



Australian Government
**Australian Customs and
Border Protection Service**

**INVESTIGATION INTO THE ALLEGED DUMPING OF
FORMULATED GLYPHOSATE**

**EXPORTED TO AUSTRALIA FROM THE PEOPLE'S
REPUBLIC OF CHINA**

REVIEW OF THE TRADE MEASURES REVIEW

OFFICER SUBSTANTIVE ISSUES

17 January 2013

PUBLIC RECORD

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1. INTRODUCTION

On 21 December 2011, an application was lodged on behalf of the Nufam Limited and Accensi Pty Ltd requesting that the Minister publish a dumping duty notice in respect of formulated glyphosate exported to Australia from China.

On 6 and 23 January 2012, additional information in respect of the application was received, which restarted the consideration period.

The CEO was satisfied that the application was made in the prescribed manner by a person entitled to make the application and decided not to reject the application and an investigation was initiated on 6 February 2012.

Following the CEO's decision to terminate the investigation on 2 August 2012, Nufarm Ltd lodged an application with the Trade Measures Review Officer (TMRO) to review the decision of the CEO to either affirm or revoke that decision.

On 23 October 2012, the TMRO decided to revoke the CEO's decision to terminate the investigation. In the resumed investigation the TMRO considered Customs and Border Protection re-examine the following three substantive issues.

- a) include 62 per cent IPA salt and the unregistered goods as like goods;
- b) consider further whether the low volume of domestic sales of unregistered goods by Rainbow, adjusted under s 269TAC(8), was nevertheless sufficient to allow a proper comparison to be made for the purposes of determining a dumping margin; and
- c) give substantive consideration to whether Good Harvest's normal value should be assessed in accordance with s 269TAC(2)(d) of the Customs Act.

In the resumed investigation the investigation period remains from 1 January 2011 to 31 December 2012 and the injury analysis period from 1 January 2008.

On 21 November 2012, Customs and Border Protection resumed the investigation and invited interested parties to comment on the three substantive issues identified in the TMRO's decision to revoke the CEO's decision to terminate. ACDN 2012/54 refers.

This report has been compiled with reference to the responses from interested parties responding to ACDN 2012/54 and all other information provided to date during this investigation. This includes the preliminary views of the investigating teams articulated in their respective normal value visit reports and SEF 183.

The visit reports reflect the views and recommendations of the verification teams. Each exporter was informed that the findings contained in the reports were preliminary and subject to review by case management and may be revised by the case management team.

This report sets out findings of the case management in reviewing the information in the context of the three substantive issues identified by the TMRO.

2. LIKE GOODS

Like goods are defined as:

“goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration”¹.

The full discussion of the goods and like goods the subject of the application is addressed in SEF 183 for which will not be repeated here. The purpose of this report is to inform interested parties of Customs and Border Protection's views with regard to the specific issues raised following the TMRO's decision.

2.1 Include 62 per cent IPA salt

In resuming the investigation, and considering this issue, Customs and Border Protection has taken into consideration, SEF 183, the views provided in the relevant submissions, and comments recorded in the visit reports by the investigating teams.

To consider like goods the original investigation team examined the issue of like goods and the evidence presented and relied upon the goods description the subject of the anti-dumping application. The anti-dumping application described the goods as, inter alia, formulated glyphosate. Whilst the definition of like goods is legislated, it is open with regard to determine the characteristics of the like goods that can be considered to closely resemble those of the goods under consideration.

If the goods are not identical, it is necessary to determine whether the goods still fall within the ambit of goods having characteristics that closely resemble those of the goods under consideration². Customs and Border Protection considered the following factors to determine like goods as articulated in the *Dumping and Subsidy Manual August 2012*, which indicates inter alia, many sub criterion to the below four categories.

- Physical likeness
- Commercial likeness
- Functional likeness
- Production likeness

¹ Subsection 269T(1) of the Act.

² Dumping and Subsidy Manual August 2012 p.8

Customs and Border Protection considers the question of like goods in the context of the goods the subject of the application; formulated glyphosate. To this end Customs and Border Protection considers both the physical and functional characteristics with greater weight than the other factors.

Therefore, Customs and Border Protection considers formulated glyphosate has two essential characteristics, being, the goods contain the glyphosate acid as the active ingredient, and the goods can kill weeds.

Customs and Border Protection agrees that 62% IPA salt contains the necessary active ingredient, being glyphosate acid, which is required for formulated isopropylamine salt of glyphosate liquid formulated products. Nufarm has argued that there is no other use for 62% IPA salt other than it to be manufactured into a formulated glyphosate product.

However 62% IPA salt cannot kill weeds as it requires surfactants and other adjuvants for this purpose.

In its application to the TMRO, Nufarm indicated to convert 62% IPA salt to formulated glyphosate is a simple process. Nufarm indicated it is simply the addition of surfactants, water and other adjuvants in the required amounts and then mixing to form the formulated glyphosate.

Customs and Border Protection found that the process is relatively simple for a formulator to make commercial grade quality formulated glyphosate from IPA salts of glyphosate. Although a relatively simple process, Customs and Border Protection considers that surfactants are, nonetheless, critical for the formulated glyphosate to work as intended.

All interested parties agree that surfactants are an essential part of formulated glyphosate for it to work as intended.

As a ratio of the finished product a typical litre of formulated glyphosate 450g/L active ingredient requires approximately 120g/L of surfactant. Per litre of formulated glyphosate that is approximately 12%. Relative to the active ingredient, the surfactant represents approximately 21%.

Whilst the surfactant is critical to kill the weeds, Customs and Border Protection also considers the surfactant is a significant (by volume) component as well.

Customs and Border Protection also found that 62% IPA salt is a product unto itself. In the trade, it is commonly referred to as 62% IPA salt or 62% glyphosate salt, it has a different tariff classification to formulated glyphosate, it is not substitutable for formulated glyphosate, it follows a distinct distribution channel, it has a different price structure, it is sold in different packaging and excludes health and safety labels, and it cannot be sold to end uses in this form.

Customs and Border Protection also found one Australian glyphosate formulator was seeking to use the tariff concession order that applies to glyphosate technical, and have it apply to 62% IPA salt.

Customs and Border Protection is satisfied that the original finding that 62% IPA salt did not possess characteristics closely resembling formulated glyphosate was reached after carefully applying the like goods framework. In considering the various factors, Customs and Border Protection gave greater weighting to the functional differences between the two goods.

Therefore, Customs and Border Protection considers that after taking into account all relevant information and applying the like goods framework it was open and reasonable to conclude that 62% IPA salt does not fall within the ambit of goods having characteristics that closely resemble those of the goods under consideration. Accordingly Customs and Border Protection considers 62% IPA salt not a like good.

2.2 The unregistered goods as like goods

Customs and Border Protection found surfactants have different efficacies depending on the climate when used and the type of plant being applied to. Given Australia's climate is predominately dry and hot, the preferred surfactant is tallow amine based. Customs and Border Protection found many formulated glyphosate product instructions indicate the addition of surfactants and other adjuvants in spray preparations to increase performance for certain plants and temperature and water conditions. Again, if not identical, an examination is required to determine if the goods are within the ambit of goods having characteristics that closely resemble those goods under consideration.

Although the goods under consideration are the goods exported to Australia and need APVMA approval to be sold on the Australian market, the goods sold on the Chinese domestic market and the Chinese export markets are similar despite no APVMA approval. These goods contain the glyphosate molecule, use surfactants to break down the leaf's waxy surface, albeit different surfactants, are non-selective post emergent herbicides, would be keyed to the same tariff classification as those goods exported to Australia and are called formulated glyphosate.

In applying the same like goods framework used to consider 62% IPA salt, it would follow that the unregistered goods are like goods due to their functional likeness. However it appears that the original finding was reached after giving greater weighting to registration differences over functional likeness.

Customs and Border Protection considers that it was unreasonable to attach different weightings to the various characteristics in its like goods assessment of 62% IPA salt and unregistered formulated glyphosate. Despite the Chinese products being considered formulated glyphosate, but not registered with the APVMA, Customs and Border Protection considers that a product's APVMA registration is not a critical factor to defining the product's essential characteristic. In the context of anti-dumping, like

goods can have slight physical differences to adapt them to the domestic or export markets in which they are sold.

Therefore Customs and Border Protection considers that unregistered formulated glyphosate are like goods.

3 LOW VOLUME OF DOMESTIC SALES OF UNREGISTERED GOODS BY RAINBOW, ADJUSTED UNDER S 269TAC(8)

In substantive issue two, the TMRO stated;

consider further whether the low volume of domestic sales of unregistered goods by Rainbow [Shandong Weifang Rainbow Chemical Co., Ltd], adjusted under s 269TAC(8), was nevertheless sufficient to allow a proper comparison to be made for the purposes of determining a dumping margin;

Customs and Border Protection considers the volume of sales tests as part of the assessment to determine whether domestic sales are sold in the ordinary course of trade (OCOT)³ in sufficient volumes. Section 269TAC(14) of the *Customs Act 1901* (the Act) sets a threshold of 5%, below which, it becomes a matter of judgement whether to use these domestic sales to calculate normal values pursuant to s.269TAC(1)(a). The 5% threshold is a comparison of domestic sales volume sold in the ordinary course of trade relative to the volume of export sales to Australia.

After applying the ordinary course of sales test to the aggregate volume of all models or grades of domestic sales and it is determined the aggregate volume of these domestic sales are sold in the ordinary course of trade is above 5%, Customs and Border Protection then considers the volume test again and applies it individually for each model or grade or type of like good.

The Australian Courts have considered the issue of volume and found that below 5% it is a matter of judgement⁴. In so doing 'it permits any reason that shows that they are not suitable for use in a comparison to be adopted'⁵

The investigation team examined the volume of sales including the 62% IPA salt and found the volume of sales was below 5%.

Customs and Border Protection has re-examined this issue by applying the OCOT test first and then volume of sales test. Customs and Border Protection found that ordinary course of trade sales existed and they represented significantly less than 5% of the corresponding export volume. Despite the sales volume being below the 5% threshold, Customs and Border considered whether the sales were suitable.

³ S.269TAAD

⁴ Re Enichem Anic Sr1 and Enimont Australia Pty Limited v the Anti-Dumping Authority and the Minister of Small Business and Customs [1992] FCA 151 (9 April 1992) par 15.

⁵ Ibid par 13

The remaining OCOT sales were of a particular grade of glyphosate. The relevant domestic transactions were of such a small number that they could not be considered to provide for a proper comparison with the regular export sales to Australia. Customs and Border Protection considers these sales are not sales in the ordinary course of trade in sufficient volumes that are suitable for comparison to the export sales. Therefore, Customs and Border Protection considers a constructed normal value pursuant to s.269TAC(2)(c) is the most appropriate option.

4 GOOD HARVEST'S NORMAL VALUE SHOULD BE ASSESSED IN ACCORDANCE WITH S 269TAC(2)(D)

In substantive issue three, the TMRO stated;

give substantive consideration to whether Good Harvest's [Jiangsu Good Harvest Weien Agrochemical Co Ltd] normal value should be assessed in accordance with s 269TAC(2)(d) of the Customs Act[1901].

Originally, the investigation team examined the volume of like sales and included both 62% IPA salt and unregistered formulated glyphosate products and determined the volume of these goods sold on the domestic market when applying the sufficiency of sales test was below 5% when compared to the volume of goods sold to Australia. The investigation team considered a normal value calculated pursuant to s.269TAC(2)(c) of the Act.

Approximately ten days after the release of SEF 183, Nufarm Ltd provided a submission to Customs and Border Protection which included, inter alia, Good Harvest's third country export pricing information. This information was gathered from a third party information source.

Customs and Border Protection considers there is no hierarchy in the legislation whereby it must consider s.269TAC(2)(d) first before it constructs a normal value under s.269TAC(2)(c).

Customs and Border Protection is however considering the substantive issue pertaining to the quality and or quantity of third country information and the time of its presentation to Customs and Border Protection during an investigation, and how this information should be considered as part of the normal value determinations.

Customs and Border Protection has not finalised its consideration of this issue.

5 IMPACT

5.1 Zhejiang Xinan Chemical Industrial Group Co.,Ltd

Termination of Investigation

Following the TMRO's decision to revoke the CEO's termination decision, the three substantive issues raised in the report did not impact the investigation teams assessment of the negative dumping margin associated with Zhejiang Xinan Chemical Industrial Group Co.,Ltd (including goods indirectly exported through Zhejiang Wynca Import And Export Co., Ltd (Zhejiang Xinan and Wynca).

Customs and Border Protection considers that any further assessment of the three substantive issues raised by the TMRO will not impact the dumping margins of Zhejiang Xinan and Wynca. Accordingly, Customs and Border Protection preliminarily considers that, pursuant to s.269TDA(1)⁶ of the Act, grounds exists to terminate the investigation as it relates to Zhejiang Xinan and Wynca, subject to any additional comments or information submitted by interested parties in response to this report.

5.2 Jiangu Good Harvest Weien Agrochemical Co Ltd

Customs and Border Protection considers that, apart from any substantive new evidence to overturn its view on like goods, normal values for goods exported by Good Harvest will be determined pursuant to s.269TAC(2)(c). That is because in the original investigation, all domestic sales of like goods, including unregistered like goods, were used in assessing ordinary course of trade and sufficiency.

Therefore, despite the change in Customs and Border Protection's views with regard to unregistered like goods, OCOT domestic sales of like goods including unregistered formulated glyphosate continue to be of insufficient volume for determining normal values under s.269TAC(1).

Customs and Border Protection considers constructed normal values an appropriate basis to compare to the export prices. In the resumed investigation, in determining an appropriate level of profit for the purpose of constructing a domestic selling price, Customs and Border Protection calculated the weighted average profit achieved on domestic sales of like goods in the OCOT. This included the impact of broadening the definition of like goods to include unregistered formulated glyphosate.

A comparison over the investigation period of export prices and constructed normal values using the weighted average profit, achieved by Good Harvest on its domestic sales of like goods in the OCOT, shows that exports of formulated glyphosate by Good Harvest were not dumped.

As described in section 4 of this paper, Customs and Border Protection may yet use s.269TAC(2)(d) if it considers third country sales as a more suitable approach for calculating Good Harvest's normal value.

⁶ CEO must terminate if dumping margins are negligible.

5.3 Shandong Weifang Rainbow Chemical Co., Ltd

Customs and Border Protection considers that, apart from any substantive new evidence to overturn its view on like goods, normal values for goods exported by Rainbow will be determined pursuant to s.269TAC(2)(c). That is because in the original investigation, all domestic sales of like goods, including unregistered like goods, were used in assessing ordinary course of trade and sufficiency.

Therefore, despite the change in Customs and Border Protection's views with regard to unregistered like goods, OCOT domestic sales of like goods including unregistered formulated glyphosate continue to be of insufficient volume for determining normal values under s.269TAC(1).

Customs and Border Protection considers constructed normal values an appropriate basis to compare with export prices. In determining an appropriate level of profit for the purpose of constructing a domestic selling price, as per the original investigation team's approach and as explained in their visit report, Customs and Border Protection calculated Rainbow's profitability from the sector including the GUC profit achieved on domestic sales. This includes the impact of broadening the definition of like goods to include unregistered formulated glyphosate.

A comparison over the investigation period of export prices and constructed normal values using the weighted average profit achieved by Rainbow on its domestic sales of like goods in the OCOT, shows that exports of formulated glyphosate by Rainbow were not dumped.

6. RESPONSE DATE

Customs and Border Protection will accept responses from interested parties to the issues raised in this report by 31 January 2013.

Responses can be sent via email to itrops1@customs.gov.au

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