Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal, Audit & Assurance
Department of Industry, Innovation and Science
10 Binara Street
Canberra City ACT 2601
02 6276 1781
Email: adrp@industry.gov.au
Web: www.adreviewpanel.gov.au

By EMAIL

Mr Dale Seymour
The Commissioner of the Anti-Dumping Commission
Anti-Dumping Commission
55 Collins Street
Melbourne VIC 3000

Dear Commissioner,

Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand - ADRP Review No 107

The Anti-Dumping Review Panel (Review Panel) is currently conducting a review of the decision of the Minister for Industry, Science and Technology (Minister) made on 29 May 2019 under section 269TG of the *Customs Act 1901*, applying to Ammonium Nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand.

The Review Panel accepted applications for review from the following applicants:

1. Glencore Coal Assets Australia Pty Ltd ("Glencore")
2. Downer EDI Mining – Blasting Services Pty Ltd ("DBS")
3. Yara AB ("Yara")

As you are aware, I am conducting the review.

Pursuant to section 269ZZL of the *Customs Act 1901* (the Act), I require the following findings in Report No 473 (REP 473) relating to the Applicants' grounds of review, be reinvestigated:

1. The finding that any injury caused by dumping was material

The "materiality" of injury assessment is provided at Section 9.6 of REP 473, where the ADC considered that the price reduction attributable to dumping (which it found to be significant) "will translate to revenue foregone and a fixed margin for the duration of the contract that is lower than what otherwise might have been."

In particular, 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, is material to the Australian industry as a whole when taking into consideration the relative share of the total production volume during the investigation period the applicants comprised."

The ADC's assessment of materiality was at Confidential Attachment 17 to REP 473.

Further clarification of the ADC's assessment was provided at a conference with the three applicants held prior to initiation of the review pursuant to s.269ZZHA(3) on 4 September 2019 (the 4 September 2019 Conference), the details of which, together with the applicants' comments thereon, were published in the conference summary.

Further clarifications were provided by the ADC in respect of Confidential Attachment 17 during a conference with the ADC held on 6 November 2019 (the 6 November 2019 Conference).

I provide below a summary of my reasons for making the request under s.269ZZL of the Act with regard to this finding:

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

While the ADC found that 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, is material to the Australian industry as a whole" [emphasis added], it is clear from an examination of Confidential Attachment 17 and from the ADC's written responses to questions raised at 4 September 2019 Conference, that the

ADC determined (or quantified) profit foregone in both the investigation period (IP) and the post-investigation period (post- IP).[1]

It is now apparent that the reference to "profit foregone (on an annual basis)" is in fact a reference to the aggregated sum of the profit foregone in the investigation period (calculated to be [redacted]% of the applicants' aggregated profit in the investigation period) and the annualised profit foregone in the post-investigation period (calculated to be [redacted]% of the applicants' aggregated profit in the investigation period). The aggregated sum of these two figures amounted to [redacted]%, being the calculated profit forgone percentage of Australian industry profit that the ADC assessed for materiality.

There appears to be no substantive basis to aggregate the IP profit foregone and the post-IP profit foregone, to assess materiality of profit foregone relative to the applicants' aggregated profit. An assessment of the effect of dumping on profit (including profit foregone) in the IP only, would appear to be a valid economic factor falling under s.269TAE(1)(g) and s.269TAE(3)(e) of the Act that the Minister may have regard to in determining whether material injury has been or is being caused to an Australian industry for the purposes of s.269TG.

To the contrary, it is not as clear that the post-IP profits foregone can be considered to an economic factor in relation to goods "exported" to Australia, since it appears to relate to the loss of profit arising out of future exports. That is not to say that post-IP profit foregone cannot be indicative of injury to the industry in respect of another factor that the Minister may have regard to in accordance with s.269TAE(1).

Therefore, in conducting the reinvestigation in respect of the materiality of injury analysis, the ADC should at least examine the profit foregone in the IP and the profit foregone in post-IP, as separate injury factors, and assess the materiality of any such percentages separately.

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

[1] See ADC written to response to Question 2 raised at the 4 September 2019 Conference, page 4. The ADC pointed out that while the price depression (as a result of dumping) occurred during the investigation period, in quantifying the materiality of injury to the Australian industry as a whole, the ADC had regard to "an annualised amount" of profit foregone.

In addition to separating the analysis of IP and post-IP profit foregone, the ADC should in its reinvestigation re-examine the evidentiary validity of the post-IP profit foregone calculations and analysis. While the calculation and analysis of profit foregone in the IP would appear to be based on actual and verified information relating to actual costs and sales and profits of the three industry applicants, the calculation of "annualised" profit foregone in the post IP period would appear to be far less straightforward.

It is noted that the ADC explained in its written response to Question 4, raised during the 4 September 2019 Conference, that the relevant profit amount used as the denominator in the calculations was the three industry applicants' aggregated profit achieved in the investigation period which it considered to be "the most reliable information" and was "conservative" given that the aggregated profit of the three applicants was declining and the extrapolated profit for the 12 months following the IP would have led to a higher profit foregone estimate.[2]

However, both Yara and DBS challenge the evidentiary basis of the calculation and analysis of the post-IP profit forgone.[3] Yara claims in its s.269ZZJ submission that the post-IP numbers are abstracted and based on "a dearth of evidence and simplistic assumption", not reflecting actual prices, costs or sales volumes during that period and refers to significant change of circumstances that are simply not considered in the material injury finding. [4]

DBS in its s.269ZZJ submission also contends that the consideration of a "post-investigation period" in REP 473 is "unsafe" and must be disregarded and that the consideration of materiality should be limited to profits foregone in respect of the IP only. Further it contends that the ADC failed in its obligation to investigate, and cannot be said to have arrived at a finding that was evidence-based and objective. It states that far from being the "most reliable information", it is simply an unevidenced and unreliable assumption.[5]

---

[2] See page 5 of the ADC's written response to Question 4 of the 4 September 2019 Conference.
[3] See paragraph 5 of Yara's written submission relating to the 4 September 2019, page 2 and paragraph 8 of DBS' written submission relating to the 4 September Conference, page 2.
[4] See Section E of Yara's s.269ZZJ submission, pages 5 – 6.
[5] Section A of DBS's.269ZZJ submission, pages 2 – 8. DBS states that it is not contending that events or impacts taking place in a post-investigation period may not be considered by an investigating authority. It contends that in this instance the ADC undertook no investigation of the facts pertaining to

I consider that there is some validity in these submissions and request that the ADC reinvestigate this issue. The ADC should take into consideration all other interested parties' submissions to the Review Panel commenting on this issue (including the three industry applicants), as well as conference summaries and other relevant information and documents.

The ADC should also take into consideration that under Australian law, an injury determination must be "based on facts and not merely on allegations, conjecture or remote possibility". [6] If a particular approach is adopted (or rejected) the reasons therefor should be clearly set out, and if any assumptions are made they should be tested or have some sound basis in fact. In *Mexico — Anti-Dumping Duties on Rice*, the Appellate Body observed that assumptions by an investigating authority should be based on positive evidence:

> "Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts and should be sufficiently explained so that their objectivity and credibility can be verified."[7]

c. **Alternate Methodology Comparing the applicants' profitability**

The ADC is also requested to reinvestigate its assessment of "materiality" of injury in respect of the profit forgone percentage, taking into consideration Yara's and DBS's argument, in their respective 4 September 2019 Conference submissions, 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 Australian industry's financial condition in the post-investigation period and a calculation was assumed, so as to be suggestive of material injury.

[6] Section 269TAE(2AA) of the Act. This enacts Australia's obligations under Article 3.1 of the WTO Anti-Dumping Agreement (ADA) which provides:

> "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products." (emphasis added)

[7] *Mexico-Definitive Anti-Dumping Measures on Beef and Rice, Complaint with respect to Rice* (WT/DS295/R).

Following the conference held on 6 November 2019 the ADC confirmed in its written clarification that an alternative method to determine materiality could have been to compare the applicants' profitability in the absence of dumping with the actual profitability, based on the aggregate of IP profits foregone and post-IP profits foregone, finding that the profit foregone from dumping represents a loss of [redacted] percentage points.[8]

In the light of the above discussion the ADC should in its reinvestigation and in its assessment of materiality of injury in respect of profit foregone also present the alternative method of comparing the applicants' profitability in the absence of dumping with the actual profitability, separately for IP profits foregone and post-IP profits foregone.

Using this methodology the loss of profitability from dumping in respect of profit forgone in the IP would represent [redacted], which the ADC should then reassess for materiality.

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

The ADC in its reinvestigation should reassess the materiality of the injury finding, on the following basis:

- the separation of the IP and post-IP profits, as discussed above;
- 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.

In conducting the reinvestigation the ADC should take cognisance of the Ministerial Direction on Material Injury (2012 (The Injury Direction) and the relevant submissions of all interested the parties and other relevant information and documents. In particular, it should be noted that the Injury Direction directs that, "material injury is injury which is not immaterial,

[8] This was based on profitability of [redacted]% (profit plus profit foregone), compared to actual profitability of [redacted]%. See Summary of Conference held on 6 November 2019.

insubstantial or insignificant", and that injury should be "greater than that likely to occur in the normal ebb and flow of business".[9]

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

If the ADC in its reinvestigation still finds 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 Conference held on 4 September 2019, as to the possibility of double counting.

After the conference held on 6 November 2019 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 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.[10]

2. **<u>The finding that exports from Sweden should be cumulated with other exports to Australia</u>**

I provide below a summary of my reasons for making the request under s.269ZZL of the Act, with regard to this finding:

Both Yara and DBS claim in their applications for review that it was not appropriate to accumulate the exports from Sweden with those from China and Thailand. The focus of the respective challenges is that cumulation is not appropriate, having regard to conditions of competition and the unique circumstances under which the exports from Sweden were made, in accordance with s.269TAE(2C).

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

[9] Reference is made to Yara's Fourth and Fifth grounds of review in both its application for review and in its s.269ZZJ submission; Glencore's First and Sixth Ground of Review and DBS' First Ground of Review. Also see Summaries of Conferences held of 4 September 2019 and 15 October 2019.
[10] See Summary of Conference held on 6 November 2019.

goods exported from Sweden 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 industry applicants had presented evidence to the ADC that they do take into consideration import prices including the relatively low import prices from Sweden, and that this has contributed to the injury experienced by the industry as a whole.

In its application for review Yara 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 can actually state prices offered were "at dumped prices".

In its s.269ZZJ submission the ADC countered both Yara and DBS’s claims in respect of cumulation. In addition to reiterating its reasons for the decision to cumulate the effect of the exportations of the goods from Sweden by Yara with the exportations from China and Thailand for the purposes of section 269TAE(1), 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.”[11]

In a letter received 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.

A conference was therefore held pursuant to s.269ZZHA(1) of the Act to obtain further information and clarification relating to the ADC’s assessment of the bid and to provide Yara AB (Yara) with information relating thereto, and further to provide

[11] See paragraph 125 of the ADC’s s.269ZZJ submission.

Yara with an opportunity to comment on that information and the ADC's assessment that related to Yara.[12]

The ADC is now requested to reinvestigate its finding of cumulation taking into consideration Yara's comments on the ADC's assessment of the bid during the Conference of 7 November 2019 and its subsequent written submission following the conference, as well as information contained in Confidential Attachments 1 and 2 of the ADC's s.269ZZJ submission. In particular, the ADC should in its reinvestigation of this issue take into consideration the following:

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. Yara submits further that there would therefore appear 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.

The ADC in reinvestigating this issue should also take into consideration other parties' submissions to both the ADC and the Review Panel on this issue, as well as all other relevant information and documents.

If you have any issues in relation to the reinvestigation or if you consider that a conference under s.269ZZHA of the Act would assist in obtaining the further information the subject of the reinvestigation, please contact the Secretariat.

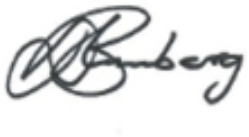
Please could you report the result of the reinvestigation within 90 days, that is, by **Monday, 17 February 2020.**

[12] See Summary of Conference held on 7 November 2019.

If you require more time, including time to allow interested parties the opportunity to comment on an aspect of the reinvestigation, please contact the Secretariat.

Thank you for your assistance.

Yours sincerely,



Leora Blumberg
Panel Member
Anti-Dumping Review Panel
19 November 2019