Australian Government
Anti-Dumping Review Panel

ADRP Conference Summary

2019/107 - Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand

Panel Member	Leora Blumberg
Review type	Review of Minister's decision
Date	7 November 2019
Participants	• Justin Wickes (Anti-Dumping Commission • Jasna Halilovic (Anti-Dumping Commission) • Alistair Bridges (Yara AB)
Time opened	2:00pm AEDT
Time closed	2:30pm AEDT

Purpose

The purpose of this conference was to: (i) obtain further information, (ii) provide Yara AB (Yara) with information relating to the finding of the Anti-Dumping Commission (ADC) with regard to Yara's second ground of review relating to cumulation, and (iii) provide Yara with an opportunity to respond to that information, in relation to the review before the Anti-Dumping Review Panel ("Review Panel") relating to Ammonium Nitrate (AN) exported from the People's Republic of China, Sweden and the Kingdom of Thailand.

The conference was held pursuant to s.269ZZHA (1) of the *Customs Act 1901* (Act).

The conference was not a formal hearing of the review and was not an opportunity for parties to argue their case before me. I have only had regard to information provided at this conference as it relates to relevant information (within the meaning of s.269ZZK(6) of the Act). Any conclusions reached at this conference are based on that relevant information. Information that relates to some new argument, not previously in any report or submission, is not something that the Review Panel has regard to, and is therefore not reflected in this conference summary.

Background

The Review Panel received a letter from Moulis Legal on behalf of Yara dated 31 October 2019 relating to paragraph 125 of the ADC's s.269ZZJ submission which challenged Yara's claim in respect of its second ground of review, particularly that the ADC had "not conducted an investigation such that it can actually state prices offered were at dumped prices".

Yara expressed concern that the ADC indicated in its submission that it had in fact assessed Yara's bids, with the ADC's assessment 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 bids 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 [redacted] or the opportunity to comment on the ADC's assessment.

Prior to this conference Yara was provided with the following:

a. An unredacted version of paragraph 121 and a partially unredacted version of paragraph 123 of the ADC's s.269ZZJ submission, in so far as the confidential information relates to the [redacted];

b. Confidential Attachment 1, referred to in paragraph 123 of the ADC's s.269ZZJ submission;

c. Confidential Attachment 2 to the ADC's s.269ZZJ submission referred to in paragraph 125 of the ADC's s.269ZZJ submission.

Discussion

1. **Clarifications by the ADC in respect of Confidential Attachment 1 and Confidential Attachment 2 to the ADC's s.269ZZJ submission**

a. Yara's Representative (YR) requested clarification from the ADC as to whether this particular tender forms one of the seven tenders found to have caused material injury to the Australian industry.

The ADC Representative (AR) clarified that [redacted] is not one of the seven examples which informed the assessment of material injury.

b. The Reviewing Member enquired whether Yara had any clarification requests relating to Confidential Attachment 2 and the calculations of the dumping margins therein.

YR stated that Yara did not require clarification in respect of the actual calculations, which were fairly straightforward and clear from the spreadsheet. However, YR submitted that Yara did not consider the calculations to be representative of dumping in any kind of legally understood manner, because the requirements of s.269TAB, s.269TAC or s269TACB were not met.

2. Comments by Yara following the disclosure of the additional information, in so far as it relates to Yara's second ground of review in respect of cumulation

a. YR commented on the legal requirements for cumulation, in particular s.269TAE(2C)(e) of the Customs Act which relates to the "effect of the exportations of goods to Australia". It was contended that there have been no exportations in relation to this tender and, therefore, the bid is not legally relevant to the section and seems to fall outside the scope of what is required to be legally considered for cumulation.

b. YR commented further that it has now been established that the relevant contract was not considered to be materially injurious, and for that reason it was, in any event, irrelevant.

c. Further, YR commented that, in terms of the dumping calculation, [redacted] to which the ADC had not had regard in this process. YR pointed out that, in effect, a [redacted] was compared to a [redacted], which Yara submitted did not reflect the [redacted], or [redacted], that would have occurred if the tender was actually agreed to. Therefore, Yara did not consider it to be relevant.

d. AR stated that the purpose of the calculation was to compare the pricing in this bid to export prices during the investigation period 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.

e. AR further stated, in regard to the interpretation of s.269TAE(2C), that the ADC read that as a cumulative effect of those exportations, having regard to the conditions of competition between those goods, with the proposal showing that AN exported to Australia from Sweden competes with AN produced locally.

f. AR stated further that the ADC recognized that there was [redacted], but pointed out that all contracts [redacted]. AR pointed out that the ADC 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.

g. YR stated that the goods that were actually exported during the IP were done so under a [redacted], with a [redacted] whereas the bid relates to [redacted] Yara considered that looking at one day was not very informative, because of the dynamic price movements. In addition YR 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.

3. Written Comments

Bearing in mind the short period which Yara had to review the disclosed documents, it was agreed that Yara would submit a written version of its comments after the conference.[1]

[1] Yara subsequently provided a written version of its comments, a non-confidential version of which is attached to the conference summary, as Attachment 1.

NON-CONFIDENTIAL

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11 November 2019

Ms L Blumberg
Panel Member
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By email

Dear Panel Member

Review 2019/107
Ammonium Nitrate from China, Sweden and Thailand

As you know, we represent Yara AB ("Yara") in this review.

The [CONFIDENTIAL INFORMATION DELETED – details of "the bid"] been raised by the Commission in relation to Ground 2 of Yara's application. As per that ground, Yara does not consider it was appropriate to accumulate the effect of its exports from Sweden with the effect of exports from China and Thailand, for the reasons discussed in Yara's application and its submission of 21 October 2019.

The Commission is of the view that the bid is relevant to the question of accumulation under s 269TAE(2C) of the *Customs Act 1901* ("the Act"). Specifically, it appears as though the Commission considers it relevant to s 269TAE(2C)(c)(e) of the Act.

Yara submits that it is not relevant to the question of accumulation as a question of law and fact. Further, Yara takes issue with the Commission's characterisation of the bid as being at *"significantly dumped prices"* – the analysis upon which that conclusion is based is legally erroneous and logically unsound.

The reasons for these submissions now follow:

1 The bid is legally irrelevant for the following reason. Relevantly, the *chapeau* to s 269TAE(2C) provides as follows:

> *(2C) In determining, for the purposes referred to in subsection (1) or (2), the effect of the exportations of goods to Australia from different countries of export, the Minister should consider the cumulative effect of those exportations only if the Minister is satisfied that:*

By its own terms, the Section is concerned with the *"effect of the exportations of goods to Australia"*. This tender is not an exportation of goods to Australia, nor did it lead to any exportations to Australia. Unsuccessfully bidding in a tender is not something the anti-dumping system is legally concerned with.

Of further relevance, the cumulative effect of exports can only be considered where the preconditions in ss 269TAE(2C)(a) - (e) are met. It was in the context of s 269TAE(2C)(e) that the tender bid was raised by the Commission. That section provides:

> *(e) it is appropriate to consider the cumulative effect of those exportations, having regard to:*
>
> *(i) the conditions of competition between those goods; and*
>
> *(ii) the conditions of competition between those goods and like goods that are domestically produced.*[our emphasis]

We think it is clear that the reference to "those goods" is a reference to the goods in the relevant "exportations". This interpretation is reinforced by the broader context of s 269TAE(2C). As we have already said, the section is concerned with the effect of exportations to Australia. S 269TAE(2C)(a) clearly delimits said exportations to those "subject to the investigation" and s 269TAE(2C)(c) requires that the dumping margin worked out for exporter for each of the exportations is at least 2%. S 269TAE(2C)(e) opens with a reference to "those exportations" – it is through this prism that (e)(i) and (ii) need to be interpreted – those goods are the goods in the exportations, the effects of which may be cumulated by dint of the Section.

The bid was not an exportation. It tells us nothing about the effect of exportations of the goods. It is irrelevant to the question of accumulation and so should have no bearing on the decision of whether to accumulate the effect of Yara's exportations or not.

2 The bid is factually irrelevant to the question of accumulation because the relevant tender was not one of the seven tenders that were found to have injured the Australian industry. This was confirmed by the Commission in the teleconference. So even if this was an "effect of exportation" of the goods, the effect was non-injurious. The suggestion that the Commission appears to be making is that a non-injurious "effect" is capable of justifying the accumulation of the effect of Yara's exports with injurious "effects" that factually have nothing to do with Yara: in affect attributing injury as being caused by Yara which it could not have caused. That would be a ludicrous outcome.

3 The Commission's submission of 21 October 2019 characterised its analysis of the bid in the following terms:

> *The Commission's assessment is at Confidential Attachment 2 to this submission, and demonstrates that Yara's bids were at significantly dumped prices.*[1]

This is inaccurate. Dumping is a legal concept. It requires an export price to be determined under s 269TAB – which, among other things, requires an export to have occurred – and a normal value to be determined under s 269TAC. Finally, whether or not dumping has occurred

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1 Para 125.

can only be determined in accordance with s 269TACB. Confidential Attachment 2 does not apply any of these requirements.

Further, the Confidential Attachment does not establish that the bids were at "significantly dumped prices". The tender does not name a specific price – it names a pricing formula included at page 20 of Confidential Attachment 1. There appears to have been no analysis of this pricing formula. Instead, the analysis, at cell E2 of the tab entitled "dumping margin", uses an FOB price of [CONFIDENTIAL INFORMATION DELETED – details of "the bid"]. It does not reflect the prices that Yara anticipated when it formulated its bid, nor the prices that would have been achieved had the bid been successful. Accordingly, the statement that the analysis establishes that *"Yara's bids were at significantly dumped prices"* is unsupported, without merit and prejudicial.

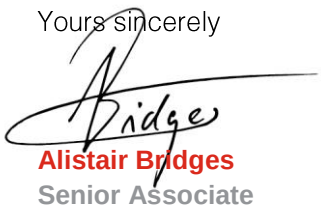
Quite apart from what we have said above, with regard to the inability to conduct a cumulation or injury analysis with respect to that bid, it is also regrettable that this analysis was not brought to Yara's attention during the investigation. Yara could have explained its pricing considerations and provided the Commission with its forecasts as to the profitable prices it expected to receive had the bid been successful. That opportunity was denied to Yara, and adverse inferences appear to have been drawn by the Commission without Yara's input.

The analysis uses a weighted average of all domestic sales over the period 1 April 2017 – 30 March 2018 to determine normal value. Had the bid been successful, no export sales would have been made pursuant to the bid over this period. A normal value assessed in this way would have been, at the very least, in breach of the requirements of s 269TAC(8) as it does not relate to sales that occurred at the same time as any exports. Ultimately, though, comparing the indicative price from [CONFIDENTIAL INFORMATION DELETED – single day] to the average of domestic prices over a 12 month period does not itself lead to a fair comparison.

Finally, Confidential Attachment 2 makes some mention of a closeness in the indicative price and an export price made close in time during the period of investigation. That analysis is also without merit. The bid set prices through the pricing mechanism at page 20 of Confidential Attachment 1. The bulk of Australian sales during the POI were made pursuant to a separate supply agreement with a different pricing formula. For example, [CONFIDENTIAL INFORMATION DELETED – details of "the bid"]. All of which is to say that the comparison made in Confidential Attachment 2 is far too simplistic to be of probative value.

For these reasons, we suggest that the ADRP disregard the bid and the Commission's analysis of that bid from its consideration.

Yours sincerely



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