

20 December 2021

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**Public File**

Dear Commissioner,

**ADRP Review 134 – Ammonium Nitrate exported from the Russian Federation**

I. Introduction

I refer to the letter of 17 September 2021 from Ms. Leora Blumberg, Panel Member, Anti-Dumping Review Panel (“ADRP”) to you concerning Ms Blumberg’s request for you to reinvestigate certain matters relating to the Minister’s Decision (“the decision”) published on 23 May 2021.

The matters requiring reinvestigation include:

- (i) Finding 1: The finding that the Commissioner is not satisfied that the expiration of the anti-dumping measures in respect of exports of ammonium nitrate from Russia would lead, or would be likely to lead, to a continuation of, or a recurrence of, the **dumping** (emphasis added).

There are two parts to this finding that the ADRP Member has requested be reinvestigated, namely:

- A. Methodology of Ascertainment of Normal Value; and  
B. The likelihood that dumping will recur.

- (ii) Finding 2: The finding that the Commissioner is not satisfied that the expiration of the anti-dumping measures in respect of exports of ammonium nitrate from Russia would lead, or would likely lead, to a continuation of, or a recurrence of **injury** (emphasis added).

The Applicant companies – CSBP Limited (“CSBP”), Dyno Nobel Asia Pacific Pty Ltd (“Dyno Nobel”), Orica Australia Pty Ltd (“Orica”) and Queensland Nitrates Pty Ltd (“QNP”) have monitored the Anti-Dumping Commission (“the Commission”) website and the ADRP website in respect of updates to the reinvestigation as directed by the ADRP member. There has not been any notification of the conduct of a reinvestigation (as did

occur in ADRP Investigation No. 107 that involved the reinvestigation of the Minister's decision in Investigation No. 473<sup>1</sup>).

This submission is to address the determination of the benchmark for inclusion in the determination of normal values for Russian exporters – in particular, the appropriateness of adjusting the benchmark price so as to exclude the Gas Export Tax imposed by the Government of Russia (GOR).

Orica Australia Pty Ltd's (Orica) position is that, if that aspect of the benchmark price is approached correctly, it will emerge that domestic gas prices in Russia are significantly distorted by GOR intervention; that domestic sales of AN therefore cannot be used to determine normal value as a result of the "market situation" that the ADC found to exist in Russia, so that the normal value is to be ascertained under s 269TAC(2); and that that analysis reveals significant dumping margins for Russian AN. That, of course, has significance for whether dumping is likely to recur if measures are not continued.

## II. ADRP Member concerns

The comments of the ADRP Member validate and confirm Orica's concerns that:

- In respect of Finding 1<sup>2</sup> there is considerable doubt as to the justification of deducting the Gas Export Tax in the determination of constructed normal values for Russian ammonium nitrate producers; and
- The re-assessment of normal values will result in the determination of significant dumping margins that will likely result in a recurrence of injury to the Australian industry manufacturing like goods (Finding 2<sup>3</sup>).

The failure to determine that the Minister's decision is not the correct or preferred decision will lead to preferentially lower cost sourcing of ammonium nitrate exported from Russia versus other sources which will make exports to Australia highly likely and be of more significant volume than a few spot orders.

## III. Orica's assessment

Orica contends that the ADRP Member's concerns about the appropriateness of deducting the GOR-imposed export tax that applies only to its majority owned monopoly single entity gas exporter are well founded.

Firstly, the NCG gas benchmark selected by the ADC is a "hub" price for natural gas suppliers from the United Kingdom, Norway and Russia, which is determined based on the competing prices by suppliers into the gas distribution network in Germany. It is a sound indicator of the price at which Russian gas is sold, when in competition with gas produced in other countries, and therefore the price that such gas would command in the domestic market absent the distortions that the ADC has found to exist.

Secondly, the GOR's Gas Export Tax, imposed only on export sales, is not a feature of the domestic market in which AN producers in Russia obtain gas. However, as the ADRP Member's comments suggest, it is irrelevant to the question of whether or not the NCG gas benchmark ought to be adjusted by deducting the amount of the tax. The point of using a benchmark is to find the price paid for the relevant product in a competitive market, and use that as a point of comparison with the market that is being analysed. The particular vagaries of the market being analysed cannot be allowed to affect the selection of the benchmark, as that distorts the comparison.

Thirdly, the Gas Export Tax cannot be considered a typical or "usual tax", comparable to (for example) a value-added tax or consumption tax that is applied across the whole economy in other countries and is often refunded on the export of goods. Rather, the Gas Export Tax should be classified and treated as a levy

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<sup>1</sup> Investigation No. 473 – ammonium nitrate exported from The People's Republic of China, Sweden and the Kingdom of Thailand.

<sup>2</sup> ADRP Letter to Commissioner requesting reinvestigation, 17 September 2021, P.2.

<sup>3</sup> *Ibid*, P. 12.

imposed by the GOR on its own agency (Gazprom, the monopoly exporter) and is therefore a targeted levy which does not apply to Gazprom to the extent gas is sold domestically.

Finally, the Gas Export Tax should be viewed as a price correction mechanism to ensure the GOR does not sell its artificially low-priced gas to external customers outside of Russia at the same beneficial levels that commercial enterprises within Russia receive it (so that those Russian enterprises maintain a cost advantage over international competitors, and the GOR's interventionist policies do not operate to the benefit of enterprises in other countries).

The ADC's methodology of deducting the Gas Export Tax is deficient and irrational, as the effect of its decision to deduct the Gas Export Tax effectively engineers a benchmark that is subject to all the same distortions as the domestic price. For this reason, including the fact that the decision to deduct the Gas Export Tax is such significant determinant of the dumping margin (and consequently the likelihood of resumed dumping and material injury), it makes it difficult to reconcile the ADC's methodology as the most logical option. In Orica's view, this has contributed to the ADC's incorrect conclusion in Finding 2 as to whether injury from the dumping of ammonium nitrate exported from Russia is likely.

Orica submits that it is not appropriate to make an adjustment to the external NCG benchmark gas price at the border for the 30 per cent Export Gas Tax applied by the GOR. Adjusting the benchmark price by deducting the Export Gas Tax removes the very mechanism by which artificially suppressed Russian gas prices are converted to prices approximating an internationally competitive level, and results in a benchmark which is subject to the very same distortions as the domestic price.

#### IV. Proper comparison

The ADRP Member referenced the ADC's methodology in its proper comparison test between domestic and export prices of the two Russian ammonium nitrate producers. The ADRP member commented that *"the ADC in Rep 565 considered that the approach it undertook in its assessment of whether sales are "suitable" for the purposes of s.269TAC(1) of the ACT, outlined in paragraph 2(c) above, to be consistent with Australia's obligations under the ADA and the WTO Panel's interpretation of the obligations set out in the Panel Report, Australia – Anti-Dumping Measures on A4 Copy Paper."* ("WTO Panel Report")

The ADRP member nominates particular paragraphs that address the 'proper comparison' narrative in the WTO Panel Report.

Orica notes the comments of the WTO Panel at Paragraph 7.75 where it is stated that:

*"...it is necessary to conduct a qualitative comparison of the domestic and export prices. The phrase "because of the particular market situation" makes clear that the qualitative assessment of whether the domestic and export prices can be properly compared should focus on how the particular market situation affects that comparison. We therefore consider that the "proper comparison" language calls for an assessment of the relative effect of the particular market situation on domestic and export prices."*

The WTO Panel then discussed at Paragraph 7.76 whether a "proper comparison" is not permitted because of the particular market situation and whether because of the particular market situation a proper comparison of domestic and export prices is not permitted. The WTO Panel commented:

*"In other words, the investigating authority must examine the domestic sales in order to determine whether a proper comparison between the two prices is permitted in spite of the effect of the particular market situation. The point is to determine if there is a comparable domestic price (i.e. if there is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" in the sense of GATT 1994 Article VI:1(b) and Article 2.1 of the Anti-Dumping Agreement)."*

The WTO Panel makes it clear that the determination of a proper comparison is “fact specific” and “determined on a case by case basis”. Importantly, the WTO Panel noted that “*while a particular market situation may have an effect on both domestic and export prices, it does not follow that the impact on domestic and export prices will be the same.*”

Orica notes the WTO Panel's comments at Paragraph 7.81:

*“Accordingly, we are not persuaded that a low-price input used identically to produce merchandise for domestic and export markets will necessarily have the same effect on domestic prices and export prices and therefore necessarily permit a proper comparison. Rather, we find that whether the exporter’s domestic sales permit a proper comparison with the export price is a question that can only be ascertained through an examination of relevant factual circumstances.”*

The ADC is required to examine whether domestic ammonium nitrate sales by the two Russian producers permitted a proper comparison between the domestic prices found to be influenced by GOR distortions (i.e. price-setting on the domestic market) and with the export prices for ammonium nitrate. The ADC’s analysis in REP 565 relied upon its finding that “*the cost of gas for both exporters was comparable to the competitive price benchmark during the inquiry period*”. As inferred by the ADRP Member, this is not the requirement of the proper comparison test which is undertaken in respect of the domestic and selling prices for ammonium nitrate for each of the two ammonium nitrate manufacturers.

Nevertheless, Orica considers that the domestic ammonium nitrate prices that are subject to government influence cannot be properly compared with ammonium nitrate export prices as the GOR distortions impact the selling prices in different ways such that the prices in the two markets are different.

#### V. Correct and preferable decision

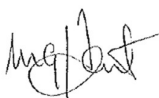
The Commissioner erred in his recommendation to the Minister in the determination of normal values for the two Russian ammonium nitrate producers by deducting the 30 per cent Gas Export Tax (or levy) from the benchmark German Border gas price. The then Commissioner did not deduct the Gas Export Tax in the normal value assessment in Continuation of Measures Investigation No. 312 in 2016 concerning ammonium nitrate exported from Russia and it is considered that it was not the correct or preferable decision (to deduct the Gas Export Tax) in REP 565. It is therefore difficult to reconcile the reasons that the Gas Export Tax was considered appropriate for deduction in this instance.

Orica requests that the Commissioner re-calculate the benchmark gas price at the German Border without deducting the Gas Export Tax. Once the benchmark natural gas price is included in the two ammonium nitrate producers’ production costs, it will demonstrate that dumping margins for Russian ammonium nitrate exporters are significant.

Following the recommended approach to ascertaining the normal values and dumping margins, the Commissioner will be satisfied that future exports of ammonium nitrate to Australia will be likely to be at dumped prices and that injury to the Australian industry will also be likely, should the measures be allowed to expire.

If you have any questions concerning this submission, please do not hesitate to contact me on (03) 9665 7309.

Yours sincerely,



Malcolm Hart

Senior AN Market Manager - APA

