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28 January 2022

The Director
Investigations 2
Anti-Dumping Commission
GPO Box 2013
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By email

Dear Director

ADRP Review 2021/134 – request for ADC reinvestigation Ammonium nitrate exported from the Russian Federation

We write with respect to Anti-Dumping Review Panel (“ADRP”) Review 2021/134 concerning ammonium nitrate exported from the Russian Federation.

1 Introduction and contents of this submission

The ADRP has requested the Anti-Dumping Commission (“the Commission”) to conduct a reinvestigation of certain findings stemming from the determination in Continuation 565. It has done so by way of “*Letter from the Review Panel to the Commissioner - Request for Reinvestigation*” (“the Reinvestigation Request”) published 21 September 2021.¹

The Commission has invited interested parties to comment on the issues detailed in the Reinvestigation Request.² We represent JSC Novomoskovsky Azot and JSC Nevinnomyssky Azot, respectively “NAK Azot” and “Nevinka”, in this Review 2021/134.³ NAK Azot and Nevinka are interested parties, having been cooperative exporters in the continuation inquiry pursuant to which the Commission

¹ See ADRP public record *Ammonium Nitrate exported from the Russian Federation* at https://www.industry.gov.au/sites/default/files/adrp/2021_134_-_ammonium_nitrate_-_request_for_reinvestigation.pdf

² See Continuation 565, Doc 052 *ADC File Note*, at https://www.industry.gov.au/sites/default/files/adc/public-record/565_-_052_-_file_note_-_adc_-_extension_of_time_for_reinvestigation_report_and_invitation_to_make_submissions.pdf.

³ We also represented NAK Azot and Nevinka in Continuation 565.

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recommended to the Minister that the anti-dumping measures concerning ammonium nitrate exported from Russia should be allowed to expire ("Continuation 565").⁴

Our clients welcome the Commission's invitation for submissions commenting on the Reinvestigation Request.

This submission responds to the matters at hand in the following manner

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2 The Commission's determination with respect to dumping

Our starting point will be to understand and explain the approach by which the Commission decided that domestic sales by our clients were not excluded from consideration for the purposes of determining their normal value.

The Commission determined that a "*particular market situation*" existed in respect of the domestic market for ammonium nitrate in Russia in the inquiry period.⁵ Our clients opposed the making of that determination during the Commission's inquiry ("Continuation 565"). They remain opposed to that characterisation of the Russian domestic market for ammonium nitrate.

For the purposes of its final report in Continuation 565 ("Final Report")⁶ the Commission had before it a very large amount of detailed information on the "market situation" topic. On behalf of NAK Azot and Nevinka, we presented a large volume of evidence to the Commission on the contemporary situation in the Russian domestic market for ammonium nitrate and the competitive nature of the costs incurred by the Russian ammonium nitrate industry. This information was presented through the detailed questionnaire responses of NAK Azot and Nevinka, and through the lens of the comprehensive verification of their sales practices and financial records. We note that the questionnaires to which NAK

⁴ See <https://www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-current-cases/565>]

⁵ "*Particular market situation*" is a phrase that is not to be found in the *Customs Act 1901*. Australia's implementation of the "particular market situation" reference in Article 2.2 of the Anti-Dumping Agreement is to be found in Section 269TAC(2)(a)(ii). To paraphrase, that Section provides that the Minister need not base normal value on the domestic sales prices of the exporter "*where the Minister...is satisfied that... the situation in the market of the country of export is such that sales in that market are not suitable for use*".

⁶ *Customs Act 1901 – Part XVB Report No. 565 - Inquiry into the continuation of anti-dumping measures applying to ammonium nitrate exported from the Russian Federation either directly or via Estonia (19 April 2021)*. See EPR 565, Doc 050.

Azot and Nevinka responded asked many of the same or similar questions as those that the Commission invited the Government of Russia ("GOR") to address in questionnaires that were addressed to the GOR.

In our submissions to the Commission, we also pointed out the almost complete absence of evidence from the domestic industry as to the contemporary "market situation" issues that were of interest to the Commission. The domestic industry simply dragged-up five-year old allegations and assertions, apparently relying on the Commission to reinstall a previous decision which was not informed by an appreciation of facts that related to the inquiry period which painted a different picture to that previously viewed by the Commission.

Our client also provided the Commission with the elaborate and compelling Brattle report,⁷ which goes directly to the question of whether Russian gas prices were market-based and whether they were a market cost in the verified financial records of our clients in the inquiry period. The main conclusions of that report were as follows:

- (a) With respect to the question of whether independent gas prices in Russia were competitive market prices:

While the state-owned company Gazprom still holds a pipeline export monopoly, it has been facing increased competition in the domestic market from independent gas suppliers (IGS), of which the two largest are Novatek and Rosneft. By 2019, the Gazprom Group's share of the domestic Russian market had fallen just below 50%. The market share of the IGS outside of the residential segment, which is almost entirely supplied by Gazprom Group, is even higher - potentially over 60%.

Further competitive pressure on Gazprom has been provided by the creation of a gas trading hub, the St Petersburg gas hub (SPIMEX). However, the volumes traded directly at the hub only account for around 3% of the total gas consumed in Russia.

Gazprom's sales prices are regulated by the government but those of the IGS are not. In fact, Gazprom's average sales prices have consistently been higher than those of Novatek and Rosneft. This is also the case for the gas bought by EuroChem: the price it paid to Gazprom has been around [] higher than the price that it paid IGS. For this reason, Gazprom has been losing market share in the industrial segment and asked the regulator to be allowed to apply a discount to be able to compete with Novatek and Rosneft.

As we discuss below, the gas prices paid by EuroChem are sufficient to cover the costs of Novatek, who we take to be representative of the IGS more generally, and enable it to earn a reasonable return. Accordingly, it is clear that the IGS are exerting some competitive pressure on Gazprom with respect to gas prices for phosphate plants in Russia and that the prices they receive from such plants are at market levels in the sense that they enable IGS to cover their costs and make a reasonable return.⁸

⁷ See *The Cost of Russian gas - A Benchmark Study on Russian Industrial Gas Prices*, at https://www.industry.gov.au/sites/default/files/adc/public-record/565_-_non-confidential_attachment_eurochem_group_ag_-_brattle_report_0.pdf]

⁸ Ibid, at pages v and vi.

- (b) With respect to the question of whether Gazprom covers its costs of supply to EuroChem, as a way of assessing the commerciality of Gazprom's prices:

Basic economic principles dictate that a firm must at least recover its short-term marginal operating costs in order to remain solvent. However, for the longer term, an adequate remuneration must also include depreciation, and a fair return on the current capital employed in assets used for gas production. We use the term "all-in delivered costs" for the sum of operating costs, depreciation and a fair return for Gazprom's production and transportation businesses. We have calculated 2019 all-in delivered costs for Gazprom and also for Novatek, which we take to be representative of IGS more broadly.

To the extent that the operating costs we have calculated include allowances for the costs of the flexibility in deliveries required for residential customers but not for industrial customers, we may have over-estimated the costs that industrial users should pay to cover the cost of natural gas production. This is more likely to be an issue for our analysis of Gazprom's costs than those of the IGS because typically IGS predominantly sell gas to industrial customers, with Gazprom serving most domestic customers.

We have calculated a range of all-in delivered costs for Gazprom, since we obtain somewhat different results depending on the sources on which we rely. However, the prices paid by all but one of the principal phosphate and fertiliser plants owned by EuroChem are [sic] exceed the maximum all-in delivered costs that we calculate, as can be seen from Figure 1. The one plant, North West, for which this is not the case pays a price that is only []% below Gazprom's maximum all-in delivered costs, which we consider to be insignificant given the approximations we have to make in estimating transportation distances.⁹

Market operation and profitability within the relevant market, whether relating to the price of the goods under consideration or to the cost of major inputs used in the production of those goods, appear to be fundamental to the question of whether a "market situation" impacts on the domestic price of goods under consideration, and to the "particularity" of that situation. The expert opinions in the Brattle report directly address those issues. The Australian industry did not contradict key elements of the Brattle report, such as the data relating to the expanded market share of independent gas suppliers and their profitability;¹⁰ Gazprom's domestic and overall profitability;¹¹ the relativity of Gazprom and independent gas supplier prices;¹² and the emergence of trading data from the St Petersburg Gas Exchange ("SPIMEX") where "prices have generally been lower than regulated tariffs".¹³

The Commission's market situation analysis, appearing in Appendix B of the Final Report, canvassed these factors:

- alleged "pricing arrangements" between Russian ammonium nitrate producers;

⁹ Ibid, at page vii.

¹⁰ Ibid, at paras 6 and 19.

¹¹ Ibid, at paras 73 and 74.]

¹² Brattle report, Figure 9 and Table 12.

¹³ Brattle report, at para 29.

- railway freight costs, including government ownership of railways, freight tariff controls and the subsidisation of railway freight; and
- government influence on gas prices.

The first of these factors, alleged pricing arrangements, relates to a situation found to exist in a previous continuation inquiry, for which the inquiry period was FY2015. In that inquiry period it was found that “pricing decisions were made with reference to a price established by the All-Russian Association of Fertiliser Manufacturers”.¹⁴ The Commission was satisfied that this did not exist in the FY2020 inquiry period for Continuation 565.

The Commission also found insufficient evidence to establish that railway freight costs were impacted by government influence. Instead, the Commission found that multiple countries within Europe had similar railway freight costs to those in Russia, using our client NAK Azot's freight costs as a comparison.¹⁵

Ultimately, the Commission's market situation finding was based entirely on the third factor, being government influence on gas prices. The Final Report states as follows:

The Commission considers that the GOR continues to exert significant influence over the Russian natural gas industry through its price regulation and creation of a mandated Gazprom export monopoly on piped natural gas.

*Consequently, the Commission is satisfied that there is a market situation in the Russian domestic market for ammonium nitrate.*¹⁶

Thus, in the Commission's view, the “market situation” was the continued influence of the GOR over the Russian natural gas industry, through its utility price regulation, and the fact that only Gazprom was able to export pipeline gas. Even though we disagree with that conclusion, our clients do understand the meaning of that conclusion. Our clients also understand the rationale of the Commission in thereafter accepting that the market situation did not prevent domestic sales of ammonium nitrate from being properly comparable with their export sales of ammonium nitrate. In our mind, the GOR's significant influence was considered by the Commission to be “the elephant in the room”, having both a potential role and an actual role in gas pricing which was able to be considered to be a “market situation”. Nonetheless, a conclusion about the *existence* of a “market situation” does not dictate the rejection of domestic sales for normal value determination. The use of domestic sales prices is the default requirement and may only be dispensed with for the reasons stated in Section 269TAC(2)(a) of the *Customs Act 1901*. Relevantly, one of those reasons is that the market situation “*is such*” that domestic sales are not suitable.

Section 269TAC(2)(a)(ii) states that domestic sales may be overlooked as the source of a normal value if “*the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a [domestic sales] price*” for normal value purposes under Section 269TAC(1). The question, therefore, is whether the situation “*is such*” – in other words, of a kind, or having an effect – that causes the Commission to arrive at the conclusion that the sales made in that market are not

¹⁴ Final Report, at page 76.

¹⁵ Ibid, at page 82.

¹⁶ Ibid, at page 92.

suitable to be used. The market situation does not compel the exclusion of domestic sales. Whether it does or not is a matter for further investigation, due consideration and an ultimate decision.

As we see it, the policy approach that has been adopted by the Commission in applying the “*is such*” test is to equate the question of “*is such*” with the text of the Article of the Anti-Dumping Agreement that the Section implements. Article 2.2 states that domestic sales need not be the source of a normal value if “*because of the particular market situation in the domestic market of the exporting country, such sales do not permit a proper comparison*”. The proper comparison, says the Commission, is the comparison “*between Russian domestic ammonium nitrate prices and Australian export prices*”.¹⁷

The Reinvestigation Request contrasts the Commission’s finding that the price of ammonium nitrate in Russia in the inquiry period was artificially lower than would have otherwise been the case, because it “*reflected the capped price and cost of gas in Russia that resulted from the programs and policies of the GOR*”, with the Commission’s later-expressed view that the export tax did not distort Gazprom’s domestic gas pricing (“*the evidence before the Commission does not demonstrate that the export tax is part of the distortive impact caused by the GOR*”). The Reinvestigation Report is critical of the Commission in this regard, saying the two observations are contradictory. On one view, there is no contradiction, because:

- the “*artificially lower*” statement was made with respect to domestic ammonium nitrate prices, whereas the “no distortion” statement was made only with respect to the effect of the export tax on domestic gas prices; and
- the finding that the export tax does not distort Gazprom’s domestic pricing does not mean that Gazprom’s domestic gas prices may not be impacted or are not impacted by regulation of the GOR – no energy market operates without a framework of regulation of some type in place.

Furthermore, an export tax is not an intervention with respect to the cost of gas “in” Russia or is not necessarily such an intervention. Nor does it inevitably cause a distortion, as the Australian industry would have the ADRP think. The point the Commission seems to have expounded in the Final Report is that it found that the overall regulation of the GOR, including the export tax, may be characterised as a “market situation”. However, when the Commission considered whether the “market situation” affected the proper comparison between domestic and export sales it was found that the export tax itself had no impact on the cost of gas and therefore no impact on domestic ammonium nitrate prices. Having no impact, the cost of gas could not be creative of a difference in the comparison between domestic and export prices for ammonium nitrate.

We recall that the order of analysis employed by the Commission was to consider whether a “*market situation*” existed and then - the “*market situation*” having been ascertained – to take the analysis to a higher level of detail and consider whether that situation prevented a proper comparison of the domestic and export prices of ammonium nitrate. We interpret the building blocks for the Commission’s conclusion that the market situation with respect to gas pricing did not unequally affect domestic and export prices of ammonium at all, or to a sufficient degree, were the following:

¹⁷ Ibid, at, page 41.

- it was exclusively or largely the cap and collar on Gazprom's in-Russia gas prices that impacted Gazprom's in-Russia gas prices, meaning that the export tax was impotent in terms of affecting domestic gas prices;
- regulated Gazprom prices for gas were determined having regard to the range of factors that are typical for any commercial enterprise, namely "*Gazprom's economically justified costs, reasonable rates of return on capital, including providing the profit necessary for their self-financing*";
- the cap and collar did not apply to independent gas suppliers, and independent gas suppliers' gas prices were proven, on the evidence before the Commission, to be lower priced than Gazprom's;
- independent gas suppliers engaged in open competition with each other and with Gazprom on the domestic market;
- both Gazprom and independent producers were profitable with respect to their domestic gas supplies; and
- for all of the reasons stated above, domestic gas prices were commercially reliable, did not differ as between domestic and export production, and did not prevent a proper comparison of domestic and export sales of ammonium nitrate.

It was this reasoning that allowed the Commission to conclude:

...on the basis that domestic prices are regulated for the largest domestic supplier, Gazprom, who also holds an export monopoly on piped natural gas, the Commission does not consider that the export tax distorts Gazprom's domestic pricing in the Russian market.

The Commission made no finding that the export tax had the effect of increasing domestic supply and reducing domestic prices. Nor would such a finding be justified because, as the Commission points out, domestic prices were maintained in a range that allowed for cost recovery, reasonable rates of return on capital, and profit necessary for self-financing. Had the benchmarking exercise, including the deduction of the 30% export tax, arrived at a higher benchmark than the gas price available on the domestic market, then we assume the Commission may have interpreted the situation differently. However, that was not the case.

There can be no suggestion that the export tax unbalanced the *supply* of gas to domestic customers and export customers in the inquiry period. Russia has the largest reserves of natural gas in the world. Furthermore, as per the Gazprom website:

Gazprom owns the world's largest gas transmission system, most of which forms part of the Unified Gas Supply System (UGSS) of Russia. The UGSS is a unique engineering complex encompassing gas production, processing, transmission, storage and distribution facilities in European Russia and Western Siberia. The UGSS assures continuous gas supply from the wellhead to the ultimate consumer.¹⁸

¹⁸ See <https://www.gazprom.com/about/production/transportation/>

The availability of Russian gas and the scalability of the distribution network means that the demand of both domestic and export customers can be met continuously. The fact that prices charged by Gazprom to an export market are necessarily higher than domestic prices because Gazprom must remit an export tax to the GOR does not mean that domestic prices are “artificially lower”. The “artifice”, if that is a proper description, is a higher gas price in export markets.

Accordingly, we see nothing remiss about the Commission’s reasoning. What can be said is that the Commission has done its best to make its underlying logic clear, in an area of law and economics that is quite complex. That said, the Commission can be questioned for expressing an opinion in the Final Report about the *effect* of the market situation – that ammonium nitrate prices were “*artificially lower*” - before it had actually done the research that might support such a conclusion. When it did that research, the Commission established that:

- the input price for gas in Russia was not artificially lowered by the market situation; and
- resultantly, the domestic and export prices of ammonium nitrate could be properly compared.

The evaluation that the input price for gas was an acceptable cost came later in the analysis, in the benchmarking exercise, which established that despite the “*market situation*” that was generally identified, there was no specific impact in the sense of an “artificial lowering” of the gas cost, and therefore no flow through effect of an “artificial lowering” of the domestic ammonium nitrate price. Whether this was an instance of loose language or an inadvertent mistake in the writing of the Final Report, and therefore should be clarified or corrected, should be a matter for the Commission’s consideration in this reinvestigation.

To recap - our view is that the identification of a market situation is independent of the later-required “*is such*” finding regarding the market situation’s effect on the proper comparison of domestic and export prices. A “market situation” finding does not inexorably lead to a finding of the unsuitability of the domestic price of the goods under consideration. In this case the Commission quite rightly said that there was no effect of the market situation that rendered domestic and export sales of ammonium nitrate incomparable.

An outcome cannot be branded as “wrong” because it is misunderstood. The Commission’s recommendations in the Final Report involved the exercise of judgement at multiple points of a complex factual and legal analysis. Although we do not agree with the central premise that a “market situation” existed at all, we support the Commission’s ultimate recommendations with respect to the dumping determination concerning our clients.

As mentioned above, in this reinvestigation the Commission may wish to give consideration to its “*artificially lower*” statement in the Final Report, given that the Commission’s later conclusion was that the actual cost of gas was similar to the benchmark gas cost in the market conditions that existed in the investigation period.

3 Responding to the specific issues raised by the ADRP

Against that backdrop, we now address the key issues raised by the ADRP in its Reinvestigation Request.

a Issue 1 - nature and treatment of the export tax on gas

The Reinvestigation Report requests that the Commission reinvestigate the *“methodology of the ascertainment of normal value”*¹⁹ applied in Continuation 565. The focus is the gas benchmark calculation and the treatment of the gas export tax as an adjustment element in arriving at that benchmark. The Reinvestigation Report has asked the Commission to explore the nature and circumstance of the tax, to ensure it is an element to be adjusted, by way of deduction, in the benchmark calculation.

The Reinvestigation Request requires the Commission to reassess:

- the nature and circumstances of the tax;
- whether the tax is suitable for adjustment;
- whether the market situation prevents a “proper comparison”.

To derive a competitive gas benchmark the Commission worked backwards from a European market gas price. The deduction of the export tax component was only one of the elements that were deducted. Clearly, to arrive at what the Commission considered to be an appropriate cost for the purchase of gas by a Russian producer of ammonium nitrate, it was necessary to take out costs that would not apply to the gas at the point of purchase in Russia. The Final Report details the rationale employed by the Commission in applying this methodology and contains a robust rebuttal of the Australian industry’s contrary argumentation.²⁰

The Reinvestigation Request does not deny the Commission the ability to maintain its already-stated approach, as per the Final Report. Rather, the ADRP has requested a careful examination of the *“specific nature and circumstances of the imposition of the Gas Export Tax”*²¹ to consider whether the adjustment is *“appropriate and justified”*.²² Further, the Reinvestigation Request asks whether if *“it is a usual type of tax that applies to exporters, both domestically and in other gas producing countries, and indeed if it is ‘tax’ that is contemplated and appropriate as an adjustment”*.²³

In cases such as this the Commission is required to carefully assess whether a cost *“reasonably reflects competitive market cost”*. As the ADRP states, this is not only with respect to the export tax, as it is important that an investigating authority *“carefully examine the facts and circumstances surrounding each adjustment claimed”*.²⁴ To its credit, we consider that the Commission properly engaged in that kind of an assessment in Continuation 565, and that the outcome of that assessment is strongly justified. That the Reinvestigation Request now requires more detail with respect to that assessment does not signal that it was incorrect. Rather, we interpret the ADRP’s request as being in the nature of a “quality assurance” exercise regarding that assessment.

¹⁹ Reinvestigation Request, at page 2.

²⁰ Final Report, at page 100.

²¹ Reinvestigation Request, at page 6.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

The Reinvestigation Request queries whether the export tax is a “*usual type of tax*”²⁵ that applies to “*exporters, both domestically and in other gas producing countries*”.²⁶ The conditions of the export tax itself are straight forward – a flat 30% tax applied at the border for all gas exported from Russia.²⁷ The language “*export tax*” is not shorthand or a colloquialism characterisation by NAK Azot and Nevinka, but rather the characterisation of the GOR.

For the Commission’s information, taxation of Russian gas exports has been in place for an extended period of time. In its present form it can be traced back 23 years, over which time the rate has varied on a number of occasions. Gazprom was designated as an export monopoly in 2006 meaning that the custom export tax on natural gas was in place long before Gazprom became a piped gas export monopoly.

The export tax is exactly that. It is not a domestic industry protection mechanism and is not levied for the purpose of increasing domestic gas supplies. As already explained, in our comments about Russia’s gas reserves and the scale and efficiency of the gas distribution system, such a purpose cannot be fulfilled by an export tax.

According to Art. 3 of the *Custom Code of the Russian Federation*:

Article 3: Rates of customs duties and the procedure for their establishment

1. The rates of customs duties are unified and shall not be subject to change depending on the persons importing to and exporting from the Russian Federation goods, types of transactions and other factors, except as provided by this Law.

2

3. The rates of export customs duties and the list of goods in respect of which they apply shall be established by the Government of the Russian Federation, unless otherwise specified in this Article.

The tax is not “profit” of Gazprom, nor is it “filtered back” to Gazprom, and suggestions to the contrary are rejected. It becomes part of what we in Australia would call consolidated revenue of government.²⁸ The Budget Code of the Russian Federation establishes that the formation of the revenue part of the national budget is carried out through tax, non-tax and non-repayable revenues. As is the case in many jurisdictions, customs payments constitute a significant part of the GOR’s budget revenues. The procedure for the receipt and further use of these revenues is clearly regulated. This type of revenue belongs to the category of non-tax revenues and is credited in full to the federal budget.²⁹

Article 51. Non-tax revenues of the federal budget

²⁵ Ibid.

²⁶ Ibid.

²⁷ Brattle report, at page 30.

²⁸ The fund, established by Section 81 of The Constitution, into which all revenues and moneys raised or received by the executive government are paid.

²⁹ Budget Code of the Russian Federation, Art. 51.

1. *Non-tax revenues of the federal budget shall be formed in accordance with Articles 41, 42 and 46 of this Code, including at the expense of:*

.....

- *customs duties and customs dues - at the rate of 100 percent;*

We expect the interest of the ADRP as expressed in the Reinvestigation Request is whether the export tax acts in a manner different to a tax. We do not consider that such an assertion has been substantiated at any point by the Australian industry. A differing intent or application for the export tax to that explained by the relevant Russian laws we have cited would require an evidentiary rationalisation. On the evidence at hand, this is a tax imposed on exports at the border by the GOR. Gazprom exports gas, and as such is taxed on those exports. Yes, Gazprom is the only exporter of piped gas, but there is no evidence to show it is a tax applied because Gazprom is the only exporter. An export tax on gas in a country with such plentiful natural supplies of gas as Russia does not render the prices of gas in Russia as being any less reliable an indicator of what those prices would be without the export tax in place. We see no reason why other gas producers in Russia would not also be subject to the tax if they commenced exportation of gas.

In summary, export customs duties are not unusual.³⁰ The Russian tax in question goes to the consolidated revenue account of the Russian federal budget and is certainly not considered to be “profit” of Gazprom, nor is it used to subsidise Gazprom. Gazprom is a corporate entity that is audited under International Financial Reporting Standards. The tax does not appear as revenue or as a contribution in those accounts in any way, shape, or form.

b Issue 2 - is the gas export tax appropriate for adjustment?

The crux of this request is whether the export tax is an “appropriate” deduction to the competitive gas benchmark. The Reinvestigation Request’s inquiry seems to be due to the circumstance of what it calls “a relatively high ‘export tax’ (30 per cent)” being “paid to government, from a government-owned entity that has a monopoly on exports in a market (natural gas), where it has been found that a market situation exists”.³¹ In such circumstances the Reinvestigation Request considers “a thorough and comprehensive analysis”³² of the adjustment is required. In requesting the examination of this conclusion, the ADRP proffers the view that the claims by the Australian industry in this regard may have “merit”.³³ As will be clear from the foregoing, we disagree entirely.

We recite and consider the claims in the order they appear in the Reinvestigation Request.

The first is that:

³⁰ The consolidated revenue purpose of the Russian export tax is in contrast to the motivation of the Australian Government in its regulation of the Australian gas industry. The *Heads of Agreement – The Australian East Coast Domestic Gas Supply Commitment* dated 5 January 2021 is unabashedly a domestic market price intervention. Its stated objective is “to ensure a secure and competitively priced gas supply for the East Coast domestic market” by, *inter alia*, not allowing “[u]ncontracted gas to be offered to the international market unless it is first offered with reasonable notice on competitive terms to the Australian gas domestic market”. See <https://www.industry.gov.au/sites/default/files/2021-01/australian-east-coast-domestic-gas-supply-commitment-heads-of-agreement.pdf>

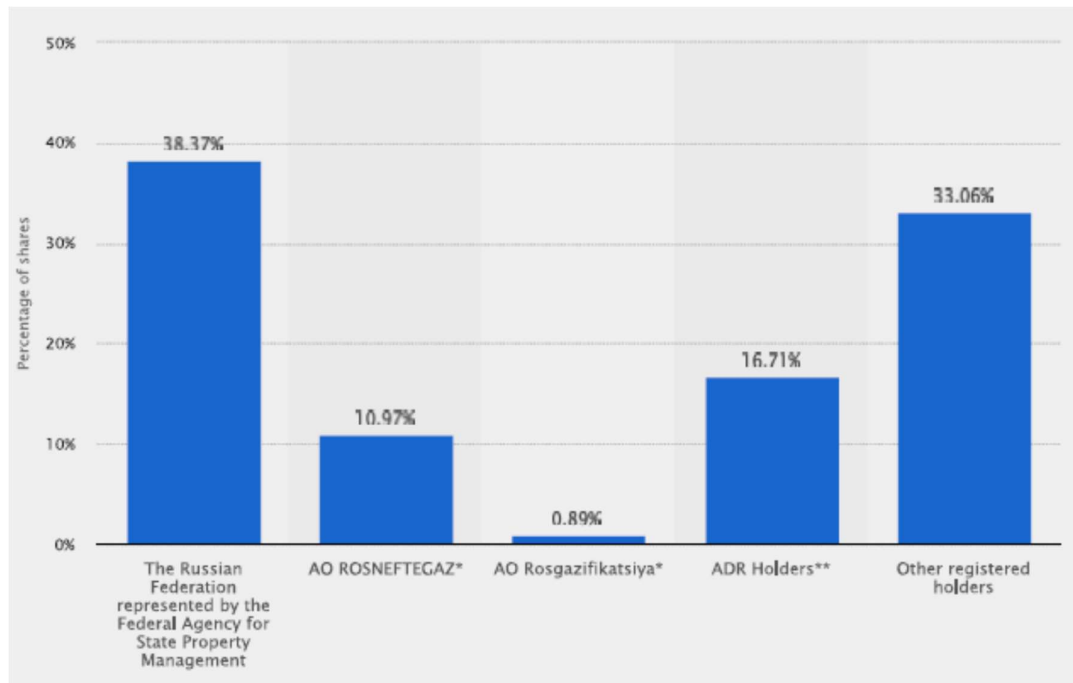
³¹ Reinvestigation Request, page 7.

³² *Ibid.*

³³ *Ibid.*

...the “tax” applies only to sales by Gazprom, a majority government owned monopoly exporter (and is thus, in effect, a mark-up by the seller rather than an external impost)³⁴

With respect, suggesting that the tax is a price mark-up is ridiculous. It is tantamount to saying that the export tax should appear as revenue in the financial records of Gazprom, which is an individual corporate entity, with significant private ownership, as shown in the chart below (as of 2020):³⁵



The tax is exactly that – a tax. It is not credited or funnelled back into Gazprom. It is not used to subsidise local gas prices, whether openly or secretly. Gas export tax collections are placed in the GOR’s general tax revenues, for social and welfare purposes of the State.

As established, the export tax is of formal application by the GOR. While Gazprom is majority government-owned, it operates as a private corporation and is audited and accounted-for as a private corporation in a comprehensive and detailed manner. It is certainly not the case that Gazprom itself, as the seller, is “given back” what appears to be a tax as if it were revenue. No evidence has been offered to support the proposition that the tax is a “mark up” on price or should be considered as such. The proposition is wrong.

Attempts to reframe the categorisation of the export tax do not speak to the specific consideration required for any adjustment to the competitive benchmark. The purpose of further considering the benchmark derivation approach is to establish whether an adjustment is required for a fair comparison between the benchmark and the domestic price of gas. The Final Report has explained that it “does not consider that the export tax distorts Gazprom’s domestic pricing in the Russian market”³⁶ and also

³⁴ Ibid.

³⁵ Source: <https://www.statista.com/statistics/273267/shareholder-structure-of-gazprom/#:~:text=Gazprom%20is%20held%20largely%20by,converted%20into%20Gazprom%2C%20a%20corporation.>

³⁶ Final Report, at page 100.

notes that “the export tax does not have a distortive effect on the gas prices offered by the IGS sector”.³⁷ The domestic market is also serviced by independent gas suppliers (“IGS”), and in the inquiry period they supplied gas to domestic buyers at prices that were around and below those of Gazprom. NAK Azot’s and Nevinka’s gas supply needs are serviced by both Gazprom and these IGS companies.

Given the Russian gas market was delivering profitable returns to Gazprom and the IGS, through the application of accepted utility pricing mechanisms, and because prices were contested amongst the participating suppliers, it is entirely appropriate to accept the domestic gas cost as reasonably reflecting the conditions of a competitive market. The Australian industry’s insinuation that the domestic profitability of Gazprom should be increased by a reallocation of the export tax as if it was revenue of Gazprom is untenable. Is it suggested that the profitable prices of the IGS should also be increased? Underlying the Australian industry’s arguments is an assumption on their part that Gazprom and the IGS have not been price gouging their clients, and that the Commission should expect them to do so.

It is for these reasons that we say that the Australian industry’s position has no merit. It is a matter of record that the Australian industry has strong concerns about the level of its own gas costs, however these concerns are its own to resolve.³⁸ It is not the case that every country has or should have the same gas costs. The question in an anti-dumping investigation such as this is whether the input cost of the exporter concerned is a competitive cost. The Commission’s benchmarking exercise established the acceptability of our clients’ gas costs, in Russia, in the inquiry period, for the purposes of its determination. We do not see any fact or reason arising from the Australian industry’s application that would disrupt that determination.

The second claim is:

*Whether Gazprom’s prices net of that “tax” are not the product of competitive market conditions and whether the appropriate benchmark is the price at which gas is sold into a competitive market*³⁹

The Commission has detailed in the Final Report an extensive process to determine a suitable competitive benchmark that, after adjustments, would reflect the competitive market prices for gas in Russia.⁴⁰ After analysis of different sources, the Commission determined the most suitable benchmark was the daily NetConnect Germany gas prices at one month ahead prices.⁴¹ Following this selection, the Commission evaluated adjustments to ensure the benchmark was reflective of competitive gas prices in the Russian domestic market. These adjustments included, among others, removal of German charges and costs and removal of export transport costs and export costs.⁴²

To the point that “Gazprom’s prices net of that “tax” are not the product of competitive market conditions”, the consideration at hand is whether the export tax is or is not an appropriate adjustment.

³⁷ Ibid.

³⁸ Regarding Australian gas costs in the inquiry period, please refer to “Gas price gap irks manufacturers” (1 June 2020) at <https://www.afr.com/companies/energy/gas-price-gap-irks-manufacturers-20200601-p54y9f>; “East coast gas prices cost Orica \$12M” (20 November 2020) at <https://www.energynewsbulletin.net/finance-legal/news/1399679/east-coast-gas-prices-cost-origa-usd12m>; “Code aims to ease tensions in supply” (15 June 2021) at <https://www.theaustralian.com.au/special-reports/code-aims-to-ease-tensions-in-supply/news-story/331ba2b23f1db88630e0df68242d445f>.

³⁹ Reinvestigation Request, page 7.

⁴⁰ Final Report, Appendix C, at page 93.

⁴¹ Ibid.

⁴² Ibid, at page 97.

This rests on whether the adjustment is necessary for ensuring that the work back price (worked back from a market that does not have the “*market situation*”) is a proper benchmark. For all of the reasons expressed in this submission, the finding that the benchmark was generally equivalent to domestic prices supported the finding that those prices were appropriate market prices. As the domestic gas prices do not have an export tax applied, and as the Commission determined that the market situation finding did not rely on the export tax nor cite the export tax as a contributing factor, then in such circumstances the fair comparison requirement dictates the export tax should be adjusted. To not do so would render the benchmark inflated and not appropriate for its stated purpose.

The third and last claim is:

*Whether the Gas Export Tax should be considered a levy that corrects the artificially low Russian gas price to an equivalent competitive market gas price that compensates Russia for the export of its natural resource.*⁴³

This attempted re-framing of the export tax is irrelevant, unnecessary, and unsustainable. We concur with the Commissioner’s submission to the ADRP in response to this claim:

*I note the Applicants say an ‘export tax’ is equivalent to the “Australia’s Rent Resource Tax”. I am unsure as to the significance of this point. However, it is a new argument that was not raised as an issue during the continuation inquiry 565. There was no information before me about the Government of Russia’s objectives in imposing the export tax.*⁴⁴

We are as unsure about the significance of the Australian industry’s comparison between the export tax and “Australia’s Rent Resource Tax” as was the Commissioner. All this comparison seems to be doing is to point out that it is customary for world governments to tax the energy and resources industry for general revenue purposes, which is consistent with our position.

Nonetheless, whatever may be the claimed relevance of the point, the Commissioner was correct to highlight that there was no information before him to evidence the Australian industry’s claims (and, we would add, to explain those claims). In this submission, we have added to the information before the Commission that denies those claims. For the Commission to conduct a “*thorough and comprehensive analysis*”, as is asked by the Reinvestigation Request, it must take a vigorous, evidence-based approach. There is no room for unsubstantiated implication or mere inference. If there is no evidence to support the claim that the tax should be “*considered a levy*”, then that claim cannot overcome what the evidence does demonstrate.

c Issue 3 – ensuring assessment of a proper comparison

Following the reassessment of the appropriateness of the export tax, the Commission has been requested by the ADRP to compare the reinvestigated benchmark against the exporters’ gas costs “*to assess whether the exporters’ domestic and export prices are likely to have been distorted by the*

⁴³ Ibid.

⁴⁴ See Anti-Dumping Commission interested party submission dated 18 August 2021, page 10, at https://www.industry.gov.au/sites/default/files/adrp/submissions_adrp_2021_134_final_public_version_redacted.pdf.

market situation and, if so, whether the market situation prevents a proper comparison under s.269TAC(1) of the Act.”⁴⁵

The result of the Commission’s “proper comparison” assessment was as follows:

The Commission has found that the cost of gas for NAK Azot was comparable to the competitive price benchmark during the inquiry period. Therefore, the Commission considers that the evidence before it does not demonstrate that the market situation is having a substantial effect on domestic prices. In turn, the Commission considers it does not demonstrate that the market situation is having a different relative effect on domestic and export prices. Accordingly, the Commission considers that a proper comparison is permitted.⁴⁶⁴⁷

The Reinvestigation Request acknowledges that the overall approach of the Commission in reaching this conclusion, as well as its assessment of whether sales were suitable, was “sound”,⁴⁸ although the analysis itself was considered to be “very brief”.⁴⁹ As such, the ADRP has instructed the Commission to “ensure that it does a comprehensive examination of whether “a proper comparison” of the domestic and the export price is permitted, for the purpose of s.269TAC(1) of the Act”.⁵⁰ It goes on to outline the process for the Commission, which is that it should focus on:

...how the particular market situation affects that comparison, in accordance with its stated methodology in REP 565 and as informed by the various findings in Australia - Anti-Dumping Measures on A4 Copy Paper, referred to in Footnote 11.⁵¹

In this submission we have provided our observations on the appropriateness of the market situation methodology and determination in the Final Report. In lieu of repetition, we refer the Commission to those comments, which also hold relevance for this aspect of the Reinvestigation Request.

Turning back to the request, the Commission has explained that for the purposes of the comparison exercise it examines:

- *the relationship between gas costs and ammonium nitrate prices (domestic and Australian export – where available) for each relevant Russian ammonium nitrate producer;*
- *the domestic market conditions (the particular market situation) that create those costs and prices; and*
- *export market conditions.⁵²*

We consider that there is no basis for any deviation from the Commission’s original determination that the “market situation” did not affect the comparison between the exporters’ domestic and export sales. Gas is a raw input material purchased by NAK Azot and Nevinka and is used for production for sales to

⁴⁵ Reinvestigation Request, at page 7.

⁴⁶ Final Report, at page 44.

⁴⁷ The same finding was made for Nevinka.

⁴⁸ Reinvestigation Request, at page 8.

⁴⁹ Ibid.

⁵⁰ Ibid, at page 9.

⁵¹ Ibid.

⁵² Final Report, page 41.

both domestic and export markets. In the inquiry period the Russian price was shown to be at the same level as the legitimate, well-calculated workback price. The gas costs did not vary based on the intended markets for the sale of ammonium nitrate. Because of this, and because of the equality of application of the gas price to domestic and export production, there was no practical or substantive difference in the effect of the market situation on domestic or export prices.

d Issue 4 - likelihood that dumping will recur

In the event that the reinvestigation results in a revision to the dumping margins, the ADRP requests the Commission to reinvestigate the finding that the Commissioner is not satisfied that the expiration of the anti-dumping measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping. The Reinvestigation Request notes that the Commission, in its determination, placed weight on *“positive dumping margins in reaching the required level of satisfaction that it was likely that dumping would continue or recur”*.⁵³

As detailed in this submission, we do not consider that there are grounds for the Commission to deviate from the methodology for the ascertainment of normal value as explained in its original findings in the Final Report. In such circumstances, the dumping margins will remain unchanged and there would be no new information or new reasoning to overturn the Commission's finding that *“there is insufficient evidence before it to be satisfied that any future exports are likely to be dumped should the measures be allowed to expire”*.⁵⁴

e Issue 5 - likelihood that exports will recur

The Reinvestigation Request also asks the Commission to *“re-examine its finding on the likelihood of exports recurring should the measures be removed”*.⁵⁵ This consideration is to include a re-examination of the Russian production capacity and capacity utilisation in light of *“further information”* from the Australian industry.

The Final Report found that exports of ammonium nitrate from Russia were likely to continue, but that they were likely to continue or recur on a spot sale basis – a segment which forms about 5% of the Australian market.⁵⁶ Noting the maturity of the Australian market, and the prevalence of long term contracting between the domestic industry and local customers, we see no reason for the Commission's finding to change, irrespective of the *“further information”* provided.⁵⁷

The Reinvestigation Request identifies for consideration *“further information”* produced by the Australian industry with respect to production capacity in Russia. There are two aspects to this information. The first is the completion of the Kemerovo production facility. The second is the supposed capability and wherewithal of Russian producers to “switch” capacity between products. While *“further information”*

⁵³ Reinvestigation Request, at page 10.

⁵⁴ See Final Report, at page 52. We highlight for the Commission's benefit that, as noted in the Final Report, it is not sufficient to consider future exports *“may”* be dumped, and that it must be satisfied as to the higher threshold that such a circumstance is in fact *“likely”*.

⁵⁵ Reinvestigation Request, at page 10.

⁵⁶ Final Report, at page 63.

⁵⁷ An added “protection” the Australian industry has is the captive market of two of the producers, whose related companies offer blasting services for resource extraction.

may have been provided on these points, the claims themselves have already been addressed by the Commission in the Final Report.

Concerning the first aspect, the Australian industry in the “further information” states, “[t]his expansion was foreshadowed to the ADC by Orica in its submissions during Investigation 565 (refer Orica Australia Commercial-in-Confidence submission of 25 March 2021 in response to SEF 565)”.⁵⁸ The change in circumstance is that the foreshadowed project is now completed. We do not see the persuasive value of this information when it was already considered in the Final Report. We do not expect this information to change the Commission’s established position from that explained in the Final Report.

Turning to the second – the “switching” claim - the Australian industry notes that the Commission was also made aware of the information during the continuation inquiry.⁵⁹ The Commission has commented in depth about the alleged possibility and likelihood of “switching” between HDAN and LDAN production in the Final Report. As explained, while switching may be “possible”, the Commission stated that it:

*...is not satisfied on the evidence before it that it is likely they would do so. The evidence has not demonstrated that “switching” from HDAN to LDAN production is straightforward or likely.*⁶⁰

We do not see any evidence in the “further information” that would cause the Commission to reach the opposite conclusion.

Accordingly, considering the Commission’s already robust analysis with regard to the matters to which the “further information” pertains, we do not expect that reinvestigation of these issues would result in a change in the ultimate finding.

f Issue 6 - likelihood of a continuation or recurrence of injury

Finally, to the extent the reinvestigation results in an increase to the dumping margins, the Reinvestigation Request asks for a reinvestigation of the finding that the Commissioner is *not* satisfied that the expiration of the anti-dumping measures would lead, or would likely lead, to a continuation of, or a recurrence of, injury. The Reinvestigation Request highlights references to the negative dumping margins through the Final Report, which were said to support the Commission’s finding in this respect.

The Final Report focusses its attention on injury in the form of price, volume and profitability. Following a substantive analysis of the market dynamics and these injury factors, the Commission concluded it was likely that minimal volumes of ammonium nitrate would be exported to Australia and that it was likely that these exports may be lower priced than other participants in the market.⁶¹ Nevertheless, highlighting that spot sales only account for 5% of the Australian market, the Commission concluded that:

However, due to the low volumes of goods likely to be exported, insufficient positive evidence before it, and the speculative nature regarding the degree of impact of the low priced-inputs,

⁵⁸ See letter from Orica to the ADRP dated 13 July 2021, second page (not numbered). https://www.industry.gov.au/sites/default/files/adrp/2021_134_ammonium_nitrate_-_conference_summary_-_15_july_2021_redacted_0.pdf

⁵⁹ Reinvestigation Request, at page 16.

⁶⁰ Final Report, at page 56.

⁶¹ Ibid, at page 70.

the Commission is not satisfied that it is likely that any injury to Australian industry would be material in degree. The Commission notes that the estimated Russian landed price calculation also contained many limitations and is also not satisfied that it is likely any injury would be attributable to dumping for the reasons outlined in section 7.5 of this report.⁶²

We do not consider the items necessitating this reinvestigation are of the type that should transform the Commission's ultimate finding. As explained in the Final Report, due to the nature of the Australian market, there will continue to be only a low volume of product from Russia, which competes for spot sales, where spot sales only occupy 5% of market volume. The Commission further identified the "many" limitations in the Australian industry's landed price calculation⁶³ and was not satisfied of the likelihood that any injury would be attributable to dumping. In making this determination the Final Report was not satisfied that it was *likely* that injury to the Australian industry would be material. The Commission's finding that it is not satisfied that it is likely that any injury to Australian industry would be material in degree is justified and we see no reason for it to be reversed.

We appreciate the Commission's invitation to comment on the Reinvestigation Request and trust the foregoing comments are helpful in your assessment.

Yours sincerely



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⁶² Ibid.

⁶³ Ibid.