like goods)

[178] See ADC's s.269ZZJ submission, paragraph 50.
[179] See ADC's s.269ZZJ submission, paragraph 51.
[180] See CSBP's s.269ZZJ submission, section IV(b).

are used in the same end use applications and can be substituted, the ADC was satisfied that the conditions of competition as detailed in s.269TAE(2C)(e) were met, and that it was therefore appropriate to cumulate the injurious effects of the exports.[181]

266. QNP in its s.269ZZJ submission refutes the claim that Yara's exports were supplied to a single customer in the Australian market and that therefore any impact from its exports is isolated. It submitted that the pricing of the imports was publicly available (i.e. import statistics) and would have been used by DBS in representations to existing and prospective customers (including mining customers or other service providers, all of whom are or could be direct customers of the domestic AN industry). QNP agreed with the ADC's assessment in this regard that the Australian importer of the Yara exports has "on-sold the Goods to other entities within the market" thereby impacting the broader AN market. Further, QNP submitted that the ADC's conclusions concerning the availability of the Swedish imports from Yara are consistent with QNP's understanding that the importer had offered the imported goods for supply to a range of entities.[182]

Yara's Concerns and the Fourth Conference

267. In considering Yara's claims in REP 473 the ADC found that the particular circumstances of the Goods exported from Sweden do not support the assertion that they do not compete with goods exported from China and Thailand. The ADC also referred to the fact that Yara had competed at "dumped prices" directly with certain Australian industry members for a significant contract during the IP and that the Original Industry Applicants had presented evidence to the ADC that they take into consideration import prices, including the relatively low import prices from Sweden, and that this contributed to the injury experienced by the industry as a whole.

268. In its application for review Yara had contended this to be mere speculation, stating definitively that it has not been awarded this supply contract nor had it made exports under this supply contract. It submitted that the ADC had not conducted an investigation such that it could actually state prices offered were "at dumped prices".

[181] See Orica's s.269ZZJ submission, section IV(ii).
[182] See QNP's s.269ZZJ submission, section V.

269. In its s.269ZZJ submission the ADC countered both Yara and DBS's claims in respect of cumulation. The ADC stated that Yara's claim that the ADC has "not conducted an investigation such that it can actually state prices offered were at dumped prices" was incorrect, and attached the "Commission's assessment" in this regard at Confidential Attachment 2, which the ADC stated "demonstrates that Yara's bids were at significantly dumped prices."[183]

270. In a letter received by the Review Panel on behalf of Yara dated 31 October 2019, Yara expressed concern that the ADC indicated in its s.269ZZJ submission that it had in fact assessed Yara's bids, with the ADC's assessment being at Confidential Attachment 2 to its submission, which according to the ADC demonstrated that Yara's bids were at significantly dumped prices. Yara submitted that it was not made aware of the ADC's assessment of the bid until the ADC's s.269ZZJ submission of 21 October 2019 nor had it been provided with either the ADC's assessment of its bid nor the opportunity to comment on the ADC's assessment of its bid.

271. The Review Panel therefore decided to hold the Fourth Conference to obtain further information and clarification relating to the ADC's assessment of the bid and to provide Yara with information relating thereto, and to further to provide Yara with an opportunity to comment on that information and on the ADC's assessment that related to Yara. Prior to and in preparation for the conference, certain additional information was disclosed to Yara, in so far as it related to Yara's Second Ground of review.

272. During the Fourth Conference:

- the ADC clarified that the relevant tender was not one of the seven examples which informed the assessment of injury.

- Yara submitted that there had been no "exportations" in relation to this tender and, therefore, the bid was not legally relevant to cumulation, in particular with reference to s.269TAE(2C)(e) of the Act, which it contended relates to the "effect of the exportations of goods to Australia".

[183] See ADC's s.269ZZJ submission, para 125.

- Yara submitted further that it had now been established that the relevant contract was not considered to be materially injurious, and for that reason it was, irrelevant.

- Yara challenged aspects of the dumping calculation, and pointed out that not only was the comparison with normal value not at the same time as any exports which would have been made, but there were also no adjustments made for any differences in the goods or the terms of the contract. Therefore, Yara did not consider the bid to be relevant to cumulation.

- The ADC submitted that the purpose of the calculation was to compare the pricing in this bid to export prices during the IP and if the pricing was very different to what was found to be the dumped price, then that would be relevant to assessing the conditions of competition. The ADC pointed out that it had made comparisons between the indicative price and actual export prices close in time during the IP, and found the pricing to be almost identical. The ADC submitted that this showed that ammonium nitrate exported to Australia from Sweden competes with ammonium nitrate produced locally.[184]

- Yara suggested that, for the above reasons, the Review Panel should disregard the bid and the ADC's analysis of that bid from its consideration.

Reinvestigation of the finding relating to cumulation

273. In light of the above, I decided to request the ADC to reinvestigate its finding of cumulation taking into consideration Yara's comments on the ADC's assessment of the bid during the Fourth Conference and its subsequent written submission following the Fourth Conference, as well as information contained in Confidential Attachments 1 and 2 of the ADC's s.269ZZJ submission. In particular, I requested the ADC in its reinvestigation to take into consideration the following:

[184] See Fourth Conference Summary. In particular, Yara's submissions are set out in detail in its written response forming part of the Fourth Conference and attached to the Fourth Conference Summary as Attachment 1.

a. Yara's submission that it considers the analysis to be legally erroneous and unsound, in that the bid was not an "exportation" in accordance with s.269TAE(2C) and has no bearing on the decision to cumulate.

b. Yara's submission that the bid was factually irrelevant to the question of cumulation because the relevant tender was not one of the seven tenders that was found to have injured the Australian industry, and that there appeared to be no causal link between the Swedish exports and the injury suffered by the domestic industry.

c. Yara's actual analysis of the bid and its contention that the ADC's analysis is inaccurate, unsupported and without merit.

d. Other parties' submissions to both the ADC and the Review Panel on this issue, as well as all other relevant information and documents.[185]

274. In the Reinvestigation Report, the ADC observed that s.269TAE(2C) is derived from Article 3.3 of the ADA and referred to WTO jurisprudence where it was found that the ADA did not direct or guide members on how 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 by the ADC].[186] The ADC noted that the Appellate Body understood the phrase "conditions of competition" to refer to the "dynamic relationship between products in the marketplace".[187]

275. According to the ADC, 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 ADA, which is reflected in the drafting of the domestic legislation which similarly does not provide guidance on how this assessment should be undertaken. According to the ADC, this gives the decision-maker some flexibility and discretion when conducting the assessment. The ADC

[185] See Section 2 of the Reinvestigation Request.
[186] In this regard the ADC referred to Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (*WT/DS219/R), para 7.241.
[187] Ibid, paragraph 7.242 refers.

points out that while there is no legislated methodology for assessing the conditions of competition under s.269TAE(2C)(e), 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.[188] According to the ADC, in assessing the "conditions of competition", it had followed the guidance as outlined in the Manual.[189]

276. The ADC made the following findings in the Reinvestigation Report regarding Yara's bid for a particular supply contract, which was the focus of the Fourth Conference and the reinvestigation:

- In response to Yara's submission that the bid was not legally relevant to cumulation, as there had been no "exportations", the ADC found that unlike the assessment required under s.269TAE(1), which requires the Minister to determine actual (or potential) injurious outcomes, the assessment under s.269TAE(2C)(e) is concerned with identifying which goods are in competition with each other. Therefore it found that it was open to the ADC to consider all genuine offers to supply ammonium nitrate in identifying which goods are in competition with each other, in accordance with s.269TAE(2C)(e).

- The ADC disagreed with Yara that the bid was "factually irrelevant" to the question of cumulation since Yara was not awarded the contract and the relevant tender was not one of the seven tenders found to have injured the Australian industry. In this regard the ADC considered that the assessment of the conditions of competition under s.269TAE(2C) is separate to the analysis required under s.269TAE(1). The ADC considered that the relevant fact was that Yara participated in the request for tender and competed with other suppliers in the market, with its bid being genuinely considered.

- Yara's assertion that its exports have not caused injury to the Australian industry was not supported when its customer is an active participant in the Australian ammonium nitrate market. While Yara was not a negotiating party

[188] Reference was made to Chapter 8 of the Manual.
[189] See Reinvestigation Report, page 22.

in any of examples used in the injury assessment, its exports, including its significantly lower export prices, were referred to in the negotiations with the Australian industry applicants providing evidence that the prices of the goods exported from the subject countries were used in deriving their bid prices when negotiating the relevant contracts.

- The ADC found that the analysis of the bid was not 'inaccurate, unsupported and without merit, as claimed by Yara'. The analysis was undertaken by having regard to Yara's bid price (explicitly referenced in the bid in relation to date and on particular terms) and Yara's verified data was used to ascertain the normal value.

- The ADC did not rely solely upon Yara's bid in determining whether it is appropriate to consider the cumulative effects of the exports from Sweden, Thailand and China, but also the other factors outlined in section 3.3 of the Reinvestigation Report.

277. The ADC confirmed the same general findings relating to what it considered to be the conditions of competition in relation to the Goods imported from Sweden, as in REP 473 and its s.269ZZJ submission, assessing each condition with reference to the guidelines in the Manual. The ADC also confirmed its analysis relating to DBS' and Yara's claim that, because the Goods exported from Sweden are purchased in accordance with a [redacted], the effects of exportations of goods from Sweden should not be cumulated.

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

279. The ADC did not agree with Yara's contention that it has "failed to explain why it is preferable to cumulate the effect of the Swedish exports", and points out that its assessment at Section 7.5.1 of REP 473 and Section 3.3 of the Reinvestigation

Report was undertaken in accordance with s.269TAE(2C), which prescribes the factors that the Minister must be satisfied of in determining whether to consider cumulation.

280. Finally, the ADC stated that it remained satisfied of the other criteria under s.269TAE(2C), which had not been disputed by DBS nor Yara, and affirmed its finding that it was appropriate to consider the cumulative effect of the dumped exports from China, Sweden and Thailand.

Consideration

281. This ground of review turns on whether one of the particular requirements for cumulation under s.269TAE(2C) was met, relating to "the conditions of competition", as required by s.269TAE(2C)(e) and whether it was "appropriate" to consider the cumulative effect of the Goods exported from Sweden, having regard to such conditions of competition. In my consideration, I have reviewed and had regard to REP 473, the relevant applications for review, all relevant submissions to both the ADC and the Review Panel, the Reinvestigation Report and further information obtained and conclusions reached at relevant conferences.

282. At the outset, it is important to note that there is no prescribed methodology in the legislation for the Minister to assess the conditions of competition in s.269TAE(2C)(e), in order to be satisfied that it is "appropriate" for cumulation. The ADC in the Reinvestigation Report appropriately referred to WTO jurisprudence relating to Article 3.3 of the ADA (from which s.269TAE(2C) is derived), which has relevantly found that the ADA does not direct or guide members on how they should assess the conditions of competition between products, and further that an investigating authority enjoys "a certain degree of discretion" in making that determination on the basis of the record before it'. In addition, it was noted in the WTO jurisprudence that the phrase "conditions of competition" refers to the dynamic relationship between products in the marketplace and that 'the phrase is not accompanied by any sort of qualifier (for example, "identical" or "similar")'.[190]

[190] See *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazi*l (WT/DS219/R), para 7.241 and 7.242.

283. I have taken note of the ADC references to WTO jurisprudence on "conditions competition" since s.269TAE(2C) enacts Article 3.3 of the ADA into our legislation and, in particular, subsection (2C)(c) relating to "conditions of competition" is similarly worded to that of Article 3.3. The role and powers of the Review Panel in a review is relevant, as articulated by the former Senior Member of the Review Panel (The Hon Michael Moore) in ADRP Report No. 24:[191]

> *It seems to me that having regard to the fact that the Panel will ordinarily have to undertake a review in a comparatively short time frame against a background where the Commissioner will have ordinarily undertaken an extensive process of investigation and reporting, and also having regard to the fact that the Panel can require the Commissioner to reinvestigate, the Panel's role in a review does not entail full reinvestigation of matters considered by the Commissioner and raised by interested parties in the application for review. The investigation by the Commissioner will often entail the evaluation by the Commissioner of material gathered in the investigation both from overseas and domestically. That evaluation may involve subsidiary conclusions or decisions involving assessment and judgment. I do not see the Panel's role as involving this type of evaluation afresh. Rather the Panel's role includes, by way of illustration, assessing whether there has been inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Act or relevant regulations*. [emphasis added]

284. I will therefore, in my consideration of the issue at hand, examine whether the ADC conducted a comprehensive and proper assessment of all the facts and legal issues, without taint of error of law or fact, and will assess whether the resulting decision is the correct or preferable one.

285. The ADC has pointed out that while there is no legislated methodology for assessing the conditions of competition under s.269TAE(2C)(e), the Manual does provide guidance and in assessing the "conditions of competition", it has followed

[191] ADRP Report No. 24 - Power Transformers exported from the Republic of Indonesia, Taiwan, the Kingdom of Thailand and the Socialist Republic of Vietnam, paragraph 14.

the guidance as outlined in the Manual. I consider this approach to be appropriate and reasonable.

286. The ADC provided a detailed analysis of the conditions of competition in relation to the Goods exported from Sweden in REP 473, further clarified in its s.269ZZJ submission, the Fourth Conference and as reinvestigated and reported in the Reinvestigation Report, and has explained its reasons for rejecting each of Yara's and DBS' submissions. In the Reinvestigation Report, the ADC addressed all the issues arising from the Fourth Conference and the issues identified in the Reinvestigation Request, particularly relating to Yara's claims regarding its bid for a particular supply contract.

287. I will firstly address the issue of Yara's bid for a particular supply contract, which was the focus of the Fourth Conference and the reinvestigation.

288. In response to Yara's submission that there had been no "exportations" in relation to this tender and, therefore, the bid is not legally relevant to cumulation, the ADC found that unlike the assessment required under s.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 s.269TAE(2C)(e) is concerned with identifying which goods are in competition with each other (for the purpose of considering the cumulative effect of those exportations). I would agree with the ADC's interpretation of the legislative provision, that they are separate assessments. I consider that the reference to "exportations" in the chapeau of s.269TAE(2C)(e) is in respect of considering the "cumulative effect" and not in respect of the assessment of the "conditions of competition". I disagree with Yara's interpretation in its written response during the Fourth Conference, that when referring to the chapeau of s.269TAE(2C) that the section is concerned with the "effect of the exportations of goods to Australia". I consider that Yara has taken the emphasised phrase out of context and that in fact while s.269TAE(1) and (2) are concerned with the effect of exportations of goods to Australia, s.269TAE(2C) is concerned with whether "for the purposes referred to in subsection (1) or (2)", the Minister should consider the cumulative effect of those exportations, setting out the various requirements to satisfy the Minister. One such requirement for determining if it is appropriate to consider cumulation is to have regard to the "conditions of competition" under s.269TAE(2C)(e), which as stated by

the ADC, is separate analysis. I consider that the ADC's interpretation of the legislation is reasonable and agree that it would be open to the ADC to consider all genuine offers to supply ammonium nitrate in identifying which goods are in competition with each other, in accordance with s.269TAE(2C)(e). Yara has not demonstrated that the relevant bid is not legally relevant to cumulation.

289. Yara had also contended that the bid was not factually relevant to the question of cumulation because Yara was not awarded the contract and that the relevant tender was not one of the seven tenders found to have injured the Australian industry. The ADC also disagreed with this contention since it considered the assessment of the conditions of competition under s.269TAE(2C) to be a separate analysis to that required under s.269TAE(1), as discussed above, and found that regardless of the assessment of the bid, and whether Yara was awarded the contract, the relevant fact to the ADC was that Yara participated in the request for tender and competed with other suppliers in the market, with its bid being genuinely considered, as part of the assessment of the conditions of competition. I consider that the approach taken by the ADC in this regard is reasonable and not inconsistent with s.269TAE(2C)(e).

290. The ADC found that Yara's assertion that its exports have not caused injury to the Australian industry, is not supported when its customer is an active participant in the Australian AN market, bearing in mind that competition in the Australian market is based on bids to supply customers in response to requests for tender for fixed term contracts. The ADC stated that while Yara was not a negotiating party in any of the examples used in the injury assessment, its exports, including its significantly lower export prices were referred to in the negotiations. Further, the ADC found that the Original 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.[192] The effects of the dumped imports (including from Sweden) on the prices relating to the negotiations of the seven contracts, has already been considered in other parts of this report. Again, I do not consider that there was anything unreasonable in the approach taken by the ADC.

[192] The details of these negotiations were set out in Confidential Attachment 15 to REP 473.

291. Yara claimed that the analysis of the bid was 'inaccurate, unsupported and without merit'. This issue was the focus of the Fourth Conference, arising out of concerns expressed by Yara with regard to certain statements in the ADC's s.269ZZJ submission and Confidential Attachments 1 and 2 thereto. Yara had challenged the ADC statements that the bids were at "significantly dumped prices" and had challenged the calculation methodology as not being in accordance with s.269TAB, s.269TAC and s.269TACB. The ADC had stated during the Fourth Conference that the purpose of the calculation was to compare the pricing in this bid to export prices during the IP, to determine if the pricing was similar and therefore relevant to assessing the conditions of competition. The ADC pointed out during the Fourth Conference that it had found the pricing to be almost identical.[193] The ADC submitted in the Reinvestigation Report that 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 was used to ascertain the normal value. I reviewed Confidential Attachment 1 and 2 of the ADC's s.269ZZJ submission to understand the basis of the calculation as clarified by the ADC during to Fourth Conference, and found it to be sound, bearing in mind that that the calculation was undertaken for the purpose of assessing the conditions of competition. While Yara may have been correct in that the methodology of determining that the bid was at "dumped prices" was not strictly in accordance with s.269TAB, s.269TAC and s.269TACB, I do not consider that is what was required in the circumstances. As stated by the ADC, the purpose of the calculation was to determine if the pricing was similar to Yara's dumped exportations during the IP, which would be relevant to assessing the conditions of competition for the purpose of s.269TAE(2C)(e). I consider that the approach taken by the ADC to be reasonable, being based on Yara's verified data and bearing in mind that it was not an actual assessment of dumping under s.269TACB, but rather an assessment for the purpose of considering the "conditions of competition" under s.269TAE(2C)(e). I cannot find any error with this approach and it would not appear to be inconsistent with Australian law.

[193] See Confidential Attachments 1 and 2 to the ADC's s.269ZZJ submission and the Fourth Conference Summary.

292. The ADC pointed out in the Reinvestigation Report that it did not rely solely upon Yara's bid, and other factors were examined to assess the conditions of competition which were addressed in Section 7.5.1 of REP 473 and Section 3.3 of the Reinvestigation Report. Using the guidelines set out in the Manual,[194] the ADC considered the conditions of competition in relation to the Goods exported from Sweden 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. The Commissioner considered 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. The Commissioner considered that this similarity in end-user*

[194] According to the Manual (pages 134 and 135), 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;
  - 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.

demonstrates that the goods are used for the same purpose, are interchangeable and substitutable;

- [redacted] *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 considered that this demonstrates that the goods are physically, functionally and commercially alike and are used for the same purpose; and*

- *the Australian industry applicants 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.*[195]

293. In its analysis, each of the conditions of competition referred to by the ADC was supported by documentation and considered with reference to the guidelines set out in the Manual. I consider this approach to be reasonable and consistent with the practice of the ADC pursuant to the Manual.

294. In addition, the ADC found that bulk explosives and associated service providers that source the Goods from the Australian industry directly compete with other providers that import the Goods, such as DBS, which also compete among themselves. The ADC also found that ammonium nitrate is a commodity product and end users are unlikely to discern significant physical or functional differences, therefore considered to be highly substitutable and interchangeable, given that these goods compete mostly on price.

295. The ADC also provided a reasoned analysis of DBS' and Yara's claim that, because the Goods exported from Sweden are purchased in accordance with a [redacted], the effects of exportations of goods from Sweden should not be cumulated with the effects of goods exported from China and Thailand. The ADC considered that despite the 'unique' circumstances relevant to the exportation of the

[195] See Reinvestigation Report, page 23.

Goods from Sweden, this did not mean that the Goods exported from Sweden were 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.*[196]

The ADC also found that DBS had imported the Goods at significantly dumped prices from Sweden, and at the expense of sourcing these goods from other Australian industry producers, and further that DBS also on-sold these goods to other entities in the market, including entities that also imported the Goods from other countries. Also noting QNP comments in this regard, I consider that the ADC's analysis relating to the "unique" circumstances of the Swedish exports with regard to the "conditions of competition" to be comprehensive and its approach reasonable.

296. The ADC disagreed with Yara's contention that it has "failed to explain why it is preferable to cumulate the effect of the Swedish exports", and pointed out that its assessment at Section 7.5.1 of REP 473 and Section 3.3 of the Reinvestigation Report (discussed above) was undertaken in accordance with s.269TAE(2C), which prescribes the factors that the Minister must be satisfied of in determining whether to consider cumulation. In addition, the ADC referred to the evidence provided by the Original Industry Applicants that the prices of the Goods exported from the subject countries were considered and used in deriving their bid prices when negotiating the relevant contracts.

297. In my view the ADC has undertaken a thorough and comprehensive assessment the conditions of competition with regards to the Swedish exports, in accordance

[196] See Reinvestigation Report, page 24.

with s.269TAE(2C)(e). I cannot find error in the approach by the ADC and do not consider that there was anything unreasonable in the ADC's methodology or conclusions reached. The approach adopted by the ADC would not appear to be inconsistent with Australian law in any way and is consistent with the ADC's own guidelines in the Manual. I consider that it was reasonable that the ADC considered it appropriate to cumulatively assess the material injury effects of the imports from Sweden.

298. I do not consider that Yara or DBS has demonstrated that that the effects of the exportations from Sweden should not be cumulated with regard to conditions of competition or that such cumulation was not appropriate. I therefore do not consider that Yara and DBS have established that the decision of the Minister with regard to cumulation of the Swedish imports was not the correct or preferable decision.

Ground 1: Yara's exports have not caused injury to the Australian industry

299. I will now consider Yara's First Ground of review that its exports have not caused injury to the Australian industry.

Yara's Arguments

300. Yara contends that its exports have not caused injury to the Australian industry.

301. Yara points out that REP 473 determined that the Commissioner was satisfied that material injury to the Australian industry in the form of price depression, decreased profit and profitability, and loss of sales volumes (lost contracts) has been or is being caused by dumped goods exported to Australia from the subject countries during the IP.[197] Further, Yara submits that this was a specific finding based on an analysis of thirteen contract negotiations (six of which were disregarded as irrelevant to the question of injury).

302. Yara refers to s.269TAE(1) of the Act which provides guidance on items the ADC should have regard to in undertaking its causation analysis, including:

[197] Reference was made to Section 1.4.7 of REP 473, page 9.

……..

(f) the effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the price paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and

(g) any effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the relevant economic factors in relation to the Australian industry;

303. Yara submits that while s.269TAE(1) is drafted somewhat broadly, and does not limit the considerations the Minister may have regard to when making an injury determination for the purpose of s.269TG, it does provide some discipline for that exercise. Yara contends that the Minister's "satisfaction" under s.269TG must be based on a determination under s.269TAE(1), and that the Minister, must be satisfied that material injury is being caused by any circumstance in relation to the exportation of the Goods. Yara observe that "causation" naturally speaks of "effect", so the considerations in s.269TAE(1)(f) and (g) would be of fundamental importance to any causation finding. Further, Yara submits that this interpretation aligns with Australia's obligations under the ADA, which places the "effect of the dumped imports on prices in the domestic market for like products" as one of the primary considerations in an injury determination.[198]

304. Yara also emphasises that, under Australian law, an injury determination must be based on facts and not merely on allegations, conjecture or remote possibility,[199] which is a substantive requirement for any injury determination.

305. Yara contends that an assessment of the "economic conditions" of the Australian industry during the period of investigation and the impact of the subject exports during that same period was unable to establish that dumping had caused injury, because, “the majority of the applicants' sales during the investigation period were made in accordance with contracts negotiated several years prior to the investigation period”. Therefore, the applicants' selling prices and volumes observed

[198] Reference in this regard was made to Article 3.1 of the ADA.
[199] This is a reference to s.269TAE(2AA) of the Act.

from 1 April 2014 to 31 March 2018, “mostly reflect the contract terms, including prices and volumes, negotiated and agreed to before the investigation period.”[200] Yara submitted that as a result, the injury finding does not relate to the general economic conditions as observed and partially verified by the ADC. Instead, it submits, the injury finding narrowly focuses on 13 contract negotiations that occurred during or after the period of investigation, and of these only seven were found to be relevant to some degree to the injury determination.

306. Yara submits that these seven examples form the entirety of REP 473's injury finding, and therefore the entirety of the decision to impose measures against Yara's exportation of the Goods. Yara submits further that when they are considered carefully, there is no factual basis to support any conclusion that Yara's exports have materially influenced the outcome of the contract negotiations.

307. Yara noted that all of Yara's exports during the period of investigation were made to one customer only. It was pointed out that Yara had a supply agreement with that customer which pre-dated the period of investigation, and under which the majority of the exports were made. Yara does not believe its customer was one of the customers in any of the seven negotiations through which injury was said to have been caused. Additionally, it was submitted that Yara participated in only one tender during the period of investigation, at prices that were significantly different to those to its pre-existing customer, and in respect of which Yara was immediately advised were too high. Yara contends that therefore, the supposed effect of Yara's exports on the Australian industry's prices do not arise directly from Yara's exports.

308. Yara then addresses each of the seven negotiations contending that it shows how far removed Yara is.[201]

309. Yara submits that the supposed "factual" effects REP 473 links to the exports on the Australian industry vary in degree, being as innocuous as a member of the Australian industry having regard to import pricing information when formulating a price offer, to the more express, such as the adoption of a pricing mechanism based on imports from the next closest source, to the completely speculative. Yara contends that these seven negotiations do not relate to Yara, either directly or

[200] Reference was made to REP 473 at page 69.
[201] For the detailed arguments in this regard, see Yara’s application for review, pages 6 – 11.

indirectly and that it is not correct for any supposed price or volume injury to be attributed to exports by Yara from Sweden in these circumstances.

ADC's Position

310. In its s.269ZZJ submission the ADC disagreed with Yara's assertion that since it was not a party to the seven contract negotiations, the determination that the exports from Yara have caused material injury is neither correct nor preferable.

311. The ADC referred to s.269TAE(2C) of the Act which states that the Minister should consider the cumulative effects of the exportation of goods to Australia where: those exportations are subject to the investigation, the exporter's dumping margin is not *de minimis*, the volume from each country is not negligible and it is appropriate to do so having regard to the conditions of competition between the exported goods, and the exported goods and the Australian industry's like goods.

312. The ADC states that the Commissioner was satisfied that the facts supported an assessment of the cumulative effects of the exports from the subject countries. The ADC considered that having cumulated the effects of exportations from the subject countries, the Minister is not required to find material injury caused by exports from Sweden, or specifically in relation to Yara, alone. The ADC stated that the Commissioner does not dispute that Yara was not a party to the seven contract negotiations and that the Goods exported by Yara [redacted]. However, the Commission has found that [redacted] and DBS competes with other bulk explosives and associated services providers that purchase the Goods from the Original Industry Applicants. The ADC stated that it accepts that Yara would not be privy to negotiations [redacted]

313. The ADC submitted that evidence before it demonstrated that the Australian industry reduced prices in response to dumped prices, with the Original Industry Applicants having provided the ADC with information that they used to arrive at their prices in order to remain competitive with imports. The ADC referred to Section

9.2.3 of REP 473 which outlined that the dumped prices at which Yara has supplied the market, being the lowest prices during the IP, were used to inform or arrive at Australian industry price offers, either directly or by an average of import prices in the period.

314. For these reasons, the ADC considered that the Minister did not err in making her finding that, because of any circumstances in relation to the exportation of the Goods to Australia from Sweden, and subject to s.269TAE(2C), material injury has been or is being caused to the Australian industry producing like goods, pursuant to s.269TG(2)(b) of the Act.

Other submissions

315. CSBP in its s.269ZZJ submission challenged Yara's claims that its exports to Australia have not caused injury to the Australian industry. It submitted that contrary to assertions made by Yara that its exports were to only one Australian customer, the ADC had established that the Yara exports were sold to a number of mine sites in Australia. Further, CSBP submitted that, as reported at Section 7.5.1 of REP 473, it has evidenced that the import prices for the Goods sourced from Sweden have had a broad impact on contract negotiations across the Australian industry. CSBP contended that 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.

316. Orica in its s.269ZZJ submission also challenged Yara's conclusion that its exports, "had no effect, injurious or otherwise" on each of the seven negotiations, submitting that the assessment on behalf of Yara is limited and cursory only. Orica contended that Yara's assessment does not address the pervasive effect that dumped exports with an injurious FOB export price have had on contract negotiations across the whole of the Australian market for AN. Orica pointed out that customers can readily gain access to import prices through the ABS import data and the presence of low-priced dumped goods becomes apparent and given customers' strong interest in lowering their input costs, the price impact of the lower priced dumped goods becomes of interest to other customers. Further Orica submits that it is naïve to contend that the sale to one Australian importer during the IP is an isolated instance as it clearly sets a precedent for other customers to seek to access similar dumped

prices. It also points out that in REP 473 the ADC cited evidence that Yara's product was on sold to other customers, contrary to Yara's claim.[202] Orica contends therefore that the ADC's assessment that Yara's dumped exports had caused and threatened injury to the Australian industry is the correct and preferable decision.[203]

Consideration

317. In the consideration of Ground 2 of Yara's application for review (above), I found that it was reasonable for the Commissioner to be satisfied that the facts supported an assessment of the cumulative effects of the exports from the subject countries, with the requirements of s.269TAE(2C) having been met, and as such that it was appropriate to cumulate the effects of the exportations from Sweden, China and Thailand. Arising from this finding, I consider that the ADC is correct in its submission that having cumulated the effects of exportations from the subject countries, the Minister is not required to find material injury caused by exports from Sweden, or specifically in relation to Yara, alone.

318. While it was not disputed that Yara was not a party to the relevant seven contract negotiations and that the Goods exported by Yara from Sweden were imported by one customer, the ADC was in any event able to show causal link through the following:

- Yara's customer [redacted]
- Yara's customer also sources [redacted] and competes with other bulk explosives and associated services providers that purchase the Goods from the Australian industry applicants; and
- evidence before the ADC demonstrated that the Australian industry reduced prices in response to dumped prices, including the dumped prices at which Yara has supplied the market, being the lowest prices during the IP. The ADC had evidence showing that Yara's prices were used to inform or arrive

[202] Orica makes reference to page 50 of REP 473 in this regard.
[203] See Orica's s.269ZZJ submission, section IV(a).

at Australian industry price offers, either directly or by an average of import prices in the period.

319. I reviewed Confidential Attachment 15 of REP 473 and other relevant documents and submissions and consider that the ADC's analysis relating to causation is comprehensive and its conclusion reached is reasonable with regard to the exports from Sweden. I do not consider that Yara has demonstrated that its exports have not caused injury to the Australian industry. In any event, as discussed above, having properly cumulated the effects of exportations from the three subject countries, the Minister was not required to find that material injury was caused by exports from Sweden, or specifically in relation to Yara, alone.

320. Yara has not demonstrated that the decision was not the correct or preferable one with regard to the exportation of the Goods to Australia from Sweden.

Ground 3: The price effects and volume effects have not been correctly determined

Yara's arguments

321. Yara refers to REP 473's inability to establish what is more traditionally recognised as injury and its consideration of the "effect" of the subject exports on seven contract negotiations.

322. Yara submits that Australian law requires that an injury determination be, "based on facts and not merely on allegations, conjecture or remote possibilities."[204] Yara contends that REP 473 does not meet this requirement, and that "no injury, in a palpable or material sense, is identified, with no indication that any of the seven sales agreements negotiated by the Australian industry are unprofitable or otherwise not to the benefit of the individual industry member."[205] Rather, Yara contends that the injury found is hypothetical in nature, premised on the theory that the Australian industry could have performed even better than it factually did. Yara contends that the entire injury finding is built on allegation, conjecture and remote

[204] Reference was made to s.269TAE(2AA) of the Act.
[205] See Yara's application for review, page 20.

possibility, rather than fact, and that this is clear when the "price effect" methodology and the "volume effect" methodology are considered.

323. Yara submits that the calculation of the price effect is based on an assumption as to the outcome of the relevant negotiation absent the effect of the subject goods, referred to as the "undumped price". Yara contends that such a conclusion ignores the fact that there is substantial competition in the Australian AN market, including as between the members of the Australian industry, as well as with imports from counties not subject to the investigation. Yara submits that it also ignores the fact that the negotiation for significant supply agreements are protracted processes and are based on issues wider than the price, including volume, delivery terms and terms of the contract, assuming automatically, that the "undumped price" would have been an achievable outcome, without greater consideration of the broader market context. Yara contends that the resultant injury identified cannot be said to be more than a "remote possibility".[206]

324. Yara submits further that the "volume effect" analysis is similarly skewed, and considers that QNP (being the Australian industry member involved in the negotiation of contracts 5 and 6) suffered reduced sales volumes by virtue of the fact that it was not successful in winning supply for these volumes. Yara notes that the customer in example 5 is referred to as a "potential" customer and the volumes being negotiated are described as being "additional" and submits therefore that the outcome of these negotiations did not impact QNP's actual sales volumes adversely, but rather, is considered to be injurious because QNP did not win additional sales volume. Further Yara submits that this assumes that QNP would have won the additional sales volumes if dumping did not occur, with no consideration that there may have been other suppliers who were contacted (including other members of the Australian industry) that would also compete with QNP to tender these volumes.

325. Yara further noted that QNP has access to imports, and questions to what degree REP 473 can be certain that any of the examples relating to QNP would have been supplied by its own produced ammonium nitrate, submitting that if the sales were not of Australian produced ammonium nitrate, then any impact is not an impact on

[206] See Yara's application for review, page 20 – 21.

the Australian industry producing like goods. Yara further notes that QNP had significant shutdowns in the first half of FY18 and of FY19 and that these would have impacted supply under examples 4, 5 and 6.

326. Yara contends that any injury based on these methodologies cannot be said to rise to the level of fact, rather it is more of the character of remote possibilities and allegations, being “conjectural” in nature.[207] Yara submits that REP 473 has failed to fully inform itself of the facts of the negotiation and is not informed by the customer's view of the negotiation and therefore any conclusions drawn from this are conjectural in nature. Yara submits that because actual interested parties, such as Yara, did not participate in the relevant negotiations they are ham-strung in making submissions about them.

327. Yara submits that ADC needs to ensure that the "effect" found meets the requirements of s.269TAE(2AA) and that if there is not sufficient facts (and it is within the ADC's power to apprise itself of the facts) then the injury conclusion is based on allegation, conjecture and remote possibility, and a positive injury determination cannot be made for the purpose of s.269TAE(1). Yara contends that in such circumstance, the ADC cannot make a recommendation that the Minister be satisfied that dumping has caused, or is causing, material injury.

The ADC’s position

328. The ADC in its s.269ZZJ submission disagrees with Yara’s assertions that the ADC’s assessment of the Australian industry’s prices is not based on allegations, conjecture and remote possibilities. In this regard the ADC submitted that:

- the relevant Australian industry applicants have provided evidence to demonstrate a causal relationship between the dumped imports and the injury to the Australian industry.[208]

- as noted throughout Chapter 9 of REP 473, in relation to the seven examples, the relevant Australian industry applicants provided data and

[207] In this regard Yara refers to the common definition of the term "conjecture", being: “an opinion formed on the basis of incomplete information..”(As per the Australian Concise Oxford Dictionary, Fifth edition).
[208] In this regard the ADC refers to Confidential Attachment 15 of REP 473.

information in support of their claims that dumping has caused injury to the Australian industry.

- where possible, this information was cross-checked with information provided by importers and other entities in the Australian market.[209]

329. The ADC submitted that in relation to the 'undumped' price determined and used by the ADC in its 'but for' or counterfactual assessment, it is important to note that the main reason the ADC undertook a 'but for' or counterfactual assessment was to quantify the effects of dumping on the Australian industry's prices. Further the ADC stated that the assessment of prices in the absence of dumping is explained in Section 9.2.2 of REP 473, and is based on the information and data provided by the relevant Australian industry applicant in relation to each example referred to in the assessment. Further, the ADC submitted that the assessment of prices in the absence of dumping was detailed and that it considered all information available before the ADC, as demonstrated in Confidential Attachment 16 to REP 473. Therefore, the ADC concludes that its assessment of prices is not based on conjecture, as claimed by Yara.[210]

330. In relation to Yara's claims that the ADC could not be certain that any of the examples provided by QNP would have been supplied by its own production, the ADC observes that the plant shutdowns in the June 2017 and March 2019 quarters were short in duration and did not affect the negotiations for fixed-term supply contracts. Further, the ADC states that it understands that QNP's scheduled plant maintenance (referred to as 'turnaround') occurred in late 2018 and the relevant contract negotiations found to have been affected by dumping were negotiated before July 2018. The ADC submitted that unplanned and unscheduled plant shutdowns do, however, occur sporadically in the industry from time to time (as they occur in any manufacturing industry), and are usually short in duration and do not have any bearing on the negotiations conducted in relation to fixed-term contracts for supply of ammonium nitrate produced by the Australian industry.[211]

[209] See ADC's s.269ZZJ submission, para 128.
[210] See ADC's s.269ZZJ submission, para 130.
[211] See ADC's s.269ZZJ submission, para 133.

331. The ADC also reiterated that there is no prescribed nor legislated methodology for assessing injury and causation and it is open to the Commission to have regard to contracts when assessing injury to the Australian industry.

Consideration

332. At the outset it should be noted, as reiterated by the ADC, that s.269TAE(1) of the Act is broad in terms of the matters and methodology that the Minister may have regard to when determining whether material injury to an Australian industry has been or is being caused. It should also be noted that it is particularly stated in the Injury Direction that, "identifying material injury will depend upon the circumstances of each case and will differ from industry to industry and from time to time." At the same time it should be recognised, as submitted by Yara, that Australian law requires that an injury determination be, "based on facts and not merely on allegations, conjecture or remote possibilities."[212]

333. In Chapter 7 of REP 473, the ADC provided detailed reasons as to why a 'coincidence analysis' was not possible in the circumstances and why it undertook an alternate analytical method, being the 'but for' analysis (or counterfactual) when examining causal effects. In Section 9.2.1 of REP 473, the ADC assessed thirteen examples of contract negotiations submitted by the Original Industry Applicants in support of their claims that the Goods dumped during the IP affected pricing and volumes, finding a causal relationship with the dumping in seven of those examples. I have already found, in respect of other grounds of review, that it was open for the Commissioner to use a 'but for' analysis in the circumstances, and that the ADC was not precluded from assessing individual contracts in its injury and causation assessment.[213] It is noted that the main reason the ADC undertook a 'but for' or counterfactual assessment was to quantify "the effects" of dumping on the Australian industry's prices.

334. The ADC's assessment of injury in the absence of dumping is explained in Section 9.2.2 of REP 473, and is based on detailed information and data provided by the relevant Australian industry applicant in relation to each example referred to in the

[212] See s.269TAE(2AA) of the Act.
[213] See consideration of Glencore's third ground of review and the first and second components of Glencore's sixth ground of review.

assessment. This information and data is set out and analysed in substantial detail in Confidential Attachment 15 to REP 473, which I reviewed. The assessment of prices in the absence of dumping was considered by the ADC, based on all available information detailed in Confidential Attachment 16 to REP 473, which I also reviewed. The ADC compared the applicants' actual price offers and re-negotiated prices to what the prices might have been in the absence of dumping. In relation to injury in the form of loss of sales volumes, the ADC attributed lost volumes to dumping in certain instances where it established that these sales volumes were directly displaced by the dumped goods. I consider that all the relevant documents and the data referred to in Confidential Attachments 15 and 16 to REP 473, supports the ADC's findings of volume and price effects of the dumping in regard to the relevant examples. I consider that the ADC's analysis and conclusions relating to the effects of the subject exports, is based on facts and is comprehensive. The ADC in its s.269ZZJ submission has in my view reasonably addressed Yara's contentions relating to QNP and volume effects, and they do not detract from the ADC's findings. I do not consider that there was anything unreasonable in the approach taken by the ADC, particularly in light of the circumstances of the industry.

335. Yara has not demonstrated that that ADC's determination relating the price and volume effects is not based on facts but rather on "allegations, conjecture or remote possibility", contrary to s.269TAE(2AA) of the Act.[214] Yara's ground of review challenging the determination of the price and volume effects therefore fails.

Ground 4: The injury is not material

Ground 5: The injury is not greater than that likely to occur in the normal ebb and flow of business

336. Under Ground 4, Yara contends that the injury is not material and under Ground 5, Yara contends that the injury is not greater than that likely to occur in the normal ebb and flow of business. These two grounds of review will be considered together

[214] It should be noted that concerns were raised that an aspect of the ADC's analysis relating to profits foregone in the post-IP and materiality of injury, might not meet the requirements of s.269TAE(2AA), which was the subject of reinvestigation as set out in the Reinvestigation Request. See consideration of Yara's fourth and fifth grounds of review in this regard.

since they are related and are often referenced together in arguments, both by the ADC and the various parties making submissions.

337. The fifth component of Glencore's Sixth Ground of review, that any injury that was suffered by the Australian industry as a whole was not material, will also be discussed under this section, as well as aspects of the first sub-ground of review under DBS' First Ground of review, that material injury was not caused by dumping.

Glencore's, DBS' and Yara's arguments

Glencore

338. In the fifth component of its Sixth Ground of review, Glencore contended that any injury that was suffered by the Australian industry as a whole was not material. In this regard, Glencore referred to the Injury Direction which provides that, in order to be material, "[t]he injury must also be greater than likely to occur in the normal ebb and flow of business".[215]

339. Glencore stated in its application for review that in the absence of access to Confidential Attachment 17 to REP 473, it was not possible to make meaningful submissions on this issue. However, Glencore submitted that it was notable that the Frontier Economics Report[216] contained a detailed evaluation of the normal flow of business in the ammonium nitrate industry, noting that this is characterised by:

    a. *regular swings in profits from changes in contract arrangements when existing contracts come up for renewal (due to the existence of only a few large suppliers and large buyers);*

    b. *large contract price variations including, in 2017, a difference of more than 40% between upper and lower price bounds; and*

[215] Injury Direction, page 1.
[216] This is a reference to the report commissioned by BHP entitled, "Opinion of Preliminary Affirmative Determination" ('the Frontier Report"), which was prepared by Frontier Economics.

c. *Variations in key input prices which, in 2017, included variability of 50%, which can be expected to result in material variations in profits (all other things being equal).*[217]

340. Glencore concludes that any injury found to have been suffered by the Australian industry would need to exceed the bounds of the ebbs and flows as outlined, in order to qualify as material within the meaning of the Ministerial Direction.

DBS

341. DBS in the first sub-ground of its First Ground of review contended that, 'material' injury was not caused by dumping, and if there was any injury, it cannot be considered to meet any reasonable appreciation of the term "material" and can only have been "immaterial, insubstantial and insignificant". DBS submitted that the ADC must determine material injury by reference to s.269TAE and the Injury Direction, according to which injury "must… be greater than that likely to occur in the normal ebb and flow of business" and must not be "immaterial, insubstantial or insignificant".[218]

342. DBS pointed out that the heads of injury relied upon by the ADC in its ultimate finding were only "price depression, decreased profit and profitability, and loss of sales volumes" with respect to the seven relevant contracts that were negotiated during the IP. DBS submitted that based on, "the massive size of the Australian industry and its high profitability, the limited number of allegedly reduced-price contracts, and the time over which and at which they were entered into",[219] the impact on the Australian industry of entering into those contracts cannot be classified as having been material.

343. DBS contended that it is the injury in the period of investigation that must be material,[220] and that the conclusion that is unavoidable, based on the words of s.269TG(1) and (2), is that material injury must have been caused, by dumping, in the period in which injury is assessed. DBS contended that the impacts of dumping in a future period are legally irrelevant, except in the case of a finding of threat of

[217] See Glencore's application for review, paragraph 46.
[218] See DBS' application for review, page 3.
[219] Ibid.
[220] At the same time DBS acknowledged that it does not mean that the period in which injury is assessed cannot extend beyond (i.e., in a period after) the period of investigation.

material injury, which has not been made in this case. DBS submitted that the words of the relevant sections are clear – they associate "dumping" with "material injury" that "has been" or "is being" caused, and injury that might flow in the future, from actions and reactions to dumped imports in the past, is not relevant.

344. DBS pointed out that REP 473 shows, for the Original Industry Applicants, between 2016/17 and 2017/18, production volumes were steady; sales volumes overall were relatively steady; prices were up in the case of CSBP and QNP; the industry was still profitable; and capacity utilisation improved.

345. DBS submitted that a finding that an Australian industry has suffered material injury at all is not maintainable in circumstances where it is so dominant in the market, and is so profitable. DBS further submitted that the dominant themes of REP 473, which are competition between large domestic market competitors, the vicissitudes of fixed price contracts, and changing costs, are fully embraced by the concept of the ebb and flow of business, as per the Injury Direction.[221]

346. DBS submitted that the ADC did not explain its analysis of the volume of the sales made under the contracts, in the extended IP, as compared to the overall volume of sales, in order to test the proposition that any revenue loss was material. Further, DBS submitted that the ADC had not indicated whether the Original Industry Applicants were accepting the same prices under their long-term contracts.

347. Further DBS submitted that the level of injury that could be said to have been caused by dumping could only be insubstantial and insignificant in the overall picture presented by the accepted evidence, bearing in mind the following:

    - pricing under seven contracts only, with respect only to the price "gap" between the Original Industry Applicant's "desired" price and the customer's claimed "import parity price", and only with respect to the volume sold under those contracts, over the extended period of investigation for injury purposes and not extending after the date of SEF 473;

    - in circumstances where the ADC admits that other very powerful incentives to lower price were in place (namely, excess capacity and competition

[221] See DBS' application for review, page 5.

between the applicants themselves), and when at the same time the Australian industry was operating profitably and was attracting major investment.[222]

Yara

348. In its application for review, Yara challenged REP 473's "materiality" assessment provided at Section 9.6 of REP 473 where it contended that the form of injury was summarised with limited comment on how material that injury actually was. Yara submitted that no basis has been provided at Section 9.6 to consider whether the assessment in Confidential Attachment 17 considers issues wider than the text in Section 9.6.

349. Yara submitted the following with regard to materiality:

- the "injury", said to be the profit foregone as a result of the price and volume effects (discussed above under Ground 3), is hypothetical in nature, and based on untested conjecture as to the possibility of the outcome of seven negotiations, with no suggestion that the actual outcome of these negotiations were unprofitable to the relevant Australian industry member.

- the profit foregone is said to have been assessed on an annual basis, which suggests that some portion of the "material" injury derives from assumptions regarding the Australian industry's performance in the future, which is, according to Yara, clearly a remote possibility as (a) such injury has not been suffered by the Australian industry at this time; and (b) the quantification of such injury likely has no relationship to how the Australian industry will actually perform in the future.

- the materiality of the injury, in the sense of profit foregone, fails to take into consideration the profit of Dyno-Nobel, one of the bigger producers in the Australian market representing a significant portion of the Australian industry producing like goods.

- None of the seven negotiations which have been said to injure the Australian industry related to Orica, one of the largest producers of ammonium nitrate

[222] See DBS' application for review, page 8.

> in Australia and none of those seven negotiations relate to Dyno-Nobel either, these two entities, according to Yara, representing over half the Australian industry producing like goods.[223]

350. Yara submits that over 97 per cent of this market is supplied by the Australian industry, whether through their own production, or through imports they acquire either directly or through traders when they suffer supply shortfalls. Yara submits further that there is no suggestion that these contract negotiations were unprofitable, no suggestion that the Australian industry is unprofitable generally and no suggestion that the Australian industry has lost any pre-existing sales volumes to the subject exports.[224]

351. Yara stated that it would have liked to address this ground further, but REP 473 was opaque as to how the "materiality" of injury had been assessed. Yara points out that it has previously raised the lack of reasoning of this materiality finding in the SEF 473 and had requested clarification from the ADC on this issue to allow Yara to "accurately respond to the findings and proposed recommendations". Yara requested the Review Panel to direct the ADC to release its assessment of this issue in a legible manner, to allow interested parties to review and provide submissions in relation to this significant issue.[225]

352. Yara submits that the Injury Direction is Australian law that must be followed in the ADC's decision making. It submits further that the injury, as identified in REP 473, is not material in the correct sense of the word, and REP 473 has not provided any appropriate basis to consider the injury is material. Yara submits that the level of injury identified is immaterial, insubstantial and insignificant.

353. Yara points out that this was raised during the investigation, as noted in REP 473:

> *In order to establish the profit in the normal ebb and flow of business, in its submission, Yara duplicated the index of profit variations from the*

[223] See Yara's application for review, page 24.
[224] See REP 473, page 57.
[225] See Yara's application for review, page 25.

application, which it submitted shows a 12.5 per cent reduction in the applicants' aggregated profit from 2014 to 2017.[226]

And in response, the ADC had stated:

The Commission reiterates that the 'profit foregone', as estimated by the Commission in its assessment of material injury, isolates the injury caused by dumping in the examples outlined in section 9.2.1 of this chapter. As the assessment isolates the injury caused by dumping, the Commission is satisfied that the injury to the Australian industry is greater than that likely to occur in the normal ebb and flow of business.[227]

354. Yara submits that this response does not address the "normal ebb and flow of business" requirement in the Injury Direction. Yara submits that the "ebb and flow" consideration is not about other factors that may have caused injury, but that it is the understanding that within the course of ordinary business a company will have positive and negative factors, and that these negative factors that occur within the course of ordinary business are not unexpected. Yara points out that this is a baseline as to whether injury is considered material according to the Injury Direction.

The First Conference

355. Resulting from concerns expressed by both Yara and Glencore in their respective applications for review with regard to the detail and reasoning provided in relation to the finding of the "materiality" assessment provided at Section 9.6 of REP 473, and after reviewing Confidential Attachment 17 of REP 473, I decided to hold the First Conference with the ADC and the three Review Panel Applicants (Yara, DBS and Glencore) pursuant to s.269ZZHA(3) of the Act. The purpose of this conference was to obtain further information and seek clarifications from the ADC and a better understanding of the reasons for the finding relating to materiality of injury in REP 473, and also to provide an opportunity to the Review Panel applicants, being Yara, DBS and Glencore, to comment on such clarifications and information provided by

[226] See REP 473, page 92.
[227] See REP 473, page 92.

the ADC, in relation to their relevant grounds of review relating to materiality of injury, in their respective applications for review before the Review Panel.

ADC

356. The ADC was firstly requested to provide a step by step non-confidential narrative of its methodology and analysis of the finding in Section 9.4 of REP 473 relating to materiality of injury, with reference to Confidential Attachment 17 and the three relevant worksheets.

357. The ADC explained that in Confidential Attachment 17, it quantified the effect of dumping, which occurred in the IP, on the Australian industry's profit in order to determine whether the resulting injury is material to the Australian industry as a whole, with the profit forgone calculated in relation to only the examples listed and discussed 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 during the IP. The ADC explained its calculation of profit foregone and the ratio calculated to determine the significance of the profit forgone relative to the applicants' aggregated profit. Further the ADC explained how the profit foregone for each example was then adjusted or multiplied by the ratio of the relevant applicants' production volume to the Australian industry's total production volume (i.e. the aggregated production volume of five ammonium nitrate manufacturers) in the IP. It was explained that this calculation was undertaken because the ADC did not have information relevant to the profit amount for Dyno Nobel and Yara Pilbara Nitrates. Further, the ADC explained that the resulting figures were then aggregated to determine a total profit forgone as a percentage of the Australian industry's profit on a per annum basis.[228]

358. The ADC was also requested to clarify whether its finding with regard to materiality of injury related to the IP only or whether it also included injury (in the form of profit forgone) in the post-IP. In its response the ADC stated that it was important to note that the injury experienced, in terms of price depression, occurred in the IP as the applicants were responding to the pricing of the dumped goods in the IP when negotiating contracts for future supply. Further, the ADC stated that this price depression, occurring as a result of dumping during the IP, was quantified and

[228] See ADC's detailed explanation in its written response in Attachment 1 to the First Conference Summary.

disclosed in section 9.2.2 of REP 473 and was considered to be significant. It was pointed out, however, that in quantifying the materiality of the injury to the Australian industry as a whole, the ADC had regard to profit forgone (an annualised amount), and the ADC determined profit forgone in both the IP and post-IP, given that some sales occurred in the IP, and other sales commenced in the post-IP in accordance with the date specified in the negotiated/re-negotiated contract. The ADC submitted that the price at which these sales occurred had been affected or influenced by the dumping that occurred in the IP. In terms of lost volumes and the quantification of profit forgone in relation to these volumes, the ADC took into consideration the period in which the sales volumes in relation to the relevant Original Industry Applicant's bid would have occurred; however, the ADC indicated that the negotiations for these volumes were still influenced by dumping which occurred during the IP.[229]

359. The ADC confirmed that it relied on both the total IP profit forgone (as a percentage of Australian industry profit) and the total post-IP profit forgone (as a percentage of Australian industry profit) as they were both relevant to the finding of material injury caused by dumping. The ADC pointed out that in Confidential Attachment 17, the calculations are presented separately as they relate to the profit effects, based on some sales occurring in the IP and other sales post-IP. The ADC pointed out that regardless, the injury to the Australian industry occurred during the IP due to the dumped goods leading to price depression, or loss of sales volumes in certain instances. In other words, according to the ADC, the injury experienced, in terms of price depression and loss of volumes, occurred in the IP as the applicants were responding to the pricing of the dumped goods in the IP when bidding and negotiating contracts for supply. However, in quantifying the materiality of the injury to the Australian industry as a whole, the ADC had regard to profit forgone which is also based on negotiated contracts where the sales commence or occur in accordance with these contracts subsequent to the IP and the profit on these sales, and therefore the profit foregone, is realised subsequent to the IP also.[230]

[229] See ADC's written response to the relevant clarification request in Attachment 1 to the First Conference Summary.
[230] See ADC's written response to the relevant clarification request in Attachment 1 to the First Conference Summary.

360. The ADC disclosed the aggregated profit forgone being 6.2 per cent of the Australian industry's profit, calculated on a per annum basis (comprising 1.9 per cent during the IP, and 4.3 per cent post-IP for the examples where sales commence post-IP). The ADC pointed out that this profit forgone was solely attributable to dumping of the goods from the countries subject to the investigation. The ADC further submitted that Confidential Attachment 17 demonstrated that the injury to the Australian industry, as a whole, is not immaterial, insubstantial or insignificant, noting that there is no legislated threshold to observe in determining whether the injury is material.[231]

361. The ADC was also requested to clarify how it calculated the Australian industry's profit, for a period in the future, to obtain the relevant percentages of profit forgone (in the post-IP) as a percentage of Australian industry profit. The ADC clarified that the relevant profit amount (which was used as the denominator in the calculations) was the Original Industry Applicants' aggregated profit achieved in the IP, which the ADC considered was the best available information and the most reliable information. The ADC stated that it had not extrapolated an aggregated profit amount post-IP, and that using the profit amount achieved in the IP was conservative given that the aggregated profit for the Original Industry Applicants has consistently decreased between 2015-16 and the IP (2017-18), and was lower than that achieved in 2014-15. Therefore, according to the ADC if it had extrapolated the profit based on the data presented in tables 11 and 12 in Chapter 8 of REP 473, the extrapolated profit would have been lower than that used by the ADC in Confidential Attachment 17, and would have led to a higher profit forgone estimate.[232]

362. During the First Conference the ADC also clarified that in quantifying materiality the ADC only took into consideration the specific contract negotiations that were found to be influenced by dumped goods during the IP (discussed in detail in Section 9.2 of REP 473). The ADC stated that it then considered what the result of that price depression was in terms of a reduction in that particular industry member's profit that it might have otherwise achieved if it did not have to compete against the dumped imports. That was considered to be the only profit foregone that was

[231] See ADC's written response to the relevant clarification request in Attachment 1 to the First Conference Summary.
[232] See ADC's written response to the relevant clarification request in Attachment 1 to the First Conference Summary.

considered because it related specifically to those contracts. The ADC stated further that in trying to examine whether that was material, the ADC took that profit foregone and looked at it as a percentage of the industry's profit on an annual basis, which resulted in the 6.2 per cent, emphasising that the ADC did not take any findings of price depression or reduction in profit and extrapolate it across any other contracts or sales by the Australian industry.[233]

363. During the First Conference each applicant was provided with an opportunity to comment on the ADC's clarifications and any effect on the arguments relating to their relevant grounds of review:

Yara[234]

364. Yara observed that the "profit foregone" is a percentage of the aggregated IP profit for the applicants, which means that the percentages do not reflect a total reduction in the profit margin of that percentage. Rather they are the percentage of the profit margin itself.

365. Yara submitted that the "profit foregone" amount in the post-IP is not based on any verified information regarding actual costs incurred, sales made or profits achieved in the period 1 April 2018 - 31 March 2019. Further, it submits that no regard seems to have been had to the fact that in the post-IP, the applicants would have had an additional twelve months to make further profit.

366. Yara noted the ADC's comment that "there is no legislated threshold to observe in determining whether the injury is material' and observed that does not mean that any injury is material. Yara submitted that materiality of injury is a condition precedent to the exercise of the power to impose anti-dumping measures under s.269TG(1) and (2) of the Act, being a fundamental concept in anti-dumping law which is of equal importance to a finding that dumping occurred.

DBS [235]

[233] See ADC paragraph 7 (1) of the First Conference Summary.
[234] See Yara's written submission in respect of the First Conference, being Attachment 2 to the First Conference Summary.
[235] See DBS' written submission in respect of the First Conference, being Attachment 3 to the First Conference Summary.

367. DBS noted that the ADC determined profit forgone, caused by dumping, on a per annum or annualised basis, and not for the duration of the contract. DBS notes that this explanation indicates that profit foregone was determined for the duration of the contracts, at one point in the ADC's calculation, but that it is not indicated, in REP 473 or the ADC's written responses, whether the actual contracted or supplied quantities in either the IP or the post-IP were the same as the per annum or annualised quantities.

368. DBS noted that the ADC's explanation of its methodology and analysis did not include any consideration of cost in the post-IP or beyond that period (profit being a return on cost of sales). DBS therefore maintains its contention that post-IP "profit foregone" percentage has no evidentiary basis.

369. DBS also notes that the percentages referred to in the ADC's written responses are percentages of the profit, and not percentage points of the profit.

370. Finally, DBS advised that nothing in the ADC's written response caused it to withdraw or moderate any of the grounds on which it presented its application for review to the Review Panel.

Glencore[236]

371. Glencore contends that any impact on price in the seven contracts concerned does not equate to injury to the industry as a whole, which is what s.269TG of the Act requires.

372. Glencore makes the following observations about the 6.2 percentage figure and requested that these matters be considered by the Review Panel:

    - Firstly, Glencore contends that an injury calculated as 6.2 per cent of the Australian industry's annual profit, if correct, is not material injury and is not significant when compared to the usual ebbs and flows in the Australian industry's profit. According to Glencore, those ebbs and flows can be seen by an analysis of the profits of the three applicants (who between them comprise 78 per cent of total production volume during the investigation

[236] See Glencore's written submission in respect of the First Conference, being Attachment 4 to the First Conference Summary.

period).Glencore submits that the analysis, set out in REP 473, p 63, shows that in the three years from 2015 to 2018, there were variations of well over 50 per cent compared to 2014-2015 profits.[237]

- Secondly, Glencore challenged the correctness of the 6.2 percentage figure based on its estimation of the Australian industry's total profit, and its assumption of tonnage produced domestically each year and the estimated margin over allocated cost.[238]

- Glencore submitted that without access to the underlying workings, it could not identify where any error may have crept in, but invited the Review Panel to consider the various technical issues relating to the calculations, including whether there was double-counting of production volumes within, and post-dating, the IP.[239]

The Second Conference

373. Following initiation of the review and publication of the First Conference Summary, the Review Panel received a letter from Orica dated 8 October 2019 ("Orica's Letter") concerning the First Conference. Orica's Letter requested that the Review Panel disclose information, relating to profit foregone percentages, to the Original Industry Applicants, as had been disclosed to the Review Panel Applicants during the First Conference.

374. I decided to hold the Second Conference, the purpose of which was to provide the Original Industry Applicants with information disclosed to the Review Panel applicants by the ADC during the First Conference and to provide them an opportunity to respond to that information.

375. The Review Panel disclosed the relevant aggregated profit foregone percentages as disclosed to the Review Panel Applicants during the First Conference, as reflected in paragraph 3(b) of the ADC's written submission relating to the First

[237] See REP 473, page 63.
[238] See paragraphs 6 - 7 of Glencore's submission in respect of the First Conference for details of this calculation.
[239] Details of the various other technical issues that Glencore requested be included in the assessment of the calculation, are set out in paragraph 8 of Glencore's written submission in respect of the First Conference, being Attachment 4 to the First Conference Summary.

Conference. Each of the conference participants were provided with an opportunity to provide preliminary or detailed comments on the information disclosed during the conference. It was pointed out that if any party wished to consider the information further, they would have an opportunity to comment on the information in more detail in submissions made to the Review Panel pursuant to s.269ZZJ of the Act, which were due on 21 October 2019. The representatives from each of the three participating parties separately advised that they would not comment during the conference but would consider the information and comment thereon in submissions to the Review Panel in terms of s.269ZZJ of the Act.[240]

Section 269ZZJ submissions in respect of materiality of injury

ADC

376. In response to the various Review Panel Applicants' grounds of review relating to materiality of injury and further submissions relating to the First Conference, with regards to the analysis of "profits foregone":

- The ADC maintained that given the nature of the sales in the Australian ammonium nitrate market, its analysis was appropriate.

- The ADC referred to Chapter 9 of REP 473 where it explained the methodology it used to determine that the injury caused by dumping is material, and the step by step outline of the methodology in the First Conference. Based on the assessment, the ADC considered that the injury is material and is not negligible, insubstantial nor insignificant.

- The ADC clarified that in its analysis it only considered injury factors within the injury analysis period, being from 1 April 2014, and did not consider the impacts of dumping for a future unspecified period.

- The ADC considered that the assessment of material injury is conservative given that it took into consideration all three Original Industry Applicants' profit, and in the absence of Dyno Nobel's and Yara Pilbara Nitrate's profit, it

[240] See Second Conference Summary.

adjusted for the relative production volumes of the Original Industry Applicants relative to the Australian industry's total production volume.[241]

- The ADC observed, in response to Yara's claim that the Australian industry did not suffer material injury because imports constituted 3.1 per cent of market, that there is no minimum standard that should be used to determine whether dumped imports have a sufficient share of the Australian market to cause material injury.[242]

- The ADC separately in Attachment B to its s.269ZZJ submission addressed Glencore's additional comments on the ADC's methodology of determining profits foregone arising out of the First Conference.[243]

377. In response to the various contentions by the Review Panel Applicants that the level of injury was outside the normal ebb and flow of business:

    - The ADC reiterated that the 'profit foregone', as estimated on a per annum basis by the ADC in its assessment of material injury, isolates the injury caused by dumping in the examples outlined in section 9.2.1 of REP 473, and that the ADC was satisfied that the injury to the Australian industry is greater than that likely to occur in the normal ebb and flow of business.[244]

    - The ADC referred to the Frontier Report that was referred to by Glencore which outlined the variations observed in bulk ammonium nitrate, ammonia and gas benchmark prices, and stated that it considered that these observations do not inform the Minister's consideration of the profit forgone that is caused by dumping nor demonstrates that the injury experienced by the Australian industry is greater than that likely to occur in the normal ebb and flow of business.[245]

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[241] It should be noted that the ADC subsequently changed its methodology in the reinvestigation of this issue and did not adjust each transaction by the ratio, to account for the relative production volumes of the three Original Industry Applicants relative to the Australian industry's total production volume, but rather adopted a qualitative methodology.
[242] Reference was made to the Injury Direction in this regard.
[243] See Attachment B to the ADC's s.269ZZJ submission for the details.
[244] See ADC's s.269ZZJ submission, paragraph 143.
[245] See ADC's s.269ZZJ submission, paragraph 98.

- While the ADC acknowledged that there were a range of factors that impacted on the Australian industry's profit from 2014, including variations in input prices, it submitted that these variations in input prices are typically mitigated by price variation clauses included in the supply contracts.[246]

- The ADC disagreed with Glencore's statement that the ammonium nitrate market is characterised by "large contract price variations including, in 2017, a difference of more than 40% between upper and lower price bounds". The ADC submitted that, "the information in the Frontier Report referred to by Glencore relates to the variation in monthly Baltic Free on Board prices for bulk ammonium nitrate",[247] and the ADC did not consider that this index of prices demonstrated that the injury experienced by the Australian industry is greater than that likely to occur in the normal ebb and flow of business.

Review Panel Applicants

Glencore

378. Glencore relied on its submission attached to its application for review and its response to the ADC's clarifications during the First Conference. Glencore also adopted certain contentions of DBS and Yara in their respective applications for review.

DBS

379. DBS in its s.269ZZJ submission contends that REP 473's post-IP findings are unsafe and must be disregarded for the reasons detailed in Section A of its submission,[248] including the following contentions:

    - The consideration of a "post-investigation period" represents an attempt to expand the appearance of injury caused by dumping, when the facts could not justify such a finding with respect to the period of investigation.

[246] See ADC's s.269ZZJ submission, paragraph 97.
[247] See ADC's s.269ZZJ submission, paragraph 99.
[248] See DBS' detailed reasons in Section A of its s.269ZZJ submission, pages 2 – 8.

- The “post-investigation period” was not defined in the REP 473 and according to DBS there was still no clarity about this period.[249]

- The ADC undertook no investigation of the other facts pertaining to the Australian industry’s financial condition in the post-IP.

- Profit in the post-IP as worked out by the ADC took no account of costs in the post-IP and profit foregone was not considered in the context of the overall profitability of the Australian industry in the post-IP.

- The ADC assumed no change in the profitability of the Australian industry applicants in the post-IP and an assumption of “stasis” just cannot be made, irrespective of whether the ADC thinks that it is favourable or unfavourable assumption from the perspective of any party.

- By not obtaining information for the post-IP the ADC failed in its obligation to investigate, and cannot be said to have arrived at a finding that was evidence-based and objective, and cannot be considered to be either the best information available or the most reliable information.

380. DBS therefore contended that the Review Panel should reject the ADC’s post-IP conclusion and limit its consideration of what the “correct or preferable decision” should be to the ADC’s conclusions with respect to the IP.

Yara

381. In its s.269ZZJ submission Yara contended that:

- The ‘aggregated’ profit foregone percentage of 6.2 per cent is inflated and does not reflect the fact that following the IP the Australian industry would still be making profitable sales;[250]

[249] Reference was made to the First Conference during which the ADC’s representative stated that the “outer limit” was a year following the IP (being 1 April 2019).
[250] This is explained by Yara with reference to a table in Section E of Yara’s s.269ZZJ submission, page 5.

- The underlying "effect" that has led to the "profit foregone" margins are dependent on assumption and the profit foregone figures themselves are equally based on a dearth of evidence and simplistic assumption;

- The bulk of the "profit foregone" occurred after the IP, yet REP 473 infers that that the ADC either did not seek, was not given, or failed to consider any information from this post-IP, therefore it cannot be maintained that this injury has been "caused" to the Australian industry.[251]

- The 6.2 per cent profit foregone cannot properly be considered to be "injury" as 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.

- The injury that REP 473 claims the Australian industry had suffered was not properly material so as to require the imposition of measures.[252]

Original Industry Applicants

CSBP

382. CSBP in its s.269ZZJ submission contended that the submissions of the Review Panel Applicants, in respect of the First Conference, are speculative concerning whether the profit forgone calculations as determined by the ADC can be considered “material” or whether the level is reflective of the normal ebb and flow of business.

383. CSBP concurred with the ADC that the profit forgone calculation of annualised injury to the Australian industry is a conservative estimate only, and that actual loss of profit and profitability from the dumping is considered to be substantially greater than that calculated (based on the seven contracts), once full account is taken of

[251] Yara refers to changes of circumstances in the post-IP, such as Orica bringing its mothballed capacity at Yarwun back on-line in 2018 and QNP having significant shut-downs in in the first half of FY19, that simply are not considered in the material injury.
[252] See Yara’s detailed arguments in Section E of its s.269ZZJ submission relating to its Fourth Ground of Review pages 5 – 6.

the price transparency of the dumped import prices across all contract renegotiations by the Australian industry.

384. CSBP submitted further that the seven contracts identified as confirming price and/or volume effect injury to the Australian industry in the IP are representative of only the initial injury that occurred, confirmed by the escalating profit forgone with the advancement of time.

Orica

385. Orica in its s.269ZZJ submission submitted that there were many other contracts in the industry, other than the thirteen examined by the ADC, which would be subsequently influenced by prevailing import parity prices that were identifiable during the IP. In this regard Orica referred to, "the pervasive way that dumped goods are used to negotiate price outcomes which results in a broader impact across the market".[253]

386. Orica submitted that the ADC correctly calculated profit forgone on a per annum basis for the AN industry, but contends that the ADC failed to include injury to Orica resulting from profit forgone by one of Orica's largest customers, on the basis that the contract was actively being negotiated during the IP. Orica considered that this example demonstrated the magnitude of the injury and that whilst, it may not have been appropriate at the time for the ADC to consider it, it contended that it was appropriate and right for the Review Panel to now give due regard to this example, given that the negotiations had been finalised and the contract executed.[254]

387. Orica also noted that the ADC did not use contract examples provided by Orica whereby AN imports sourced from subject countries, significantly impacted price outcomes which preceded the IP and for which injury has been sustained by Orica throughout the IP and beyond, as a result of dumping, again resulting in a conservative injury assessment.

[253] See Orica's s.269ZZJ submission, section III(a).
[254] See Section III(a) of Orica's s.269ZZJ for details of the injury Orica sustained resulting from this contract negotiation.

388. Orica submitted that the decision by the ADC to omit this and other examples of injury from the calculated profit forgone for the Australian industry has, in Orica's view, underestimated the extent of the injury to the Australian industry resulting from the dumping of the Goods exported to Australia from China, Sweden and Thailand.[255]

QNP

389. QNP in its s.269ZZJ submission also emphasised the long-term nature of contracts (i.e. often up to five years) with negotiations commencing at least one year prior to the period of supply and being often protracted and calling upon available market data (including to a large extent the only publicly available data - import pricing). QNP submitted further that once a contract is agreed, the impact of that negotiated contract extends for the full contract period.

390. QNP disagreed with the ADC's conclusions in two of the three contracts involving QNP where injury from dumping was not found. QNP submitted that in any event, the ADC's identified contracts (where it was satisfied that the Australian industry suffered injury from the dumped imports) is, in QNP's view, representative of the impact across the broader AN market for renegotiated contracts that were undertaken prior to, during and, post the IP.

391. QNP submitted that the profit forgone as calculated by the ADC and determined to be material is understated due to the pervasive impact of dumped prices across the whole of the AN market (for a period extending prior to and post the investigation period)

392. QNP observed that the calculated profit forgone component for the post-IP was greater than during the IP, which would be expected given the nature of the negotiations that occurred prior to the actual importations of the dumped goods during the IP (peaking in the quarter post the IP).

Reinvestigation

<u>Reinvestigation Request</u>

[255] See Orica's s.269ZZJ submission, section III(a).

393. Following review of the relevant grounds of review of all three Review Panel Applicants as well as all relevant submissions (and supporting documents), further information, clarifications and comments relating to the First, Second and Third Conferences[256] and conclusions reached at the relevant conferences, I decided to request a reinvestigation of the finding in REP 473 that any injury caused by dumping was material.[257]

394. There were five areas of concern relating to this finding set out in the Reinvestigation Request:

a. Separation of analysis of profit foregone in the IP and in the post-IP

- Following clarifications during conferences it became apparent that the reference to, "profit foregone (on an annual basis)" in REP 473 was in fact a reference to the aggregated sum of the profit foregone in the IP and the annualised profit foregone in the post-IP, as a percentage of Australian industry profit, which is the percentage that the ADC assessed for materiality.

- I requested the ADC to examine the profit foregone in the IP and the profit foregone in the post-IP separately in its assessment of materiality of injury, since:

  - ❖ I was also requesting the ADC to reinvestigate whether profit foregone in the post-IP could be considered to be a valid economic factor falling under s.269TAE(1)(g) and s.269TAE(3)(e) of the Act; and

  - ❖ I was also requesting to ADC to reinvestigation the evidentiary validity of the post-IP profit foregone.

b. Examination of the evidentiary validity of post-IP profit forgone

- I also requested the ADC to re-examine the evidentiary validity of the post-IP profit foregone calculations and analysis, since the relevant profit

[256] This conference was held on 6 November 2019 with the ADC to obtain further information and clarification related to Confidential Attachment 17 to REP 473.
[257] See Section 1 of the Reinvestigation Request.

amount used as the denominator in the calculations was the three Original Industry Applicants' aggregated profit achieved in the investigation period which the ADC considered to be "the most reliable information".

- Both Yara and DBS had challenged the evidentiary basis of the calculation and analysis of the post-IP profit forgone, as being "unsafe", "abstracted" and based on "a dearth of evidence and simplistic assumption", not reflecting actual prices, costs or sales volumes during that period and without consideration of significant change of circumstances.[258]

- Since I considered that there was some validity in these submissions, I requested that the ADC reinvestigate this issue taking into consideration that under Australian law, an injury determination must be "based on facts and not merely on allegations, conjecture or remote possibility"[259] and with reference to WTO jurisprudence that provides that if any assumptions are made they should be tested or have some sound basis in fact, and should be based on positive evidence.[260]

c. Alternate Methodology Comparing the applicants' profitability

- I also requested the ADC to reinvestigate its assessment of "materiality" of injury in respect of the profit forgone percentages, taking into consideration Yara's and DBS's argument, that profit foregone in Confidential Attachment 17 is reflected as a percentage of the aggregated profit and not as percentage points of the aggregated profitability, which makes the figure appear to be more significant.

- Following the Third Conference, the ADC confirmed in its written clarification that an alternative method to determine materiality could

[258] See Section 1(b) of the Reinvestigation Request for details of DBS and Yara's contentions in this regard.
[259] See s.269TAE(2AA) of Act.
[260] *Mexico-Definitive Anti-Dumping Measures on Beef and Rice*, *Complaint with respect to Rice (WT/DS295/R).*

have been to compare the applicants' profitability in the absence of dumping with the actual profitability.[261]

d. Reassessment of materiality of injury with regard to profits foregone

- I therefore requested the ADC in its reinvestigation to reassess the materiality of the injury finding, on the following basis:
  - ❖ the separation of the IP and post-IP profits;
  - ❖ the possible exclusion of post-IP profits foregone from the assessment, if found to be invalid from an evidentiary point of view; and
  - ❖ the use of the alternate (or additional) methodology of assessing profit foregone in terms of profitability.
- I also requested that in conducting the reinvestigation the ADC should particularly take cognisance of the Injury Direction that directs that, "material injury is injury which is not immaterial, insubstantial or insignificant", and that injury should be "greater than that likely to occur in the normal ebb and flow of business".

e. Possibility of double counting if still aggregate IP and Post-IP profits

- I requested that if the ADC in its reinvestigation still found it appropriate to aggregate the IP profits foregone and post-IP profit foregone in determining materiality in injury (as was the case in REP 473), then the ADC should take into consideration Glencore's concern set out in its submission in respect of the First Conference, as to the possibility of double counting.[262]
- After the Third Conference where the Review Panel sought clarification on this issue, the ADC provided a written clarification after the conference stating that the ADC had examined the material again and had accepted that in calculating an annualised figure there was double

[261] See Third Conference Summary.
[262] See Paragraph 8b of Attachment 4 of the First Conference Summary.

counting in respect of two contracts for consecutive periods. Taking this into account, the ADC recalculated a lower profit foregone as a percentage of the Australian industry's profit.[263]

Reinvestigation Report

New Information that is not "relevant information" and that post dates the IP

395. One of the major procedural issues arising out of the reinvestigation was that the ADC requested and collected new financial data from the Original Industry Applicants for the period 1 April 2018 to 30 September 2019, that is in respect of a period after the IP. The new data collected related to:

    - 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 ADC subsequently used and relied on this new data in its reinvestigation of the finding in REP 473 that injury caused by dumping was material.

396. During the course of the reinvestigation all three Review Panel Applicants objected to and challenged the collection and use of this new 'post- investigation period' information by the ADC, as being unlawful and contrary to the requirements of s.269ZZL and the notice issued by the Review Panel under that section.[264] It was contended that the ADC was not entitled to consider and rely on the new information under the Act and should:

    - confine itself to the information on the record of the original investigation and on the Review Panel's record, as made clear by the s.269ZZL notice; and
    - put out of its consideration any information it might have received in breach of the requirements of the s.269ZZL notice and the Act.

[263] See Third Conference Summary.

[264] See joint letters from DBS and Yara to the ADC dated 11 February 2020 and 20 March 2020 (that were copied to the Review Panel for information), Documents #72, #73, #74 and #79 of EPR 473 and Section 1.4.1 of the Reinvestigation Report (pages 6 – 9).

397. The ADC addressed the legal concerns relating to the collection and use of the new information in the Reinvestigation Report:

> *After receiving a request for reinvestigation from the ADRP, the Commission conducts a reinvestigation pursuant to section 269ZZL.The Act does not impose any procedural requirements for such reinvestigation.*
>
> *Section 269ZZK(4) imposes limits on the information and 'conclusions' that the ADRP may consider in arriving at its recommendation. However, the restrictions in section 269ZZK(4) are qualified by section 269ZZK(4A), which requires the ADRP also 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, 'set out any new findings that the Commissioner made as a result of the reinvestigation', and 'set out the evidence or other material on which the new finding or findings are based'.*
>
> *The legislation does not prescribe or limit what 'evidence or other material' the Commissioner's new findings may be based on. New findings may be based on evidence or other material that was before the Commissioner in the original investigation. New findings may also be based on evidence or other material that was not before the Commissioner in the original investigation – i.e. new evidence or other material provided in the reinvestigation.*
>
> *If the Commissioner was restricted to only considering evidence or other material to which the Commissioner, in the original investigation, had had regard or was, required to have regard (per section 269ZZK(6)(a)), this would limit the scope of the reinvestigation. Section 269ZZL uses the word 'reinvestigation' rather than 'review' or 'reconsideration'. In order to 'reinvestigate' a finding or findings that formed the basis of the reviewable*

decision, the Commissioner may have regard to new evidence or material that is relevant to that finding.[265]

Consideration of Reinvestigation Report containing information that is not 'relevant'

398. It is important to consider, as a preliminary issue, whether the Review Panel could rely on a Reinvestigation Report that has taken into consideration information that was not 'relevant information'.[266]

399. I agree with the ADC's legal analysis, referred to above, that it is not limited to considering "relevant information" as defined in s.269ZZK(6) in preparing a Reinvestigation Report under s.269ZZL(2). It is reasonably clear from the terms of s.269ZZK, in particular s.269ZZK(4A), that the Review Panel must have regard to such a report, irrespective of whether the report contains information that is not 'relevant information'. Moreover, the requirement in s.269ZZK(4) that the Review Panel have regard only to relevant information is expressed to be subject to subsection (4A) which, in turn, requires the Review Panel to have regard to the Commissioner's Reinvestigation Report. Indeed, the language of 'must' in subsection (4A) makes it clear that the Commissioner's Reinvestigation Report is a mandatory relevant consideration.[267]

Consideration of the Commissioner's inclusion in the Reinvestigation Report of new data that post-dates the IP

400. In addition, I have also considered whether, for the purpose of reinvestigating the 'material injury finding', the Commissioner can consider new data that post-dates the investigation period.

401. The text of s.269ZZL imposes a number of constraints on the matters to which the Commissioner may have regard in conducting a reinvestigation. Pursuant to s.269ZZL(2), the Commissioner must conduct the reinvestigation 'in accordance with the Review Panel's requirements under subsection (1)'. The Review Panel is empowered under s.269ZZL(1)(a) to require the Commissioner to 'reinvestigate a

[265] See Section 1.4.1 of the Reinvestigation Report, pages 6 – 7.
[266] Relevant information is defined under s.269ZZK(6) and includes the information the Commissioner had regard to when making the findings set out in the report under s.269TEA.
[267] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-41.

specific finding or findings that formed the basis of the reviewable decision'. Accordingly, the Commissioner:

a. is not permitted to investigate findings beyond those specified in the Review Panel's request; and

b. can investigate only those findings that formed the basis of the reviewable decision.

The Commissioner is also required under s.269ZZL(3)(c) to 'set out the evidence or other material on which the new finding or findings are based' in the report provided to the Review Panel. The text of s.269ZZL(3)(c) does not specify whether the 'evidence or other material' may include fresh evidence or is confined to the evidence to which the Commissioner had regard in making his or her initial findings.

402. The Commissioner is bounded by the two constraints identified in the above paragraph, namely: (a) that he or she is not permitted to investigate findings beyond those specified in the Review Panel's request; and (b) that he or she can investigate only those findings that formed the basis of the reviewable decision. Neither of those constraints is necessarily inconsistent with the Commissioner having recourse to data from the post-IP. In addition to these identified parameters of investigation in s.269ZZL(1) and (2), the only evidentiary constraint imposed on the report under s.269ZZL(2) is that 'the evidence or other material' on which any new finding or findings are based, are set out.

403. It would seem to me, therefore, that the Commissioner is not precluded, in discharging his or her reinvestigation function, from considering data that post-dates the initial IP, provided the reinvestigation is in accordance with the Review Panel's requirements under s.269ZZL(1)(a) to reinvestigate a specific finding or findings that formed the basis of the reviewable decision. In the Reinvestigation Report the ADC states that it sought the new information because the new information was relevant to a finding the subject of reinvestigation, that is, the finding of profit forgone in the post-IP, and explains in detail how the new information is directly relevant to this finding:

> *The Commission has sought 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 (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 using the new information is preferable to the approach of 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).[268]

404. I do not consider that there is any indication, from the ADC's explanation or from the submissions of the Review Panel Applicants, that the collection and use of the new post-IP data is not in accordance with the Review Panel's requirements under s.269ZZL. The manner in which the ADC conducted the reinvestigation was within the scope of the request to reinvestigate the finding, that dumping caused material injury.

Reinvestigated Findings: First (a), Second (b) and Fifth (e) Areas of Concern

405. I will now discuss the reinvestigated findings with regard to the first (a), second (b) and fifth (e) areas of concern identified in the Reinvestigation Request and referred to above, that is: (a) Separation of analysis of profit foregone in the IP and in the post-IP; (b) Examination of the evidentiary validity of post-IP profit forgone; and (e) Possibility of double counting.

406. In the Reinvestigation Request I requested a separation of analysis of profit foregone in the IP and in the post-IP in its assessment of materiality of injury, since I had expressed concern as to the legal basis for the examination of profit foregone in the post-IP as part of the injury analysis under s.269TAE of the Act and was also

[268] See Section 1.4 of the Reinvestigation Report, pages 5 – 6.

requesting the ADC to investigate the evidentiary validity of the post-IP profit foregone.

407. In the Reinvestigation Report, the ADC separated the analysis of profits foregone in the IP and post-IP as requested and, in addition, confirmed the use of profit foregone in the post-IP.

Legality of ADC finding with regard to profit foregone in the post-IP

408. The ADC confirmed that in undertaking its analysis of profit forgone in the post-IP, it considered that the assessment of injury is not constrained to the IP. The ADC in this regard referred to the Act which does not define the injury analysis period or prescribe a minimum or maximum period for an injury analysis. The ADC also referenced ADRP Report No. 102 and WTO jurisprudence, in support of this principle.[269]

409. The ADC clarified that the profit foregone in the post-IP is not based on notional sales, nor is it influenced by 'future exports'. Instead, it considered that the profit forgone in the post-IP is based on the Original Industry Applicants' sales occurring in the post-IP in accordance with fixed-term contracts, which were negotiated and influenced by the dumped goods exported in the IP. Specifically, the ADC 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 IP in accordance with s.269TAE(1)(f). The ADC re-emphasised that the injury experienced, in terms of price depression, actually occurred in the IP as the Original Industry Applicants were responding to the pricing of dumped goods in the IP when negotiating contracts for future supply. The ADC explained that the calculation of the profits foregone was in fact the 'quantification' of the price and volume effects of the price depression (the injury) that occurred in the IP, for the purpose of determining the materiality of the injury. The ADC determined profit foregone in both the IP and the post-IP, given that some sales occurred in the IP and other sales commenced post-

[269] See the discussion in Section 2.2.1 of the Reinvestigation Report, pages 12 – 13.

IP in accordance with the relevant negotiated/re-negotiated contracts, entered into during the IP.[270]

Consideration of legality of ADC finding with regard to profit foregone in the post-IP

410. It has been made abundantly clear from the ADC's reasoning that the injury (in the form of price depression) actually occurred in the investigation period, and the calculation of the profits foregone (in both the IP and the post-IP) was the methodology used to 'quantify' the price and volume effects of that price depression that occurred in the IP, for the purpose of determining the materiality of the injury (that occurred in the investigation period). The ADC also clarified that in its analysis it only considered injury factors within the injury analysis period and did not consider the impacts of dumping for a future unspecified period. It was made clear that the relevant injury factor here is price depression (not profit foregone) which occurred in the IP, and that the profits foregone calculation was the quantification of the price and volume effects of that injury factor. The reason for adopting this methodology with regard to profits foregone was also made clear throughout the review, arising from the fact that the relevant sales were made in accordance with fixed-term contracts, negotiated during the IP in response to pricing of the dumped goods in the IP, but with some sales occurring in the IP, and other sales commencing in the post-IP (in accordance with the date specified in the negotiated/re-negotiated contract). The ADC has also clarified that this calculation of the profits foregone is part of its use of the 'but for' or counterfactual assessment undertaken in order to quantify "the effects" of dumping on the Australian industry's prices. As has been previously discussed and considered in respect of various other grounds of review, the injury assessment could not be accomplished using the coincidence analysis because of the particular circumstances of the ammonium nitrate market, resulting in the majority of sales in the IP being reflective of contract terms negotiated many years prior to the IP. It has already been found in respect of other grounds of review, that it was open for the Commissioner to use a 'but for' analysis.[271]

411. As noted by the ADC, the Act does not define the injury analysis period or prescribe a minimum or maximum period for an injury assessment. I also note the ADC's

[270] See Section 2.2.1 of the Reinvestigation Report (pages 11 – 12) and ADC's written response to Question 2 in the First Conference, Attachment 1 of the First Conference Summary.
[271] See consideration of Glencore's Third Ground of review, the first and second components of Glencore's Sixth Ground of review and the first sub-ground of DBS' First Ground of review.

reference to WTO jurisprudence which has determined that the ADA does not set forth any express requirements regarding the choice of the period of investigation for the purposes of conducting the injury analysis, and further that an anti-dumping authority may investigate price effects of imports in an injury investigation period which may be different to the investigation period for dumping.[272] The ADC has also contended that s.269TAE(1) of the Act is broad in terms of the matters and methodology that the Minister may have regard to when determining whether material injury to an Australian industry has been or is being caused. Relevantly, the Injury Direction states that, "identifying material injury will depend upon the circumstances of each case and will differ from industry to industry and from time to time".

412. I reviewed the ADC's detailed explanation of its approach with regard to the profits foregone in the post-IP in the legal context discussed above. Taking into consideration the particular circumstances of the AN market and that the actual injury (price depression) resulting in the profit foregone, occurred during the IP, I do not consider that there is anything unreasonable in the approach taken by the ADC in assessing the profits foregone in the post-IP, as a measure of the materiality of injury that occurred in the IP. It should be borne in mind that the usual methodology of assessing the materiality of injury in the form of a "coincidence" analysis was not available to the ADC in the circumstances.

413. I do not consider that it has been demonstrated that the '"assessment" of injury cannot extend to beyond the IP for dumping,[273] nor has it been demonstrated that the approach of the ADC with regard to assessing profit foregone in the post-IP is inconsistent with Australian or WTO law or with the Injury Direction. I therefore consider it open to the ADC to consider information (profit foregone) that post-dated the IP for the purposes of the material injury assessment.

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[272] See *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, paragraph 7.276.

[273] The present case can be distinguished from the principle articulated in *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* [2002] FCAFC 423, that in order to determine whether dumping has occurred in the past, the Minister must have regard to the investigation period, because s.269TACB(1) requires the Minister to reach a conclusion about whether dumping has occurred by reference to the investigation period. By contrast, there is no reference to the investigation period, or any other temporal limit, specified in s.269TEA for the purpose of determining whether material injury has been or is being caused or is threatened.

Evidentiary validity of the post-investigation profit foregone calculation and analysis

414. Arising out of concerns expressed by the Review Panel Applicants, which I considered had validity, I requested the ADC to re-examine the evidentiary validity of the post-IP profit foregone calculations and analysis, since the relevant profit amount used as the denominator in the calculations was the Original Industry Applicants' aggregated profit achieved in the investigation period, which the ADC had considered to be "the most reliable information" in the original investigation and had considered was "conservative", given the declining trend of the aggregated profit of the Original Industry Applicants.

415. The ADC in its reinvestigation of this issue recognised this concern of the Review Panel which resulted in the ADC requesting and receiving new data from each Original Industry Applicant to determine the actual total profit and profitability in the post-IP. This updated profit data was then used in the calculations to revise the profit forgone as a proportion (or percentage) of the Original Industry Applicants' profit in the post-IP. The ADC was satisfied that using the new information was preferable to the approach of assuming that profit in the post-IP would remain the same as in the IP, as was the case in REP 473.[274] The ADC stated that it had re-examined the relevant documents (including documents evidencing contract negotiations, finalised contracts and sales records) and re-affirmed its finding that exports from the subject countries caused price depression and/or directly displaced Australian industry volumes. The ADC was satisfied of the evidentiary validity of these findings. The ADC stated that it had also reassessed the level of profit forgone in the post-IP attributable to price and/or volume injury identified and was now satisfied of the evidentiary validity of the finding of profit forgone.[275]

Consideration of evidentiary validity of the post-investigation profit foregone calculation and analysis

416. I accept that using the updated actual profit data from the post-IP in the calculations to revise the profit forgone as a proportion (or percentage) of the Original Industry Applicants' profit in the post-IP, is preferable to assuming that profit in the post-IP would remain the same as in the IP, as in REP 473. I consider that the collection

[274] See Sections 1.4, 2.1.1 and 2.2.2 of the Reinvestigation Report and Confidential Attachment 1 thereto.
[275] See Section 2.2.2 of the Reinvestigation Report, page 15.

and use of the new data by the ADC in the calculations of profit foregone adequately and reasonably addresses the concerns of Yara and DBS that the calculation and analysis of the post-IP profit forgone in REP 473 was "unsafe", and based on "a dearth of evidence and simplistic assumption" contrary to Australian law that an injury determination must be "based on facts and not merely on allegations, conjecture or remote possibility". I therefore consider that the ADC's reinvestigated calculation and analysis of the post-IP profit foregone, using the updated actual profit data collected during the reinvestigation, is based on facts and cannot be said to be based merely on allegations, conjecture and remote possibility. I consider that the reinvestigated calculation and finding is compatible with s.269TAE(2AA) of Act.

New calculations of profit forgone in the IP and in the post-IP

417. After separating the calculation and analysis of profit foregone in the IP and in the post-IP, the ADC found that the profit forgone is 2.2 per cent of the Original Industry Applicants' aggregated profit in the IP (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 IP (the post-IP, being 1 April 2018 to 31 March 2019).

418. The ADC stated in the Reinvestigation Report that while absolute profit forgone in the IP remained unchanged, the profit forgone as a percentage of the Original Industry Applicants' aggregated profit changed (that is increased from 1.9 to 2.2 per cent) given that the ADC has not multiplied the profit forgone by the proportion of the applicants' share of the total Australian industry production volume, on a transaction by transaction basis, as was done in Confidential Attachment 17 to REP 473, as discussed during the Third Conference.[276] The ADC was satisfied that a qualitative assessment of the materiality of the profit forgone was appropriate in circumstances where it did not have the profit data for the other Australian industry manufacturers.

419. In the Reinvestigation Report, the ADC used the updated data to determine that the profit forgone in the post-IP to be 3.6 per cent of the Original Industry Applicants' aggregated profit in the same post-IP. The ADC explained that this percentage is lower than that determined in Confidential Attachment 17 to REP 473 (being 4.3 per

[276] See Third Conference Summary.

cent), mainly because the aggregated profit used in the denominator in this revised calculation is relatively higher than the aggregated profit in the IP, and the numerator (profit forgone) is relatively lower. The profit forgone for the post-IP was also revised in relation to one example in order to avoid double counting, given that this contract was effective during the IP 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-IP for the relevant Australian industry applicant rather than the margin in the IP, which further reduced the profit forgone in the post-IP.[277]

420. In the Reinvestigation Report the ADC referred to Orica's submissions in respect of the Preliminary Reinvestigation Report, in which Orica claimed that the estimate of profit forgone did not take into consideration one example pertaining to Orica's negotiations to supply a particular customer. Orica considered that the injury experienced in relation to this contract was significant and was a relevant example for the assessment of injury. Although the ADC had acknowledged that there was a feature of the contract being negotiated that allowed for the price variations in certain circumstances (based, in part, upon import prices), it did not take this example into account in its injury assessment since the contract was not finalised at the time that REP 473 was being prepared. In the Reinvestigation Report the ADC stated that it still did not have any information to establish whether this price-variation provision has been included in the finalised contract, and even if included, the prices would not be affected by dumping in the IP given that the contract became effective after the IP and therefore the prices would not be affected by dumping in the IP.[278]

421. In Orica's written comments provided during the Seventh Conference (the details of which will be discussed in more detail below), Orica challenged certain factual issues of the ADC's finding in the Reinvestigation Report relating to its claim and

[277] See Section 2.2.1 of the Reinvestigation Report (pages 13 to 14) and Confidential Attachment 1 thereto.
[278] See Section 2.2.2.1 of the Reinvestigation Report, page 16.

contended that the injury resulting from the relevant negotiation should have been included in the ADC's injury analysis.[279]

422. I decided to hold the Eighth Conference, the purpose of which was to seek clarification and further information from the ADC in regard to the written submission of Orica relating to the Seventh Conference.[280] A further conference was held with Orica, the Ninth Conference, for the purpose of providing Orica with the opportunity to comment on the ADC's clarifications and comments relating to the Eighth Conference. Orica reiterated that the impact relating to the finalisation of a key contract (included in the updated information provided to the ADC during the reinvestigation) should have been taken into account by the ADC as that injury fell within the "post investigation period" and Orica provided details of the injury sustained relating to this example.[281]

Consideration of new calculations of profit forgone in the IP and in the post-IP

423. Firstly, I consider that the ADC's change to a qualitative methodology to determine the applicability of the materiality to the 'industry as a whole', is not unreasonable, bearing in mind that:

- Glencore had questioned the necessity of undertaking the step of applying the ratio to each example;[282]
- The method of applying a different ratio in respect of each transaction appeared to be unduly complex;
- This issue was subsequently raised with ADC during the Third Conference and clarification was requested as to why the reduction in profitability could not be assessed qualitatively, as to its representativity of the Australian industry as a whole, by taking into account the percentage of total production that the Original Industry Applicants' production represented (that is, 78 per cent). The ADC had clarified that the qualitative methodology could be

[279] For further details of Orica's submissions in this regard, see Attachment F to the Seventh Conference Summary.
[280] See Eighth Conference Summary.
[281] See Ninth Conference Summary for details of Orica's submissions.
[282] See Glencore's written comments on the ADC written response to the First Conference.

considered to be an alternate methodology for assessing materiality of the injury (in respect of profits foregone) to the 'industry as a whole'.[283]

- The relevant percentage of total production that the Original Industry Applicants represent, being 78 per cent, can by any account be considered to a be major proportion of the Australian industry's total production, and a finding of that high percentage being representative of the industry as a whole, from a qualitative point of view, is not unreasonable.

424. Secondly, I considered Orica's contention that the impact relating to the finalisation of a key contract should have been taken into account by the ADC in its calculation of profits foregone in the "post investigation period". While the factual discrepancy relating to the provision of the executed contract to the ADC, was not resolved during the Seventh and Eighth Conferences, I do not consider that anything turns on this discrepancy. Based on the information submitted by Orica as to the mechanism of the price-variation clause, and the date that such price-variations were claimed to be effective from, it seems clear that the prices of sales of the Goods subject to the contract would not be affected by dumping during the investigation period. I agree with the ADC that there would be not be a causal link between dumping in the IP and any injury incurred by that Orica arising out of the contract, even if relevant sales occurred in the post-IP. Therefore, I consider that the ADC's decision in the reinvestigation, not to include the injury (in the form of profits foregone) arising out of this contract in its injury assessment, is reasonable.

425. In light of the above discussion I therefore accept the ADC's reinvestigated new findings that profit forgone is 2.2 per cent of the Original Industry Applicants' aggregated profit in the IP and that the profit foregone is 3.6 per cent of the Original Industry Applicants' aggregated profit in the post-IP.

Reinvestigated Findings: Third (c) and Fourth (d) Areas of Concern

426. I will now discuss the reinvestigated findings with regard to the third (c) and fourth (d) areas of concern identified in the Reinvestigation Request and referred to above, that is: (c) Alternate Methodology Comparing the Original Industry Applicants'

[283] See Third Conference Summary.

profitability; and (d) Reassessment of materiality of injury with regard to profits foregone.

427. In the Reinvestigation Request, I had requested the ADC to present the alternative methodology of comparing the Original Industry Applicants' profitability in the absence of dumping with the actual profitability. This request arose out of Yara's and DBS' argument, that profit foregone in Confidential Attachment 17 is reflected as a percentage of the aggregated profit and not as percentage points of the aggregated profitability, which makes the figure appear to be more significant. The ADC, using this methodology, based on profitability, found that the reduction in profitability caused by dumping of exports during the IP, expressed as a percentage point change in profitability, was 0.6 percentage points in the IP and 1.1 percentage points in the post-IP. However, it was particularly stated that the Commissioner did not consider this methodology to be more appropriate or preferable to the methodology adopted in REP 473 and that no compelling explanation, was given by Yara in advocating this methodology over the methodology adopted by the ADC in REP 473 and Confidential Attachment 17 thereto. Further, it was stated that it was the ADC'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".[284] The ADC considered that it was more appropriate to calculate the profit forgone as a percentage of the Original Industry Applicants' aggregated profit.

428. The ADC found in its reassessment of the materiality of injury with regard to profits foregone, that having regard to both the profit forgone in the IP and post-IP, the ADC considered that the injury caused by the dumped goods is material to the Australian industry as a whole. The ADC considered further that, regardless of the calculation used to quantify the materiality of the profit forgone (whether it is expressed as a percentage of the Original Industry Applicants' profit or a percentage point change in profitability), the absolute profit forgone determined in the IP and the post-IP (in the millions of Australian dollars*) is* material. It was also noted by the ADC that the contracts that were found to be affected by dumping during the IP have different contract terms and periods, in some cases extending

[284] See Section 2.2.3 of the Reinvestigation Report, pages 16 - 17.

over six years. While the profit forgone calculations are confined to a 12 month period (in terms of profit forgone in the IP, and profit forgone in the post-IP), the injury experienced will continue over the full term of the contract.[285]

429. The ADC noted that the Original Industry Applicants asserted that the profit forgone that has been attributed to the dumped exports and as quantified by the ADC was conservative and Orica and QNP further asserted that the quantified profit forgone was understated as it did not take into consideration certain examples. In relation to the examples referred to by Orica and QNP, for the avoidance of doubt, the ADC stated that it did not use these examples in its calculations of profit forgone for reasons relating to causation (in the case of Orica) and because certain examples were not brought to the ADC's attention during the investigation (in the case of QNP). The ADC pointed out that no other submissions were received concerning the materiality of the injury during the reinvestigation.[286]

The Sixth Conference

430. After reviewing the Reinvestigation Report, and in order to ensure that I was able to give meaningful consideration to the Reinvestigation Report under s.269ZZL(2), I decided to hold the Sixth Conference, the purpose of which was to seek clarification from the ADC and a better understanding of the reasons for the finding relating to "the reassessment of the materiality of injury with regard to profit foregone".

431. During the Sixth Conference:[287]

    i. I requested the ADC explain the reasons for the conclusion that, "having regard to both the profit foregone in the investigation period and post-investigation period, the Commission considers that the injury caused by the

[285] See Sections 2.2.3 and 2.2.4 of the Reinvestigation Report, pages 16 – 17. Reference was also made to Table 2 of the Reinvestigation Report which showed the variations in the Original Industry Applicants' net profit and profitability (including the profit and profitability in the absence of dumping), with the new data used to update the profit and profitability figures for the post-IP.
[286] See Section 2.2.4.1 of the Reinvestigation Report, pages 18 – 19.
[287] See Sixth Conference Summary.

dumped imports is material to the Australian industry ……..” [emphasis added].[288]

- The ADC submitted that the materiality assessment was undertaken by considering the IP percentage and the post-IP percentage of profit forgone separately, noting that these amounts were directly attributable the dumping found.

- The ADC clarified that Table 2 in the Reinvestigation Report represents the profit forgone and reduced profitability in index format, with the base period being 2014 - 15, showing the trend in the Original Industry Applicants’ actual profits and profitability since the base period, and what the profit and profitability would have been in the absence of the dumping that occurred in the IP.

- The ADC further clarified that the aggregated net profit of the Original Industry Applicants in the post-IP was used as the denominator in calculating the profit forgone for the post-IP as a percentage of the Original Industry Applicants’ net profit in that same period. Given the increase in the net profit in this period, this resulted in a lower percentage in the post-IP (3.6 per cent) relative to that determined in REP 473 (4.3 per cent). The ADC considered that these lower percentages were still material.[289] The ADC pointed out that as noted in the Reinvestigation Report, the aggregated net profit of the Review Panel Applicants in the post-IP increased significantly (in particular, [redacted] which increased by [redacted] in the post-IP relative to the IP) due to increased sales volumes to certain customers in the

[288] In this regard, I requested the ADC to set out how it concluded that the injury was “material”, bearing in mind the disaggregation of the profits foregone in the IP and post-IP and the change in the percentage figures resulting from the reinvestigation. I also requested the ADC to provide a step by step narrative of how the data reflected in Table 2 supported the ADC’s reinvestigated finding of materiality of injury, as well as an explanation of how the ADC took into consideration its new finding that the aggregated net profit of the Original Industry Applicants actually increased in the post-IP.
[289] The ADC emphasised that the significant increase in profit is an aggregated profit for the Original Industry Applicants encompassing all their sales and contracts in this period, and out of all those sales, only five contracts were found to be directly affected by dumping in the post-IP, which entailed price depression or lost volumes and therefore lost profit.

Pilbara region in Western Australia, given that Yara Pilbara Nitrates Pty Ltd (aka the Burrup plant or Burrup) was continuing to experience production issues.[290]

ii. I requested the ADC to explain how it came to the conclusion that, "the absolute profit forgone determined in the investigation period and the post-investigation period (in the millions of dollars) is material" [emphasis added], since it appears to have been examined in isolation in coming to this particular conclusion, without any reference point of comparison.

- The ADC stated that having regard to the Injury Direction it considered that the absolute amounts of the profit forgone in the IP and the profit forgone in the post-IP which were in the "millions of dollars",[291] are not immaterial, insubstantial or insignificant.

- In response to a further clarification request, however, the ADC acknowledged that it was necessary for the absolute profit forgone dollar amount to be examined in the context of the Original Industry Applicants' aggregated profit and not in isolation. The ADC submitted that it already found that to be material.[292]

iii. I requested the ADC to explain the reasons for coming to the conclusion in the Reinvestigation Report 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".

[290] The ADC stated that [redacted]

[291] Reference was made to Confidential Attachment 1 to the Reinvestigation Report, with regard to these figures, which was [redacted] in respect of the profit forgone in the IP and [redacted] in the post-IP.

[292] It should be noted therefore that the absolute amount of profit foregone of [redacted], in the IP should be examined with reference to the aggregated profit of the Original Industry Applicants in the IP of [redacted] and that the absolute amount of profit foregone of [redacted] in the post-IP should be examined with reference to the aggregated profit of the Original Industry Applicants in the post-IP of [redacted]. See Confidential Attachment 1 to the Reinvestigation Report.

The ADC explained that assessment of the materiality of the injury found (in the form of profit forgone) is not based on a coincidence analysis for the reasons set out in REP 473, and that one shortcoming in employing a coincidence analysis is that it is difficult to separate out the effects caused by dumping from the effects caused by all other factors which occur within the normal ebb and flow of business. In Investigation 473, because of the nature of sales in the Australian market (being in accordance with fixed-term contracts), the ADC was able to isolate the effects of dumping using a 'but for' or counterfactual assessment in relation to seven supply contracts that were negotiated, as explained in REP 473. The ADC explained that given that the profit forgone in respect of the seven examples outlined in section 9.2.1 of REP 473 was determined using a 'but for' analysis and therefore was solely attributable to dumping, this profit forgone is outside of the normal ebb and flow of business.[293]

The Seventh Conference

432. I decided to hold the Seventh Conference the purpose of which was to put the clarifications and information provided by the ADC during the Sixth Conference, to the Review Panel Applicants (being Yara, DBS and Glencore) as well as to the Original Industry Applicants, and to provide all parties with an opportunity to comment thereon.

433. During the Seventh Conference the following submissions were made:[294]

    i. Glencore:[295]

        - reiterated its submissions related to the First Conference, and contended that the ADC's separate consideration of the 2.2 per cent and the 3.6 per cent figures underlined the impossibility of reaching a finding of material injury, with profit variations in this order well within the usual ebbs and flows of the Australian industry's profits;[296]

[293] See Sixth Conference Summary.
[294] See Seventh Conference Summary.
[295] See Attachment A to the Seventh Conference Summary.
[296] In this regard, Glencore referred to its application for review (paragraph 46) and its written submissions relating to the First Conference (paragraph 5).

- challenged the ADC's finding that the 3.6 per cent profit foregone figure for the post-IP is material, notwithstanding the increase in profits in this period, and further contended that the explanation of the increase in profits does not provide a basis for regarding the asserted injury as material;

- challenged the ADC's explanation of its finding that the profit foregone (described as "millions of dollars") is material, as not advancing the analysis and submitted that the ADC has identified no reference point for comparison;

- challenged the ADC's reasoning, that the profit foregone was determined using a 'but for' analysis and therefore was solely attributable to dumping, as circular, and reiterated that it remains necessary to test the materiality of the suggested profit foregone by reference to the normal ebb and flow of business, which it contends has not been done by the ADC.[297]

ii. DBS:[298]

- contended that a loss of 2.2 per cent or 3.6 per cent profit, being millions of dollars, in an industry whose profit is measured in the hundreds of millions, is not material;

- submitted that the ADC admitted that it did not consider the 2.2 per cent loss of profit in the IP in context;[299]

- submitted that a 2.2 per cent or 3.6 per cent reduction in profitability, was not an outright loss but just a diminution, with no consideration of

[297] In this regard, Glencore again referred to its application for review (paragraph 46) and its written submissions relating to the First Conference (paragraph 5).
[298] See Attachment B to the Seventh Conference Summary.
[299] See Attachment B to the Seventh Conference for an explanation of DBS' argument in this regard. It should be pointed out that during the Sixth Conference, the extent of the ADC's admission was that its consideration of the absolute profits being in the "millions of dollars" should be examined in the context of the Australian industry's aggregated profit and not in isolation, which the ADC submitted it had already found that to be material. See Sixth Conference Summary.

revenue or costs, and not greater than would be likely to occur "in the ebb and flow of [this] business";

- submitted that the industry members and the industry overall demonstrated greater swings in their profitability in previous years where dumping is not alleged to have occurred;

- challenged the ADC's view that the alternative methodology "trivialises" the total loss of profit and contended that it is an admission that the injury, considered in terms of a diminution of profit, was trivial. It submitted that the alternative methodology is a valid, contextual methodology of assessing materiality in a profit and revenue context and an assessment made on that basis would properly take account of the ebb and flow of business.

iii. Yara:[300]

- pointed out that there was no analysis as to why a perceived loss that is in the "millions of dollars" would be material to the Australian ammonium nitrate industry which is a very high-revenue industry;

- supported DBS' submission that the ADC's consideration that the alternative methodology "trivialises" the profit foregone, is actually an admission of the immateriality of that injury, and submitted further that the approach contextualises what are otherwise abstract figures, and therefore a better indicator of the injury to the Australian industry;

- questioned how a hypothetical loss of profit foregone "in the millions" can be material, given that Table 2 of the Reinvestigation Report shows in abstract terms that the Original Industry Applicants' profit "increased by 22.8%" in the post-IP compared to the IP;[301]

[300] See Attachment C to the Seventh Conference Summary.
[301] See Yara's explanation of this percentage on page 4 of in its written comments relating to the Seventh Conference, being Attachment C to the Seventh Conference Summary.

- contended that the ADC's reasons for not applying the normal ebb and flow test is legally impermissible;[302]

- submitted that the ADC was wrong in asserting that it did not have to apply the normal ebb and flow test, and when the test is applied, the injury is not greater than that likely to occur in the normal ebb and flow of business, and accordingly it is not material.

iv. CSBP:[303]

- submitted that the injury to the Australian industry is not immaterial, insubstantial or insignificant and that the quantified injury for the seven examples can only be considered to be the minimum amount of injury experienced by the Australian industry from the dumped exports as the total injury to all industry members was not fully examined.

v. QNP:[304]

- submitted that the ADC's response confirmed that the profit forgone by the industry was material in nature, and the injury experienced by the industry can only be considered injury that is "not immaterial, insubstantial or insignificant", consistent with the Injury Direction.

vi. Orica:[305]

- recalled from the Injury Direction that the identification of material injury "will depend upon the circumstances of each case and will differ from industry to industry from time to time" and submitted that the ADC's finding is consistent with the Injury Direction requirement on materiality of injury taking full account of the relevant particulars of the subject industry;

[302] See Attachment C to the Seventh Conference Summary for Yara's detailed reasons for this argument.
[303] See Attachment D to the Seventh Conference Summary.
[304] See Attachment E to the Seventh Conference Summary.
[305] See Attachment F to the Seventh Conference Summary.

- reiterated that the ADC's findings, which demonstrated injury across the seven contracts only was material, understated the true extent of injury to the Australian industry from the dumped imports, contending that the material injury validated by the ADC was not fully reflective of the total, aggregate injury sustained by all Original Industry Applicants across the injury analysis period.[306]

Consideration of alternate methodology comparing the Original Industry Applicants' profitability

434. In the Reinvestigation Request I requested the ADC to reinvestigate its assessment of "materiality" of injury in respect of the profit forgone percentages, taking into consideration Yara's and DBS's argument arising out of the First Conference, that it was more appropriate to reflected profit foregone as a percentage of the aggregated profitability, as the current methodology could make the profit foregone figures appear to be more significant. The ADC presented the alternative methodology in the Reinvestigation Report, finding that the loss of aggregated profitability of the Original Industry Applicants was 0.6 per cent in the IP and 1.1 per cent in the post-IP ("percentage of profitability figures"). This is to be compared to its finding of profit foregone as a percentage of aggregated profits of 2.2 per cent in the IP and 3.6 per cent in the post-IP ("percentage of profit figures"). In the Reinvestigation Report it was stated that the Commissioner did not consider that this methodology is more appropriate or preferable to the methodology adopted in REP 473 and further, since the alternate methodology represents the profit forgone as a percentage point change relative to revenue, it trivialised the total loss of profit.[307]

435. I do not consider that it can be definitively stated that either of the methodologies is the correct or the incorrect approach. In my view they are both accurate and appropriate accounting tools to assess the materiality of the injury, both with the same underlying amount as the basis for the calculation (being the amount of profit forgone in the absence of dumping), but with different reference points or contexts. Profit is an absolute number which is equal to revenue minus expenses, and profitability is a relative number (a percentage) and expresses the ratio between

[306] Orica referenced its submissions relating to this issue, discussed above, contending that the ADC did not take account of the injury sustained by Orica as a result of the dumping.
[307] See section 2.2.3 of the Reinvestigation Report, pages 16 – 17.

profit and revenue. Therefore, a percentage of profitability is in effect a percentage of a percentage and is likely to be a much smaller figure than a percentage of actual profit, being an absolute number. I do not consider it appropriate to describe one or other of the methodologies as either having an appearance of 'greater significance' or of 'trivialising' the profit foregone. Rather, I consider that they are both valid methodologies, as long as the assessment is completely understood in the context of the actual percentage and the scope of what it is measuring.

436. In light of the above discussion, I do not consider that it is unreasonable for the ADC to focus on either of the methodologies, provided that the context is made clear. In this case, both percentage figures were presented in the Reinvestigation Report with the context of both measurements explained and clarified. While it might have been preferable for the ADC to examine and comment on both sets of figures in support of its finding, its choice to focus its assessment on the percentage of profit figures (that is, profit forgone expressed as a percentage of the Original Industry Applicants' aggregated profit) was in my view reasonable.

437. I do not, however, consider that the ADC's argument that it "considered the absolute amount of the profit forgone, which is in the millions of dollars, not to be, "immaterial, insubstantial or insignificant" [emphasis added], adds anything further to the analysis. It was pointed out during the Sixth Conference that the ADC appeared to have examined this 'measure' (that is, the absolute amount of profit forgone being "millions of dollars"), in isolation and without any reference point of comparison.[308] As Yara pointed out in its submissions relating to the Seventh Conference, that while "millions of dollars" can be very significant to smaller businesses, it would be different for businesses whose profits are in the hundreds of millions of dollars. I agree with Yara's observation that there was no analysis as to why a perceived loss that is in the "millions of dollars" would be material to such an industry. The ADC itself acknowledged during the Sixth Conference that it was necessary for the absolute profit forgone dollar amount to be examined in the context of the Australian industry's aggregated profit and not in isolation, which the ADC submitted that it already found that to be material.[309]

[308] See Sixth Conference Summary.

[309] This was a reference to the percentage of profit figures, discussed above.

Consideration of reassessment of materiality of injury with regard to profits foregone

438. After considering all the issues raised in the Reinvestigation Request and conducting the reinvestigation, the ADC found in its reassessment, that having regard to both the profit forgone in the IP and post-IP (annualised) it considered that the injury caused by the dumped goods was material, for the reasons described above. This was based on the ADC's assessment of the percentage of profit figures of 2.2 per cent in the IP and 3.6 per cent in the post-IP (annualised). Further the ADC concluded 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".[310]

439. I will firstly address the former part of the finding that injury caused by dumping was "material" and then will subsequently address the latter part of the finding that the injury caused by dumping was greater than that likely to occur in the normal ebb and flow of business.

440. Since the basis of determining "materiality" of injury is somewhat subjective and involves the exercise of discretion, it is relevant for me to again refer to the role and powers of the Review Panel, as articulated in ADRP Report No. 24, which does not involve a fresh evaluation, but rather includes, "assessing whether there has been inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Act or relevant regulations."[311] I will therefore, in my consideration of the issue at hand, examine whether the ADC conducted a comprehensive and proper assessment of all the facts and legal issues, and will further assess whether the resulting decision is reasonable in the circumstances. I will not conduct a *de novo* review of the evidence and analysis, and will only recommend that a different approach and decision be adopted where I am persuaded that such a different approach and decision is the correct or preferable one.

[310] See section 2.2.4 of the Reinvestigation Report, page 17.

[311] See ADRP Report No. 24 - Power Transformers exported from the Republic of Indonesia, Taiwan, the Kingdom of Thailand and the Socialist Republic of Vietnam, paragraph 14. See also the discussion relating thereto in the consideration of Yara's Second Ground of review and DBS' Second Ground of review, relating to cumulation.

441. The key question at hand is whether 'profits forgone' of 2.2 per cent of the Original Industry Applicants' aggregated profits in the IP and 3.6 per cent of the Original Industry Applicants' aggregated profits in the post-IP (annualised), considered together, can reasonably be considered to be material injury. There is very little guidance in the Australian legislation and WTO law, as to how the Commissioner or the Minister should make this assessment, with the ADC correctly pointing out that there is no legislated minimum threshold to determine whether the injury is material.[312] The focus of such an assessment must therefore be on the Injury Direction, which both the ADC (supported by the Original Industry Applicants) and the Review Panel Applicants have repeatedly referred to in support of their arguments, particularly the following passage:

> *…. I direct you to consider material injury to be injury that is not immaterial, insubstantial or insignificant.*[313]

442. I do not consider this part of the Injury Direction to be particularly helpful in difficult cases, as it appears to be somewhat circular and seemingly begs the question. It also seems to underline the wide discretion of the ADC in coming to a finding on materiality of injury. There is some further guidance in the Injury Direction which is more helpful:

> *I direct that there is no threshold amount that is capable of general application. Rather, identifying material injury will depend upon the circumstances of each case and will differ from industry to industry and from time to time*.[314] [emphasis added]

443. This confirms the ADC's contention that there is no minimum threshold amount and emphasises that the particular circumstances of each case and each industry will be relevant in determining whether the injury is material. The emphasised wording from

[312] Yara noted in its comments relating to the First Conference that the ADC's comment that "there is no legislated threshold to observe in determining whether the injury is material' does not mean that any injury is material. Yara submitted that materiality of injury is a condition precedent to the exercise of the power to impose anti-dumping measures under s.269TG(1) and (2) of the Act, being a fundamental concept in anti-dumping law which is of equal importance to a finding that dumping occurred.

[313] See the Injury Direction, page 1.

[314] See Injury Direction, page 1 – 2.

the Injury Direction referred to above, is similar to (and possibly sourced from) that of the Federal Court in *ICI Australia Operations Pty Ltd v Donald Fraser, the Anti-Dumping Authority and the Minister of State for Small Business and Customs ("the ICI Case"):*[315]

> *Although a quantitative assessment is involved, it is essentially a practical exercise and material injury to an industry may be identified even though precise quantification of the injury is not possible. There can be no threshold figure or percentage that is capable of general application; what is material injury will depend upon the circumstances of each case and it will differ from industry to industry and from time to time*.[316] [emphasis added]

444. The circumstances of the present case would seem to align with those referred to in the ICI Case, that is, although a quantitative assessment was involved, "precise" quantification of the injury was not possible. If therefore, the profit forgone percentages were to be examined in isolation, that is 2.2 per cent (in the IP) and 3.6 per cent (in the post-IP) of the relevant aggregated profits, the Review Panel Applicants' arguments that it cannot be considered to meet any reasonable appreciation of the term "material" and can only have been "immaterial, insubstantial and insignificant", could appear to have some substance. This should also be seen in the context of an Australian industry that was, according to DBS "operating profitably" and was "attracting major investment", with no suggestion that these contract negotiations were unprofitable, and no suggestion that the Australian industry was unprofitable generally. The percentage of profit figures were considered by the Review Panel Applicants to represent "a small diminution in profitability". In addition, the Review Panel Applicants argued that the increase in profits experienced by the Australian industry in the post-IP is inconsistent with a conclusion that it has suffered material injury in this period.

445. It is necessary, however, to examine the finding in the context of the particular circumstances as suggested by the Injury Direction and the *ICI Case*, and therefore to take into consideration the following circumstances of the ammonium nitrate

[315] [1992] FCAFC 564, page 28.

[316] This passage from the ICI Case would appear to be extremely relevant to the present circumstances where a quantitative assessment of materiality is involved, although precise quantification of the injury does not seem possible.

market in Australia, in the main part arising from the practice of negotiating and entering into fixed-term contracts:

- The usual methodology for assessing injury, being the “coincidence” analysis was not appropriate and therefore the ADC used the ‘but for’ (or counterfactual) analysis, based on seven specific examples of contract negotiations (and only where there was clear evidence that pricing or volumes were influenced by the dumped goods during the IP as a result of price depression). It should be recognised that this is a much narrower perspective of injury than is usually the case with a coincidence analysis.

- In assessing the post-IP profit foregone (as an annualised amount) in addition to IP profits foregone, it is not just the profit foregone percentage in the post-IP (twelve months) that is relevant, but the fact that it is an annualised amount, that is, the injury will continue over the full term of the fixed term contract (up to six years), since the price and annual minimum volumes were set during the IP. As submitted by QNP, once a contract is agreed, the impact of that negotiated contract extends for the full contract period.

- It was contended by the Original Industry Applicants that the profit foregone from only the seven contracts was the minimum amount of injury experienced by the Australian industry from the dumped exports, as the total injury to all industry members was not fully examined, and that actual profit and profitability loss that was experienced by the Australian industry from the dumping is considered to be substantially greater, once full account is taken of the price transparency of the dumped import prices across all contract renegotiations by the Australian industry.

- The ADC acknowledged that the profit forgone calculation that has been attributed to the dumped exports, was conservative, as the ADC was careful to only take into account those examples where causation was clearly demonstrated. This had the effect of excluding injury from the calculation that was incurred partly (but not solely) as a result of dumping.

- The ADC explained the increase of the aggregated profit in the post-IP due to increased sales volume by one of the industry applicants to certain customers in the Pilbara region in Western Australia, due to continuing production issues by another non-applicant industry player. This implied a shift in revenue / profits among industry players, rather than a general increase in total profits across the Australian industry. In any event, the new profit data relating to the post-IP collected in the reinvestigation (which indicated the increase in profits) was for the purpose of quantifying the volume and price effects of the injury that occurred in the IP (in the form of the profits foregone calculation) as part of the counterfactual analysis, and was not for the purpose of assessing a particular injury factor (such as, profits /profitability) in the post-IP.

446. The reasoning of the ADC in the Reinvestigation Report could have been clearer and its explanations could have been more detailed, necessitating the holding of the Sixth and Seventh Conferences for clarifications by the ADC and comments on those clarifications by the parties. However, considering that there is no legislated minimum threshold amount, and bearing in mind the discretionary nature of the decision and the particular difficulties and limitations arising from the counterfactual methodology of analysis, I do not consider that the approach taken by the ADC and the conclusion reached was unreasonable or inconsistent with Australian law, particularly when viewed through the telescope of the industry circumstances and the nature of the analysis. It is to be recalled that the Injury Direction specifies that identifying material injury will depend upon the particular circumstances of the case. The pertinent reference in the *ICI Case* should also be recalled. One of the most significant circumstances to me was the practice of entering into long-term contracts so that the impact of that negotiated contract extended for the full contract period. This was reflected in the ADC's analysis by the inclusion of an "annualised" profit forgone amount in the post-IP, in effect representing the ongoing injury which could not be accurately quantified.[317]

447. I do not consider that there has been inappropriate reliance on particular data to the exclusion of other data, nor have there been miscalculations or the misconstruction

[317] In my view, if the assessment of materiality of injury excluded the post-IP profits forgone (annualised) and was based only on IP profit-forgone of 2.2 per cent, a finding of materiality would have been particularly difficult to sustain.

or misapplication of the Act or relevant regulations by the ADC. While the ADC's reasoning and explanations could have been more detailed, I consider that it conducted a comprehensive and proper assessment of all the facts and legal issues, and that the resulting conclusion of materiality is reasonable in light of the particular circumstances.

448. I turn now to the related finding of the ADC, that the injury caused by dumping was greater than that likely to occur in the normal ebb and flow of business.

449. The Review Panel Applicants in challenging this finding repeatedly referred to the Injury Direction, according to which injury, "must… be greater than that likely to occur in the normal ebb and flow of business".

450. Glencore was particularly robust in these arguments referring to the Frontier Report, which it contended contained a detailed evaluation of the normal flow of business in the ammonium nitrate industry.[318] Glencore concluded that any injury found to have been suffered by the Australian industry would need to exceed the bounds of the ebbs and flows as outlined in the report in order to qualify as material within the meaning of the Injury Direction. It contended that the profits foregone percentages did not constitute material injury and was not significant when compared to the usual ebbs and flows in the Australian industry's profit. DBS and Yara made similar arguments with DBS submitting that the Original Industry Applicants and the industry overall demonstrated greater swings in their profitability in previous years where dumping is not alleged to have occurred, and that further, "the dominant themes of REP 473, which are competition between large domestic market competitors, the vicissitudes of fixed price contracts, and changing costs, are fully embraced by the concept of the ebb and flow of business, as per the Injury Direction".[319] Yara also contended that the normal ebb and flow of the business is typified by rapid variations in profit level and the "profit foregone" was well within these established trends.

[318] See Glencore's application for review in respect of Sixth Ground of review, where it refers to the Frontier Economics Report containing a detailed evaluation of the normal flow of business in the ammonium nitrate industry, noting that this is characterised by: regular swings in profits from changes in contract arrangements when existing contracts come up for renewal; large contract price variations; and variations in key input prices which, which can be expected to result in material variations in profits (all other things being equal).
[319] See DBS' application for review, page 5.

451. The ADC challenged aspects of the Frontier Report referred to by Glencore (discussed above) and stated that the Commissioner considered that these observations do not inform the Minister's consideration of the profit forgone that is caused by dumping nor demonstrates that the injury experienced by the Australian industry is greater than that likely to occur in the normal ebb and flow of business. While the ADC acknowledged that there were a range of factors that impacted on the Australian industry's profit from 2014, including variations in input prices, it submitted that these variations in input prices are typically mitigated by price variation clauses included in the supply contracts. The ADC's main response to these arguments, however, was that the assessment of the materiality of the injury found (in the form of profit forgone) is not based on a coincidence analysis (for the reasons set out previously). According to the ADC, a shortcoming in employing a coincidence analysis is that it is difficult to separate out the effects caused by dumping from the effects caused by all other factors which occur within the normal ebb and flow of business. It explained that because of the nature of sales in the Australian market (being in accordance with fixed-term contracts), the ADC was able to isolate the effects of dumping using a 'but for' or counterfactual assessment in relation to seven supply contracts that were negotiated. The ADC further explained that given that the profit forgone in respect of the seven examples was determined using a 'but for' analysis and therefore was solely attributable to dumping, this profit forgone is outside of the normal ebb and flow of business. Therefore, the ADC was satisfied that the injury to the Australian industry is greater than that likely to occur in the normal ebb and flow of business.

452. The Review Panel Applicants challenged the ADC's reasoning, that the profit foregone was determined using a 'but for' analysis and therefore was solely attributable to dumping, as being "circular" and "legally impermissible", and reiterated that it remained necessary to test the materiality of the suggested profit foregone by reference to the normal ebb and flow of business, which it contends has not been done by the ADC.

453. I have already found that the ADC's analysis of materiality of injury, based on the assessment of profits foregone using the "but for" or counterfactual methodology, is considered to be reasonable, in light of the particular circumstances of the ammonium nitrate industry. This analysis particularly excludes the coincidence analysis. It follows that because a coincidence analysis was not available to assess

profits foregone, it is therefore also not available for the ebb and flow assessment, for the reasons explained by the ADC. I agree with the ADC that such an assessment, as proposed by the Review Panel Applicants, would not form the basis of a proper comparison in order to reach a conclusion that the injury was greater than that likely to occur in the normal ebb and flow of business. The ADC was able to be satisfied that the injury was greater than likely to occur in the normal ebb and flow of business, arising from its finding that the profit forgone in respect of the seven examples was determined using a 'but for' analysis and was therefore solely attributable to dumping.

454. While the reasoning of the ADC is somewhat convoluted and may not be as clear as it could be, I do not consider it to be unreasonable in light of the particular circumstances of the ammonium nitrate market, as detailed above, and in light of the use of the counterfactual methodology for the quantification of the profits foregone, to determine if the injury was material, which also resulted in the finding that the injury so quantified was solely attributable to dumping.

455. Therefore, I do not consider that it has been demonstrated that the ADC's finding that the injury caused by dumping was material and greater than that likely to occur in the normal ebb and flow of business, is not the correct or preferable decision.

Summary of Consideration of Reinvestigated Findings

456. I summarise below my consideration of the findings of the Reinvestigation Report relating to the materiality of injury, arising out of the above discussion:

- The ADC is not limited to considering relevant information in preparing a Reinvestigation Report under s.269ZZL(2);
- The ADC is not precluded in a reinvestigation from the collection and use of new post-IP data;
- It is open to the ADC to consider information (profit foregone) that post-dated the IP for the purposes of the material injury assessment.
- The ADC's reinvestigated calculation and analysis of the post-IP profit foregone using the updated data collected during the reinvestigation, is based on facts and is compatible with s.269TAE(2AA) of Act.

- I accepted the ADC's reinvestigated new calculations that profit forgone is 2.2 per cent of the Original Industry Applicants' aggregated profit in the IP and that the profit foregone is 3.6 per cent of the Original Industry Applicants' aggregated profit in the post-IP (annualised);

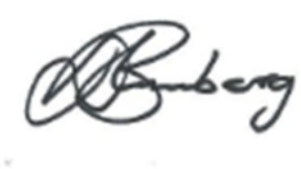
- The ADC's decision to focus its assessment on the percentage of profit figures (that is, profit forgone expressed as a percentage of the Original Industry Applicants' aggregated profit) as its chosen methodology was reasonable, provided the context of the measure was made clear; and

- The ADC's reinvestigated finding that, having regard to both the profit forgone in the IP and post-IP (annualised), the injury caused by the dumped goods was material and greater than that likely to occur in the normal ebb and flow of business, is reasonable.

457. In conclusion, I consider that it has not been demonstrated that the finding of the ADC that the injury caused by dumping is material, is not the correct or preferable decision.

Recommendation

458. Pursuant to s.269ZZK(1) of the Act and for the reasons given above, I have rejected the grounds of review of Glencore, DBS and Yara, and consider that the Reviewable Decision is the correct and preferable decision. Accordingly, I recommend that it be affirmed.



Leora Blumberg
Panel Member
Anti-Dumping Review Panel
2 July 2020