



# ADRP Conference Summary

## Review No. 134 – Ammonium Nitrate exported from the Russian Federation

Panel Member	Leora Blumberg
Review type	Review of Minister's decision – continuation inquiry
Date	20 December 2021
Participants	Evan Schnell (ADC Representative) Tim King (ADC Representative) Terese Barber (ADC Representative)
Time opened	2:00 pm AEDT
Time closed	3:07 pm AEDT

### Purpose

The purpose of this conference was to provide further information and clarification to the Anti-Dumping Commission (“ADC”) relating to the reinvestigation request under s.269ZZL of the *Customs Act 1901* (“the Act”) (“the Reinvestigation Request”) regarding Review No. 134 in relation to ammonium nitrate exported from the Russian Federation (“Russia”) before the Anti-Dumping Review Panel (“Review Panel”).

The conference was held pursuant to section 269ZZHA of the Act.

In the course of the conference, I provided further information and clarification to the ADC in relation to the Reinvestigation Request. The conference was not a formal hearing of the review and was not an opportunity for parties to argue their case before me.

I have only had regard to information provided at this conference to the extent that it relates to relevant information within the meaning of section 269ZZK of the Act. Any conclusions reached at this conference are based on that relevant information. Information that relates to some new argument not previously put in a submission is not something that the Review Panel may have regard to and, therefore, is not reflected in this conference summary.

At the time of the conference, I advised the participants:

- That the conference was being recorded and transcribed by Express Virtual Meetings Pty Ltd, and that the recording would capture everything said during the conference.



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- That the conference was being recorded for the Review Panel to have regard to when preparing a conference summary. The conference summary would then be published on the Review Panel's website.
- Any confidential information discussed during the conference would be redacted from the conference summary prior to publication.

Prior to the conference, participants were provided with a copy of the Review Panel's Privacy Statement. The Privacy Statement outlines who the conference recording and transcript may be disclosed to. The Privacy Statement is available on the Review Panel's website [here](#). The participants indicated that they understood the Privacy Statement and consented to:

- The recording of the conference; and
- The recording being dealt with as set out in the Privacy Statement.

## Background

Following the Reinvestigation Request, the ADC while working through the scope of the request, sought further information and clarification from the Review Panel in relation to the Reinvestigation Request, which was the subject of this conference.

## Introductory Remarks

As a general introduction I remarked that the purpose of this conference was to clarify the Reinvestigation Request and to elaborate on some of the reasons for the request for reinvestigation of those particular findings. I pointed out that it was in no way intended to direct how the Commissioner of the ADC ("the Commissioner") is to perform the reinvestigation, with reference to s.269SMG of the Act. I stated that in the Reinvestigation Request I had tried to provide specificity in my reasons for the Reinvestigation Request relating to the various findings and was now happy to provide further clarification and details relating to those reasons.

## Discussion

The specific information and clarifications that the ADC sought in this conference relating to the Reinvestigation Request are set out below, followed in each case by my clarification responses:

1. ADC Question 1



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At paragraph 9(e) of the Reinvestigation Request, the ADC has been requested to re-examine the Russian production capacity and capacity utilisation finding in light of certain 'Kemerovo expansion further information' provided by Orica. This further information was included in the Reinvestigation Request. The ADC also notes that the Review Panel has requested the ADC to take into consideration the comments to it by Glencore Coal Assets Australia Pty Ltd ("Glencore") and EuroChem Group AG, including NAK Azot and Nevinka ("EuroChem"), on the Kemerovo expansion further information.

Is the extent of this aspect of the reinvestigation limited to only examining the further information contained in the attachments to the Reinvestigation Request and the comments made to the Review Panel by Glencore and EuroChem?

#### Response to ADC Question 1

*I reiterated that it is not for the Review Panel to direct how the ADC conducts the reinvestigation or what information the reinvestigation should be limited to. However, I clarified my reasons for requesting the ADC to take into consideration this particular piece of "further information" of Orica (referred to in the Reinvestigation Request as the "Kemerovo expansion further information"), that the Review Panel obtained pursuant to a conference held under s.269ZZHA(1) of the Act on 24 August 2021 ("the August Conference"), together with the comments provided to the Review Panel by Glencore and EuroChem, respectively, in subsequent conferences, on the Kemerovo expansion further information:*

- *While there was other "further information" (that was not "relevant information" within the meaning of s.269ZZK(6) of the Act) brought on to the record during the August Conference, I only had "regard to" the Kemerovo expansion further information in requesting the reinvestigation since I considered that it, "relates to the relevant information" pursuant to s.269ZZHA(2)(a) of the Act.<sup>1</sup> In the Reinvestigation Request I identified the "relevant information" that I considered the Kemerovo expansion further information to be directly related to.*

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<sup>1</sup> The detailed reasons for only having regard to the Kemerovo expansion further information and not other "further information" brought on to the record during the August Conference, will be set out in the Review Panel's report to the Minister under s.269ZZK(1) of the Act.



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- *During the August Conference Orica advised that additional further information (subsequently referred to as “additional further information”)<sup>2</sup> had become available, that Orica also wished to submit to the Review Panel under s.269ZZHA(1) of the Act. I did not accept the additional further information on to the record during that conference and advised that it was in the Review Panel’s discretion as to whether to hold a conference under s.269ZZHA(1) of the Act to obtain the additional further information, if considered to be reasonable in the circumstances.*
- *After consideration I subsequently exercised my discretion and decided not to hold a conference under s.269ZZHA(1) of the Act to obtain the additional further information.<sup>3</sup>*
- *Therefore, the only “further information” that I have had regard to in making the Reinvestigation Request (and have requested the ADC to take into consideration in its reinvestigation) is the Kemerovo expansion further information. In accordance with procedural fairness principles, I have also had regard to (and have requested the ADC to take into consideration in its reinvestigation) the response comments of Glencore and EuroChem, on the Kemerovo expansion further information (provided to the Review Panel during respective conferences held on 14 September 2021, under s.269ZZHA(1) of the Act).*

#### **2. ADC Question 2**

At Paragraph 5(b) of the Reinvestigation Request, the Review Panel specifies that it considers it to be particularly significant to examine the specific nature and circumstances of the imposition of the Russian Gas Export Tax (“GET”). The ADC had a number of clarification questions relating to this issue, set out below.

#### **General Response to ADC Question 2**

*Before responding to the specific clarification requests (set out below), I reiterated that it is not for the Review Panel to direct how the ADC conducts the reinvestigation, but that I was happy to clarify my reasons for requesting the reinvestigation and provide further information relating to those reasons.*

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<sup>2</sup> The additional further information was attached to the summary of the August Conference as Annexure A, for reference purposes only.

<sup>3</sup> The reasons for this decision will be detailed in the Review Panel’s report to the Minister under s.269ZZK(1) of the Act.



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*In order to put the responses to ADC Question 2 in context, I confirmed my understanding of the following:*

- *The WTO A4 Copy Paper case<sup>4</sup> also involved a major input (pulp) into the relevant product (A4 copy paper) as did Investigation 565. The Panel in the WTO A4 Copy Paper case found that the ADC's finding of a "particular market situation" (in regard to distortions in the domestic market relating to the major input) was not inconsistent with WTO rules. However, the Panel found that the ADC failed to complete the second part of the necessary inquiry under Article 2.2 of the WTO Anti-Dumping Agreement ("ADA") as it did not properly determine that the effect of the particular market situation on the domestic sales was such that it did not permit a proper comparison (with the export sales), and therefore was not in accordance with WTO rules.*
- *The ADC's finding in REP 565 that there was a "particular market situation" is not in dispute in this review.*
- *It was stated in REP 565, after finding that a particular market situation existed, that the ADC would then consider the relative effect of the particular market situation on both the domestic sales and export sales, and if domestic and export sales were not equally impacted by the market situation, such a finding may render domestic sales not suitable for the purposes of s.269TAC(1). This was stated to be in accordance with the findings of the WTO A4 Paper case.<sup>5</sup>*
- *The Panel in the WTO A4 Copy Paper case made it clear that there is no particular methodology for conducting this necessary second part of the inquiry. In REP 565 the ADC set out in detail its chosen methodology in dealing with the second part of the inquiry, as to the relative effect of the "particular market situation" on both the domestic sales and export sales, to determine whether domestic sales were not "suitable" for use in determining a price under s.269TAC(1), pursuant to s.269TAC(2)(a)(ii).<sup>6</sup>*

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<sup>4</sup> *Australia - Anti-Dumping Measures on A4 Copy Paper (WT/DS529/R).*

<sup>5</sup> My understanding is that, in accordance with the WTO A4 Copy Paper case, it was not sufficient for the ADC to find that a particular market situation existed to demonstrate that domestic sales were not "suitable" for use in determining a price under s.269TAC(1), pursuant to s.269TAC(2)(a)(ii). In addition, it needed to be demonstrated that the particular market situation resulted in an inability to compare the domestic sales with the export sales (pursuant to Article 2.2 of the ADA). This meant that, in accordance with Australian legislation, it further needed to be demonstrated that as a result of the particular market situation, the domestic sales were "not suitable" for use in determining a price under s.269TAC(1) of the Act pursuant to s.269TAC(2)(a)(ii).

<sup>6</sup> See Section 6.4.3 of REP 565, pages 40 - 42.



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- *The first step of this selected methodology that the ADC took in REP 565 was to assess the scale of the particular market situation's effects on Russia's domestic prices for ammonium nitrate, and for this purpose had regard to a "competitive benchmark" for natural gas, that is, a comparison of domestic market (Russian) natural gas prices with natural gas prices in a market governed by competitive conditions (adjusted for differences). The relevant benchmark used by the ADC was Russian natural gas as sold on the German market.<sup>7</sup>*
- *I noted that it was important not to confuse the reference to the "competitive market price" of natural gas or the "competitive benchmark" for natural gas (which was part of the methodology selected by the ADC for the second part of the inquiry referred to above) with the phrase "competitive market costs" referred to in Regulation 43(2)(b)(ii) which relates to certain circumstances (when the records do not reflect competitive market costs associated with the production of like goods) when a benchmark can be used instead of actual costs reflected in the records of the exporter for the determination of cost of production, in terms of s.269TAC(2)(c)(i) or for the purposes of the OCOT test under s.269TAC(1).*
- *I noted further that the use of a "competitive benchmark" in the context of the ADC's own unique selected methodology to determine the distortive effect of the particular market situation on the domestic prices of ammonium nitrate, has not been the subject of WTO jurisprudential scrutiny with regard to adjustments, as has been the case with adjustments to external benchmarks relating to the term "in the country of export" when used under Article 2.2 read with Article 2.2.1.1.*
- *I further noted that it nevertheless was my understanding that it was appropriate for the ADC to make adjustments to the "competitive benchmark" in the context of the ADC's own unique selected methodology, to reflect differences in the country of export, such as, for example:*
  - ❖ *if the natural gas from the benchmark country was a different calorific value,<sup>8</sup> or*
  - ❖ *if conditions and costs relating to transportation, border administration costs and taxes were different.*

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<sup>7</sup> This consisted of daily NetConnect Germany (NCG) gas prices at 1 month ahead prices.

<sup>8</sup> I pointed out that this example did not apply in the present case as the natural gas benchmark in fact originated in Russia, so the calorific value was identical. The example was used to indicate the type of difference relating to the products that could be appropriate for an adjustment.



The specific clarification requests under ADC Question 2 are as follows:

- a. In examining whether the GET is a ‘usual type of tax’, is the Review Panel able to clarify the range of factors that are considered relevant in making such an assessment?

Response to Question 2a

*I clarified that when I referred to “usual type of tax” I was contemplating a typical tax, such as a GST or VAT, imposed generally on various other products, or categories of products, in the country of export. If there were no other products or group of products subject to such a tax in the country of export, I considered that it might be appropriate for the analysis to examine whether it was usual for such an export tax to apply to other similar (fuel-related) products exported from other fuel - producing countries.*

*I pointed out that I found it somewhat anomalous that a major ‘cost’ (being the 30 per cent GET) that increased the price of Russian natural gas to a level that amounted to a competitive market price when offered to customers in Germany, was subsequently deducted from that “competitive benchmark” as an adjustment. This appeared, in effect, to revert the “competitive benchmark” price back to what the price of natural gas was on the Russian domestic market (which price had been found to be distorted, in accordance with the particular market situation finding<sup>9</sup>). This appeared to me to detract from the adjusted price still being a “competitive benchmark”.*

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<sup>9</sup> The ADC had already considered the domestic price of natural gas to be distorted by its finding of a particular market situation. During the conference I referred to numerous references in Appendix B of REP 565 that indicated distortions of the natural gas price in the Russian domestic market (leading to the ADC’s finding of a particular market situation), such as:

- the suggestion that Gazprom was not able to engage in profit maximising behavior in the Russian domestic market, which would be reflective of a “competitive market price” (see Appendix B of REP 565, page 88);
- the reference to the 2019 Gazprom annual report identifying that Gazprom had made multiple representations to the government in relation to amending gas tariffs, being reflective of the degree of active market intervention by the GOR in setting prices for Gazprom rather than Gazprom as a profit-maximising market participant being able to set its own prices in accordance with market principle (see Appendix B of REP 565, page 88 – 89);
- The reference to the resultant price of ammonia nitrate in Russia in the inquiry period being artificially lower than would have otherwise been and reflected the capped price and cost of gas in Russia that resulted from the programs and policies of the GOR (see Appendix B of REP 565, page 91);



*I also pointed out that the mere referral to the GET as an “export tax” does not necessarily define it as such, and I considered it relevant for the ADC to more closely examine the real nature of the GET in its analysis. I pointed out that in such an examination, it should be borne in mind that Gazprom, the monopoly exporter of natural gas from Russia, was a government-owned entity. Since a “tax” is collected by the government, a **sui generis** “tax” or payment by a government-owned entity (that has an export monopoly) to the government could appear to be more like a payment to itself or an additional profit, rather than a cost incurred.*

*I stated that the above reasons contributed to me questioning whether the 30 per cent GET is an appropriate adjustment to make to the external competitive benchmark price, particularly when the adjusted price is similar to the original price in the country of export (which was found to be distorted, per the particular market situation finding). I pointed out that it was an unusual situation where the country of origin of the ‘external benchmark’ used in the methodology was also the country of export of the product and the country of the particular market situation.*

- b. In reference, to the examination of whether the ‘export tax applies to exporters, both domestically and in other gas producing countries’, can the Review Panel please clarify which domestic market is being referenced?

*Response to ADC Question 2b*

*I clarified that when I referred to the examination of whether the ‘export tax applies to exporters, both domestically and in other gas producing countries’, the domestic market that I was referring to is the Russian domestic market.*

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- The reference to the ADC in its analysis, demonstrating that natural gas is a primary raw material used in the manufacture of ammonium nitrate and that the competitive interaction between producers in the domestic market will induce and allow the producers to supply more ammonium nitrate at each possible price point than they otherwise would have, in the absence of distorted gas prices (see Appendix B of REP 565, page 92);
  - The reference to “the distorted gas prices” (see Appendix B of REP 565, page 92);
  - The reference to the confidential information provided by the cooperating exporters which described the factors influencing their pricing decisions also supporting the view that the cost to manufacture and the cost of raw materials are considered in pricing decisions (see Appendix B of REP 565, page 92).





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- c. At paragraph 5(e) reference is made to the ‘relatively high “export tax” (30 per cent) that is paid to government’. Is the size of the tax a relevant consideration in regard to examining whether the tax is a ‘usual type of tax’?

*Response to ADC Question 2c*

*I advised that it is not for the Review Panel to direct what the ADC should regard as relevant considerations for it to conduct the reinvestigation and I reiterated that I would only clarify and provide further details as to my reasons for requesting the reinvestigation.*

*I referred to my previous discussions relating to the reasons for questioning whether the 30 per cent GET is an appropriate adjustment to make to the external competitive benchmark price and why I considered it relevant for the ADC to examine the actual nature of GET when deciding whether the adjustment is appropriate.*

*The ADC representatives confirmed that my previous comments had provided clarification on this question.*

- d. In relation to examining whether ‘...if it is “tax” that is contemplated’, can the Review Panel please clarify if it is seeking the ADC to further validate the existence or nature of the tax in the normal meaning of an export tax or to investigate the Government of Russia’s purpose or intent in relation to imposing this particular tax?

*Response to ADC Question 2d*

*I reiterated my intention not to direct the ADC’s reinvestigation and referred to my previous comments relating to the reasons for requesting the reinvestigation into to the adjustment for the GET and why I considered it relevant for the ADC to examine the actual nature of the GET when deciding whether the adjustment is appropriate.*

*The ADC representatives confirmed that my previous comments had provided clarification on this question.*



3. ADC Question 3

The ADC is currently reassessing the deduction of the GET from the competitive benchmark. The assessment includes whether the 30 per cent GET should be deducted from or included in the competitive benchmark. The ADC also notes that, as a general principle, export taxes in relation to a large export country can have the impact of increasing prices in the importing country.

In this context, is it an appropriate approach to also assess the impact of the GET on prices in the competitive benchmark market (Germany)? If the 'tax' affects prices in Germany, is it appropriate for the ADC to adjust the benchmark for that impact?

Response to ADC Question 3

*I reiterated my intention not to direct the ADC's reinvestigation and referred to my previous comments relating to the reasons for requesting the reinvestigation into the adjustment for the GET and why I considered it relevant for the ADC to examine the actual nature of the GET when deciding whether the adjustment is appropriate.*

*The ADC representatives confirmed that my previous comments had provided clarification on this question.*

4. ADC Question 4

At paragraph 6(c) of the Reinvestigation Request, the ADC has, after reassessing the gas export tax deduction from the benchmark, been requested to ensure that there is '...a comprehensive examination of whether "a proper comparison" ... is permitted ... 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'.

Is the ADRP seeking a more comprehensive re-evaluation of the proper comparison only in the event that the findings for the gas benchmark are different to those found in Report 565? Or, alternatively, is the ADRP seeking a more comprehensive analysis irrespective of the benchmark findings outcome?

Response to ADC Question 4

*I referred the ADC representatives to REP 565 which sets out in detail the proposed methodology for assessing whether sales are suitable for purposes of s.269TAC(1), by considering the relative effect of the market situation on both domestic and export*



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sales.<sup>10</sup> I advised that I considered this analysis to be most relevant, as discussed extensively in the WTO A4 Copy Paper Panel report. I pointed out that according to the WTO A4 Copy Paper case, even if distorted input prices (resulting from the particular market situation) are the same for both domestic and export prices of the product, an analysis is required of the effects on those markets respectively, including an analysis of the competitive market conditions of the product in the export market (being Australia).<sup>11</sup> The ADC's analysis of the effect of the particular market situation in the export market was found to be deficient in the WTO A4 Copy Paper case.

Although the proposed full methodology for this analysis was set out in detail in REP 565, there was no actual analysis of the effect of the particular market situation on the export prices of ammonium nitrate (in the Australian market) because of the ADC's finding that the market situation was not having a substantial effect on domestic prices in Russia. In turn the ADC considered (without doing the analysis on the export market) that it was not demonstrated that the market situation was having a different relative effect on domestic and export prices, and that accordingly a proper comparison under s.269TAC(1) was permitted.<sup>12</sup> I advised that I considered it relevant to complete the analysis of how the export prices of ammonium nitrate were affected by the particular market situation, taking into account the competitive conditions for ammonium nitrate in the Australian market, irrespective of the finding relating to the adjustment to the benchmark for the GET.

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<sup>10</sup> See Section 6.4.3 of REP 565, pages 40 - 42.

<sup>11</sup> As an example, I pointed out that the low prices of the input (even though the same for domestic and export products) might not have the same effect on prices of the product in the domestic market (where those low prices were available to all domestic manufacturers), as in the export market (Australia) where the competitive conditions of the product might be quite different (for example, the low-priced inputs costs could mean the price of the exported product could undercut other sellers of the product in that export market).

<sup>12</sup> See Sections 6.5.3 and 6.6.3 of REP 565, pages 44 and 46, respectively.