EuroChem Group

Ammonium nitrate exported to Australia from the Russian Federation

Meeting of interested parties held 3 February 2021

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A Purpose

Participants in the abovementioned meeting were advised by the Commission that a transcript or summary of parties' oral submissions at the meeting would not be prepared by the Commission, and that it was the responsibility of parties to provide written submissions following the meeting within the required timeframes in order for the matters raised at the meeting to be considered by the Commission in the inquiry.

The following comprises extracts from the presentation made by Moulis Legal on behalf of EuroChem Group companies JSC Novomoskovsky Azot ("NAK Azot") and JSC Nevinnomyssky Azot ("Nevinka") at the meeting of parties.

B First, some background

These measures were first imposed in 2002. That was a long time ago. It is not just the effluxion of time – 20 years of trade barriers against ammonium nitrate exports from Russia – that is important here.

What is important are these things:

- changes that have taken place over these 20 years, with respect to fundamental aspects of both the Australian and Russian industries;
- the factual circumstances in the period of inquiry – which serves as the basis for "predicting" what is likely to happen in the future;
- and in particular, with respect to our client, the investment, production and commercial circumstances under which it now operates

Measures are only intended to remain in force "as long as to the extent necessary to counteract dumping which is causing injury". This is a general rule, which is set out in Article 11.1 of the WTO Anti-Dumping Agreement.

This is supported by the clear statement in the Anti-Dumping Agreement with respect to termination of duties not later than five years from the date of imposition.

A domestic industry has the ability to apply for the duties not to be terminated, and instead to be continued, as has occurred in this case.

This is the fourth time the Australian industry has come to the Australian investigating authority with a request for continuation of the measures. However, a proper and proven case for continuation needs to be made out, if they are to be continued, and in this instance we submit that no such case can be substantiated as against our clients.

C Legal requirements for continuation

Because of the principle that dumping measures are not intended to be long term trade barriers, the relevant legal authorities establish that:

- the termination of anti-dumping duty and the end of five years is "the rule"; and
- the continuation beyond that period is "the exception".

The representative from the Government of Russia has already made that point quite well. This flows from the pronouncements of the WTO Appellate Body in *Oil country tubular goods*.

Accordingly, it would have to be said that the measures that are the topic of our conversation today are truly "exceptional", having been in place for 20 years. We submit that there are no grounds for this exceptional treatment to continue, especially not with respect to NAK Azot and Nevinka, the AN plants of the EuroChem group.

Australian law and practice acknowledges that continuation needs to be cautiously and strictly considered. This is borne out in two ways.

The first is that an affirmative determination that there would be a recurrence of dumped exports and material injury caused thereby may only be made on the basis of probability and not simply on the basis that such a result might be possible or plausible.

This directly quotes the Federal Court's decision in the *Siam Polyethylene* case. That test is reflected in the Anti-Dumping Commission's continuation inquiry reports, with the insistence of Anti-Dumping Review Panel reports as well.

"Probability" is an important test. It is not that that such "probable likelihood" can never be demonstrated. Nonetheless a prediction about what is probable in the future must be based on a rational appreciation of facts currently known and what they most likely suggest will be the situation in the future.

Fear of the unknown does not satisfy the decision-making requirement.

The second thing that should be stressed is that a nexus between the expiry of measures and the probability of dumped exports and material injury caused thereby must be established. This is also important in terms of time, and predictability.

In this case, the Commission needs to conclude that such a nexus exists. In colourful terms, the Commission must be of the view that, if the measures expire, it is probable that EuroChem will charge into the Australian market, dump its exports and lay waste to the Australian industry.

If such "cause and effect" cannot realistically be predicted – that because of the expiry of the measures, those things will happen – then the measures cannot be continued.

It is not enough to say "oh well, it could happen in the future", because the longer the period between the expiry and the occurrence of renewed exports and material injury makes it much less possible to say that the renewed exportations and material injury occurred because of the expiry of the measures.

All of this goes to the proposition that continuation of measures is no triviality.

D Grounds advanced by the Australian industry applicants

This brings us to the case that has been put forward by the Australian industry for continuation.

We can consider the key points of the application lodged in July last year.

1 European Union presently has anti-dumping measures in place

That may be the case, however it masks a few salient matters:

- First, and most practically, the evidence of dumping measures being imposed by a country that has a land border with Russia, the width of a line on a map, says nothing about a propensity to "dump" a product like ammonium nitrate to a country 10,000 miles away, or even to be able to sell the product to that far-away country at all.

- Secondly, the normal value methodology used by the European Commission has been struck down, repeatedly, by WTO panels and the Appellate Body. In particular, the "cost adjustment methodology" adopted with respect to ammonium nitrate itself has been ruled to be inconsistent with the Anti-Dumping Agreement.

- Thirdly, and recently, the WTO ruled that the EU acted in breach of the Anti-Dumping Agreement because it initiated a 2014 expiry review against Russian exports based on an application that did not contain sufficient evidence of the likelihood of dumping.

2 US measures revoked in 2016

The Australian industry points out that measures against ammonium nitrate exports to the United States were revoked in August 2016. We agree with the applicants that revocation of the measures in the United States in 2016 is relevant. It is logical to revoke measures as economic situations change, and not to keep them in place long term or perpetually. The US example here proves that simple proposition.

3 Price comparison methodology

In support of their application, the Australian industry applicants cite many paragraphs from the five-year old Anti-Dumping Commission Report 312, mainly with respect to gas pricing.

The central premise here is that a price differential between domestic gas prices in Russia and those for gas exported via gas pipelines to European countries means that the gas cost in Russia is somehow "disqualified" from consideration for normal value purposes.

Australian law, whether one considers it to be compliant with the Anti-Dumping Agreement or not, states that costs should *"reasonably reflect competitive market costs"*. This calls for a consideration of whether there is a competitive gas market in Russia and whether the gas costs paid by the AN plants of NAK Azot and Nevinka are formed by and discovered in that market.

Our client's evidence on this point is contemporary – not historical, of over five years ago, as put forward by the Australian industry applicants - expert, and uncontested. Here we refer to the Brattle report, which is on the public record of this investigation, of which almost full disclosure has been given to interested parties.

That report is logical, impeccably resourced, expertly prepared and logically concluded.

The key points as relate to our clients are these:

- that independent gas producers and suppliers compete fully with Gazprom, which is itself fully corporatised, fully audited and 49% privately owned;
- that gas prices of the gas suppliers recover their costs and are profitable;
- that gas prices are also discovered on and purchased through SPIMEX, a mercantile exchange that establishes market prices for gas.

4 Allegation of continuing Russian imports

The application also cites import volumes of ammonium nitrate "from Russia", broadly over the four years ended 2019/20.

The concept that "because an exporter exported the goods, the measures should be continued" is baseless and uncompelling. The argument is sometimes made, as here, that the exports are evidence of "maintained distribution links".

At best, this could be evidence of the fact that if the exporter wanted to export, it would be more able to do so. Whatever the case, the Commission has the facts as they apply to our clients, including the facts that there were no exports in the inquiry period, that there were *de minimis* amounts of exports before that, and who the customer or customers involved were, and why.

5 Allegation of excess capacity

The applicants raise the issue of excess capacity that it is said may be directed to Australia.

However, the NAK Azot and Nevinka facilities run at very high utilisation rates and the allegations of investment in additional capacity on the part of our clients are not supported by the facts as have been verified by the Commission.

E Australian industry and market factors

Lastly, attention should be directed to the Australian industry itself.

An equally important factor in the "probable likelihood" test is that material injury would be caused by the dumped exports that are claimed will "recur".

In this regard capacity increases in the Australian industry itself are more significant to this case and future pricing than anything that may or may not be happening in Russia. These increases – essentially, but not only, the Yara-Orica JV production plant at Burrup in Western Australia - have added large capacity to the local industry.

Thus, price competition between the Australian industry members themselves will likely be the single most important factor impacting on the financial performance of the individual industry members in the predictable future.

A continuation inquiry requires a non-attribution analysis "in futuro", in the same way as an original dumping investigation involves such an analysis. The non-attribution analysis in this case would suggest there is little or no likelihood of price competitive exports from Russia, whether dumped or not, and especially not in the case of our clients, as we have pointed out to the Commission.

F Concluding comments

In closing, we stress and underline the position of NAK Azot and Nevinka, the two production facilities of the EuroChem group in Russia, with respect to this inquiry:

- amongst all Russian exporters, they are the very least likely to partake in dumping and the causation of material injury;
- their costs of production are competitive and market based;

- their focus, as demonstrated by the facts, is on supplying specific international customers through established supply routes, in markets, other than Australia, under stable long term supply contracts;
- they have no capacity to randomly take-up by engaging in sales to a country like Australia, a far-away market in which the likelihood of reducing prices, by reason of competition between the domestic gas producers, is going to intensify;
- they are highly profitable in their existing commercial conditions, so query why they would want to sell for lower prices exporting to Australia;
- they have been fully co-operative – the only exporter to do so – indicating that:
    - they have a strong knowledge and understanding of what dumping is, and the implications of same;
    - they have strong respect for the investigating authority of Australia;
    - their evidence is verified, and can be relied upon, which is not the case for uncooperative exporters who have done none of these things.

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