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

Email: ADRP@industry.gov.au

"Non-Confidential Version"

Dear Ms Blumberg

Review of Ministerial Decision – Ammonium nitrate exported from P R China, Sweden and Thailand

I. Executive Summary

Orica Australia Pty Ltd ("**Orica**") requests the ADRP Panel member affirm the Minister's decision published on 3 June 2019, to impose interim dumping duties on imports of ammonium nitrate ("**AN**") from The People's Republic of China ("**China**"), Sweden and The Kingdom of Thailand ("**Thailand**") ('**Ministers' Decision'**) on the basis that it is the correct and preferable decision.

Orica has examined the applications for review of the Minister's Decision as detailed in Report No. 473 ("**Report 473**") by Yara Ab ("Yara"), Downer EDI Mining Blasting Services ("DBS") and Glencore Coal Assets Australia Pty Ltd ("Glencore") but does not consider that the grounds for review offered alter the Minister's decision as published on 3 June 2019.

II. Background

Orica is a co-applicant on the application requesting the imposition of anti-dumping measures on AN exported into Australia from China, Sweden and Thailand.

Following an application by members of the Australian industry that manufacture AN, the Anti-Dumping Commission ("**the Commission**") published a notice on 25 June 2018 initiating the commencement of an investigation into the dumping and material injury caused by exports to Australia from China, Sweden and Thailand.

On 18 October 2018, the Commissioner was satisfied that reasonable grounds existed for the publication of a dumping duty notice in relation to AN exported from China, Sweden and Thailand and published a preliminary affirmative determination ("**PAD**") imposing provisional measures.

Following further investigations (including verification of data with the Swedish exporter Yara A.B. "Yara") the Commissioner published a Statement of Essential Facts No. 473 ("**SEF 473**") on 25 February 2019. The Commissioner was further satisfied that reasonable grounds existed for the publication of a duty notice and revised the measures to reflect the outcomes of further investigations.

The Commission received submissions from interested parties[1] in response to SEF 473. Following review of those submissions:

(a) it was satisfied that the Australian industry had suffered injury that was "material" arising from the dumped exports of AN from China, Sweden and Thailand; and
(b) it recommended to the Minister that dumping duty notices under subsection 269TG (1) should be applied to the injurious exports from China, Sweden and Thailand.

On 29 May 2019 the Minister accepted the Commissioner's Recommendations. A notice was published on 3 June 2019 confirming the Minister's decision to impose measures ("**Dumping Duty Notice**").

The Anti-Dumping Review Panel ("**ADRP**") has received applications for review of the Minister's decision from:

- Yara AB;
- Downer EDI Mining Blasting Services Pty Ltd; and
- Glencore Coal Assets Australia Pty Ltd.

Orica has reviewed the applicants' grounds for review and the ADRP Conference Summary of 4 September 2019 and responds below in relation to the grounds for review. The notification of the ADRP review investigation was published on 20 September 2019.

III. ADRP Conference Summary

The ADRP Conference Summary of 4 September was held "*to obtain further information and seek clarifications from the Anti-Dumping Commission (ADC) and a better understanding of the reasons for the finding relating to materiality of injury in REP 473 (Section 9.6, pages 90- 91).*" The purpose of the telephone conference was to also "*provide an opportunity to the applicants, being Yara AB (Yara), Downer EDI Mining – Blasting Services Pty Ltd (DBS) and Glencore Coal Assets Australia Pty Ltd (Glencore), 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 Anti-Dumping Review Panel (ADRP) in relation to Ammonium Nitrate exported from The People's Republic of China, Sweden and The Kingdom of Thailand.*"

Orica's understanding of the telephone conference call discussion on 4 September 2019 included:

a) a non-confidential outline of the materiality of injury;

b) to clarify whether the injury is confined to the investigation period only or whether it includes the post investigation period;

c) to clarify whether profit foregone was calculated as a percentage of Australian industry profit (and whether it is sum of calculation for investigation period and post investigation period);

d) if ADC's analysis and finding included injury post the investigation period, then the basis upon which it was calculated?

(a) Material injury

The Commission provided a written response in relation to the identified questions.

In respect of its calculation of the profit forgone, the Commission's assessment was based upon the examples listed, on an annualised basis (i.e. no period longer than twelve months). The volume of

[1] Submissions were received from the European Commission (EPR Document 049), Montcourt Group (EPR Document 050), Glencore (EPR Document 051), Orica Australia (EPR Document 052), QNP (EPR Document 053), CSBP (EPR Document 054), Yara (EPR Document 055), China Chamber of International Commerce (EPR Document 056), AECI Australia (EPR Document 057), Downer EDI Blasting Services (EPR Document 058).

AN relied upon for the profit calculation was confined to the investigation period only. The profit forgone for each example was then adjusted to reflect the profit forgone for the total Australian industry (i.e. the five AN manufacturers). The injury calculations were on a *per annum* basis only.

It is noted that the seven examples used by the Commission to assess injury, were of thirteen contracts subject to negotiation at the time of the investigation period. There are many other contracts in the industry which would be subsequently influenced by prevailing import parity prices that were identifiable during the investigation period.

The Commission found that the injury was material from just these seven contracts at an industry profit level. Whilst the Commission has assessed the injury from these contracts, the Commission also notes the pervasive way that dumped goods are used to negotiate price outcomes which results in a broader impact across the market.

The Commission's calculations for profit forgone involved a calculation of price and volume injury as a consequence of the Australian industry members reducing prices or losing profit to import volumes due to the dumped exports from China, Sweden and Thailand. Orica considers the Commission has correctly calculated profit forgone on a per annum basis for the AN industry.

Orica, however, draws to the attention of the Panel member that this quantification of injury forgone relates to the seven injury examples cited by the Commission but importantly, fails 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 investigation period. This was excluded by the Commission from its injury analysis due to a provision in the contract that, only if enlivened, enabled the contract price to be adjusted, albeit the citing of import prices by the customer to negotiate reduced prices from Orica was excluded from the injury analysis. This contract was for one of Orica's largest customer of AN (xxxktepa representing approx. xxx% of the Australian Industry) and involved the active sourcing of AN from one or more of the very countries which are the subject of this response.

The Commission appears to have acknowledged the potential injury impact through its *statement: "The Commission notes, however, that one potential feature of the contract being negotiated with this customer allows for the variation of the contract price in certain circumstances (based, in part, upon import prices). The Commission considers that, due to this potential provision, the presence of dumped imports may cause injury to Australian industry in the form of price depression, reduced profit and profitability and reduced revenue for the duration of the contract"*. The Commission though has discounted this significant and substantial injury example due to the following statement "*this contract is still being negotiated and is yet to be finalised*" and [comments concerning the potential provision]: "*it is unclear whether this provision will be included in the contract, and if it is, how it would operate*". The Commission stated that "*it did not consider this example demonstrates that injury has been caused or is being caused by dumping*." Orica considers that this is perhaps the best example to demonstrate the magnitude of the injury and that whilst, it may not have been appropriate at the time for the Commission to consider it, it is appropriate and right for the Panel to now give due regard to this example, given that the negotiations have been finalised and contract executed.

Orica does not agree that this example should be excluded from the Commission's industry analysis and therefore agrees with the Commission's assessment that injury in the seven contracts is conservative. The injury sustained in this example resulted in reduced selling prices that were caused by the dumped exports during the investigation period and this was evident during, and post, the investigation period. The injury that occurred from this customer was not temporary or isolated. The negotiations resulted in a structural reduction in prices of AN that support Orica's position that it suffered price depression (and suppression) during the investigation period and should have been factored into account.

The impact of dumped goods not only reduces the impact of price for the first year of a renegotiated contract, but rather extends for the full term of each contract, which results in ongoing profit forgone for which the Commission has not taken into account resulting in a conservative assessment of injury. Contracts typically have a term of 3-5 years.

It is also noted that the Commission did not use contract examples provided by Orica whereby AN imports sourced from countries, the subject of this Investigation, significantly impacted price outcomes

which preceded the investigation period and for which injury has been sustained by Orica throughout the investigation period and beyond as a result of dumping. The Commission has not included injury sustained for this in its assessment which again results in a conservative injury assessment.

The decision by the Commission 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 AN exported to Australia from China, Sweden and Thailand.

(b) Period of injury

The Commission's submission makes it clear that injury in the form of price depression that it identified "occurred in the investigation period". The Commission noted that this price depression injury was significant.

The Commission has further commented that in *quantifying* the injury – to assess its materiality – that it had regard to the *profit forgone* on an annualised basis (emphasis added). The Commission was therefore satisfied that the quantified injury from the dumping in terms of profit forgone was material in nature (i.e. not immaterial, insubstantial or insignificant).

The profit forgone calculation took account of the sales volumes in relation to the Australian industry participant's relevant bid(s) – which were detailed and negotiated during the investigation period.

It is noted though 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. The Commission's approach is thus conservative.

Orica agrees with the Commission's decision that the profit forgone calculation is to be determined on an annualised basis using information from the applicants' negotiations that occurred during the investigation period.

(c) Annualised profit forgone

The Commission's submission confirms that the profit forgone calculation is based upon some sales occurring within the investigation period and some post the investigation period. Nevertheless, the price depression and lost sales volumes occurred as a consequence of negotiations that occurred in the investigation period.

In respect of the confidentiality of the profit forgone calculation, Orica is concerned that this confidential figure appears to have been published to the appellant parties. It is considered sufficient that the figure is described – as was done so by the Commission -as "*not immaterial, insubstantial or insignificant*".

The Commission's assessment of the profit forgone is the correct and preferable decision.

(d) Is profit forgone a percentage of Australian industry profit?

The Commission states that it relied upon the aggregated profit of the three Australian industry applicants. Orica agrees that the aggregated profit is the most reliable measure for the Australian industry and represents more than xxx per cent of the actual Australian industry's profit during the investigation period (as the AN Pilbara facility was not producing commercial tonnes at this time).

The Commission states that if it were to extrapolate the figures in Tables 11 and 12 on P.63 (i.e. industry profit and profitability) through to a period post the investigation period, it would arrive at lower profit and profitability figures than it has calculated in the profit forgone assessment.

Orica agrees with the Commission that it has calculated a conservative estimate of injury caused by dumping from China, Sweden and Thailand, as it has not taken full account of all of the injury examples presented by the applicants (due to apparent uncertainty by the Commission as to whether these were impacted by the dumped imports or otherwise).

Orica confirms that the Commission's assessment of material injury to the Australian industry caused by dumping is the correct and preferable decision albeit that the assessment is conservative.

IV. Matters raised by appellant parties

Orica seeks to address some matters not addresses in the Commission's response to the quantification of material injury to the Australian industry that was raised by the appellant parties.

(a) Yara AB

(i) **Claim**: Yara's exports have not caused injury to the Australian industry

The Yara submission seeks to examine each industry contract to ultimately conclude that "*Yara's exports had no effect, injurious or otherwise*" on each negotiation.

Orica's submits that the assessment on behalf of Yara is limited and cursory only. It does not address the pervasive effect that dumped exports with an injurious FOB export price of approximately A$xxx per tonne have had on contract negotiations across the whole of the Australian market for AN. Customers are interested to understand what the import price is and can readily gain access to this through the Australian Bureau of Statistics ("ABS") import data. 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.

It is naïve to contend that the sale to one Australian importer during the investigation period is an isolated instance as it clearly sets a precedent for other customers to seek to access similar dumped prices. The Commission notes in its Final Report No 473 (P 50) that it cited evidence that Yara's product was on sold to other customers, contrary to Yara's claim.

The Yara submission makes unfounded statements that are simply fanciful and unsupported[2] to distance itself from the injury experienced by members of the Australian AN industry.

The Commission's assessment that Yara's dumped exports had caused and threatened injury to the Australian industry is the correct and preferable decision.

(ii) **Claim:** Yara's exports should not be cumulated with exports from China and Thailand

Subsection 269TAE(2C) of the *Customs Act* permits the Minister to consider the cumulative effects of exports from different countries of export (e.g. in this instance from China, Sweden and Thailand) if:

(a) Each of those exportations is the subject of an investigation; and
(b) The investigation of those exportations resulted from one application under section 269TB; and
(c) The dumping margin worked out under section 269TACB for the exporter for each of the exportations is at least 2 per cent of the export price or weighted average of export prices used to establish that dumping margin; and
(d) The volume of the goods the subject of the application that have been, or may be, exported to Australia over a reasonable examination period from the countries of export and dumped is not taken to be negligible for the purposes of subsection 269TDA(3) because of subsection 269TDA(4); and
(e) 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 those goods and like goods that are domestically produced.

Orica contends that the Minister's decision to consider the cumulative impact of the exports from China, Sweden and Thailand on the Australian industry is the correct and preferred decision. The

[2] For example, the statement in Example 4 – QNP (Page 9) where it states "We do not know if the volume of the contract was such that it made commercial sense for QNP to pursue a low unit price in the expectation that it could take advantage of economies of scale and thus receive higher revenue" and "For example, it could be the case that the customer was not impressed by QNP's customer service , or that QNP could not deliver the ammonium nitrate in the required timeframe".

Commission addressed the requirements for cumulation of the dumped exports and was satisfied that each of the requirements of subsection 269TAE (2C) had been met. 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) are used in the same end use applications and can be substituted, it was satisfied that the conditions of competition as detailed in subsection 269TAE(2C)(e) were met. It was therefore appropriate to cumulate the injurious effects of exports from China, Sweden and Thailand.

The Minister's decision in respect of cumulation therefore is the correct and preferable decision.

(iii) **Claim**: The price effects and volume effects have not been correctly determined

Orica submits that this matter has been sufficiently and adequately addressed through the Commission's submission clarifying the quantification of injury from dumping from China, Sweden and Thailand.

The Minister's decision on material injury to the Australian injury is therefore the correct and preferable decision.

(iv) **Claim**: The injury is not material

Orica submits that this matter has been sufficiently and adequately addressed through the Commission's submission which quantifies the injury from dumping from China, Sweden and Thailand.

The Minister's decision on material injury to the Australian injury is the correct and preferable decision.

(b) DBS

Finding 1: That dumping of ammonium nitrate (AN) caused material injury to an Australian industry producing like goods.

(i) **Claim**: Not correct or preferable to find that material injury "has been" or "is being" caused to the Australian industry

DBS claims that that the Minister's finding on the recommendation of the Commissioner in respect of material injury "was wrong at law".

DBS however does not demonstrate where the Minister (or Commissioner) has created an error of law in the assessment of material injury to the Australian industry. The Commission has established that:

- the volumes of dumped goods were above negligible levels;
- the dumped exports undercut the Australian industry's selling prices; and
- injury, once quantified by reference to non-dumped levels, was assessed as material to the Australian industry's profits and profitability.

The finding of the Minister is therefore consistent with the legislative requirements and the 2012 Ministerial Direction.

The Minister's decision on material injury is therefore the correct and preferable decision.

(ii) **Claim**: Not correct or preferable to find that the exports from Sweden should be cumulated with other exports

Orica submits that this issue has been addressed under a(ii) above for Yara.

The Minister's decision is the correct and preferable decision on the cumulation of exports from Sweden with the exports from China and Thailand.

(c) Glencore

(i) **Claim**: 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, as interpreted in *Swan Portland Cement Ltd v Minister for Small Business and Customs* (1991) 28 FCR 135 at 144.

Orica submits that the Commission has established that the seven contracts where it established the Australian industry was injured where, in aggregate, material when contrasted with the profit and profitability of the five ammonium nitrate manufacturers in the investigation period.

The Minister's decision is the correct and preferable decision on material injury to the Australian industry producing like goods.

(ii) **Claim**: The ADC misconstrued "price" in 269TAE(1)(f) by considering only the price paid in 7 contracts and not considering whether that price represented the price in any market for AN in Australia

The Commission's assessment of the relevant price in the negotiated contracts was the correct and preferable decision. The Commission 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. It is noted that many customers conduct competitive tender processes to determine their future supplier. The price determined through such an approach is the market price influenced by import parity at that time.

(iii) **Claim**: The ADC failed [to] adequately consider whether, in respect of the 7 contracts it analysed, injury was caused by factors other than dumping, contrary to 269TAE(2A)

It is submitted that Glencore's application has not demonstrated that any factors other than dumping were material to the Australian industry's performance during the investigation period.

Orica submits that the Commission adequately and sufficiently assessed the injury from the dumping as material. Whilst injury from other factors may be present, the Commission (and the Minister) must only be satisfied that the injury from the dumping was material. The Commission did assess that other factors were at play in part in their injury assessment and discussed this in their Final Report, but concluded that the impact caused by dumped gods from the countries the subject of the investigation was material.

In this regard the Minister's decision is the correct and preferable decision.

(iv) **Claim**: The ADC failed adequately to consider whether, in respect of the 7 contracts it analysed, the injury identified was caused by the volume and prices of goods that are not dumped, contrary to s.269TAE(2A)(a).

The exports from China, Sweden and Thailand accounted for more than 50 per cent of total AN imports in the investigation period. Remaining imports were the from Russian Federation (16 per cent) and Indonesia (27 per cent), with the balance from other countries.

The imports from the Russian Federation are the subject of measures. 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 investigation period. 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.

The Minister's decision therefore was the correct and preferable decision.

(v) **Claim**: The conclusion that the contract price, in the absence of dumping, would have been the import prices adjusted for dumping margin, was not based on facts but was based merely on allegations, conjecture or remote possibilities, contrary to s.269TAE(2AA).

It was reasonable for the Commission to conclude that in the absence of dumping the relevant contract price would be influenced by import prices at non-dumped levels.

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.

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.

(vi) **Claim**: The evidence before the Minister did not support a finding that there was material injury to the Australian industry as a result of the dumped imports

The Commission's quantification of profit forgone that could be attributed to the impact of the dumped imports from China, Sweden and Thailand evidenced injury from dumping was material to the Australian industry's profit and profitability in the investigation period.

The Minister's decision concerning the materiality of injury caused by dumping was the correct and preferable decision.

Finding 2: That it is not possible to carve out certain states or markets from the anti-dumping duty notice.

(vii) **Claim**: The ADC erred in finding that it cannot "carve out" certain states from the dumping duty notice. In light of the evidence that there was no material injury from dumped imports in NSW or the Pilbara, the Minister should have exempted exports to those markets from the dumping notice.

The Commission did not conclude that there was no injury from dumping in NSW or the Pilbara. Rather, the Commission found that the Australian industry had suffered material injury from dumping. That is, the injury to the Australian industry was experienced by all Australian injury members during the investigation period.

The Commission was not requested to investigate regional dumping during the conduct of Investigation No. 473. The Commission 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. 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.

The Minister's decision concerning injury to the Australian industry from the dumping was the correct and preferable decision.

If you have any questions concerning this submission, please do not hesitate to contact me on (03) 9665 7309 or Orica's representative Mr John O'Connor on (07) 3342 1921.

Yours faithfully,

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