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Public Record

On Behalf of
Shandong Weifang Rainbow Chemical Co., Ltd
Comments on the Verification Report of the
Antidumping Continuation Inquiry for 2,4-
Dichlorophenoxyacetic acid (2,4-D)

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September 13, 2022

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RE: Comments on the Verification Report of the Antidumping Continuation Inquiry for 2,4-Dichlorophenoxyacetic acid (2,4-D)- Shandong Weifang Rainbow Chemical Co., Ltd

On behalf of our client Shandong Weifang Rainbow Chemical Co., Ltd (“Rainbow Chemical”), we hereby submit the following comments concerning the Rainbow Chemical’s Verification Report (“Report”) of the antidumping continuation inquiry for 2,4-Dichlorophenoxyacetic acid (2,4-D).

Among others, the Report conclude that *“The verification team considers the invoice date as the date of sale and updated the Australian sales listing. As a result of this change, Rainbow Chemical has not exported the goods to Australia during the inquiry period (IP) and the verification team has not calculated an export price.”*¹

The facts on record, however, support that the order date, as Rainbow Chemical has already claimed and fully substantiated in its questionnaire responses, should be considered as date of sales.

I. There is no legal hierarchy in selecting the date of sale from order date and invoice date

Foot note 8 of the WTO Anti-dumping Agreement (“ADA”) explicitly stipulates that, *“Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever established the material terms of sale.”* It is Rainbow Chemical’s understanding that the only and ultimate standard for deciding a date as date of sale is that on which date the material terms of sale are established, thus there shall be no legal hierarchy among contract date, purchase order date, order confirmation date, or invoice date.

Regulations of Australia also support the conclusion, as set out in the Commission’s Dumping and Subsidy Manual at page 51 ‘Establishing the date of sale’, the Manual

¹ See *Dichlorophenoxy-Acetic Acid – Exporter verification report – Shandong Weifang Rainbow Chemical Co., Ltd*, Page 8.

states, “*In establishing the date of sale, the Commission will normally use the date of invoice as it best reflects the material terms of sale... Where a claim is made that a date other than the date of invoice better reflects the date of sale, the Commission will examine the evidence provided.*” While the Commission normally use the date of invoice, it is not because there is a legal hierarchy but only because it normally “best reflects the material terms of sale”. We see no conflict/inconsistency of the Commission’s intention or practice on this aspect with the WTO ADA, i.e., whichever date “best reflects the material terms of sale” shall be regarded as the date of sale.

We noted that there are ample cases in which the Commission determined a date other than invoice date “best reflects the material terms of sale”. For example, in *REP 529 - HSS from China, Korea, Malaysia, Taiwan and Thailand* and *TER 219: Power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam*, the Commission determined the bill of lading (shipment) date as date of sales because it best reflects the material terms of sale.² Further, in *REP 221 – Wind towers – China and Korea*, the Commission considered the date of sales revenue recognition in Win&P accounts as the date of sale.³

We also notice that the Commission has made it clear in section B-1 of exporter’s questionnaire for this inquiry that the respondent is allowed to claim as date of sale other than the invoice date:

9. *In establishing the date of sale, the commission will normally use the date of invoice as it best reflects the material terms of sale. If you are making a claim that a different date should be taken as the date of sale:*

a) *What date are you claiming as the date of sale?*

b) *Why does this date best reflect the material terms of sale?*

² Final Report, *REP 529 - HSS from China, Korea, Malaysia, Taiwan and Thailand*, Page 82. Termination Report, *TER 219: Power transformers from China, Indonesia, Korea, Taiwan, Thailand and Vietnam*, Page 23.

³ Final Report, *REP 221 – Wind towers – China and Korea*, Page 36.

To sum up, there is no pre-set hierarchy on which date is superior to others in determining the date of sale and the only and key standard is which date better reflects the date on which the material terms of sale are established, thus the invoice date takes no priority. The Commission bears a responsibility to evaluate all information and evidence received in order to decide which “date best reflects the material terms of sale”, as long as Rainbow Chemical has demonstrated that the order date is the best date reflecting the material terms of sale, which will be elaborated in more detail below, the Commission should have decided that the order date as the date of sale.

II. Facts on record have already substantiated Rainbow Chemical’s claim that the order date best reflects the establishment of material terms of sale

In section B-1.9 of the exporter’s questionnaire submitted on June 10, 2022, Rainbow Chemical explicitly claimed that “*the purchase order date shall be taken as the date of sale*”, because “*After reaching a sale contract with the customer, the customer places a purchase order ... and all material terms, including unit price, amount, payment terms and delivery terms were fixed at that moment and kept unchanged. It is therefore concluded that the purchase order date perfectly reflects the determination of the material terms by both parties and bind the rights and obligations of both parties.*”⁴ [emphasis added]

In addition, Rainbow Chemical has provided all the Australian export documents for the inquiry period in Exhibit B-3.1 of the response of the original questionnaire. The Commission has verified all documents covering all 3 transactions during the inquiry period and found no inconsistency. All these documents have proved that there’s absolutely no change on any of the terms of the sales, including the unit price, quantity, payment terms and delivery terms, after the purchase orders were placed. As explicitly demonstrated and fully supported by the verified evidence, the order date best reflects the first date on which the material terms of sale were established and, therefore, should have been considered as the date of sale.

⁴ 604-2,4-D Response to Exporter Questionnaire-Rainbow Chemical, Page 14.

Rainbow Chemical noted that in prior cases, the Anti-dumping Review Panel (“ADRP”) has ruled that even if there were certain variations of the terms, as long as they are not material, such variations do not affect the determination of the date of sale. E.g., in *ADRP Report No. 80 – Steel Reinforcing Bar Exported to Australia from Greece, the Republic of Indonesia, Spain, Taiwan and the Kingdom of Thailand*, ADRP determined that “*the proforma invoice date (for Australian sales) best establishes the material terms of sale as reflected in the definition in Footnote 8 of the ADA.*”⁵ As noted by the ADRP, even if “*the pro forma invoices countersigned by the customer Nervacero accepts adjustments in two respects, being (i) minor changes to the order breakdown, ... and (ii) port of destination... in neither of these cases are the material terms of the sale affected, nor are the prices changed.*”⁶ [emphasis added]

The precedent clearly shows that ADRP prefers the date “*confirming and establishing the material terms of the sale between the parties*”⁷ Even if there were input errors or minor changes “*does not in my view detract from the pro forma invoice being central to the transaction.*”⁸ [emphasis added]

However, in the current case, even such minor or insignificant variation has not happened.

III. As the core of a dumping investigation is the prices/cost comparison, whichever date allows a better comparison of prices should be used as the date of sale

For the purpose of dumping calculation, the core of which is price comparison, what

⁵ ADRP Report No. 80 – Steel Reinforcing Bar Exported to Australia from Greece, the Republic of Indonesia, Spain, Taiwan and the Kingdom of Thailand, paragraph 305.

⁶ ADRP Report No. 80 – Steel Reinforcing Bar Exported to Australia from Greece, the Republic of Indonesia, Spain, Taiwan and the Kingdom of Thailand, paragraph 286.

⁷ ADRP Report No. 80 – Steel Reinforcing Bar Exported to Australia from Greece, the Republic of Indonesia, Spain, Taiwan and the Kingdom of Thailand, paragraph 287.

⁸ ADRP Report No. 80 – Steel Reinforcing Bar Exported to Australia from Greece, the Republic of Indonesia, Spain, Taiwan and the Kingdom of Thailand, paragraph 290.

matters is when the price was set rather than when the product was shipped. In other words, the date of sales focuses on the timing of establishing the price (and other material terms which is relevant to pricing) but is relevant to the actual export date to a much lesser extent (unless the export date has a substantial impact on price, which is not the case here).

For this case, the invoice date, according to the Report, was closer to the export date and, therefore, be regarded as more suitable to be used as the date of sales. Rainbow Chemical cannot agree. Two prices set on the same date are comparable even though their shipping dates are separate. On the other hand, comparing two prices set at two dates apart a lot but have close shipment dates is less meaningful.

Special consideration shall be given in the current case that the use of invoice date will result in a dilemma that no export exists during the inquiry period, as verification team correctly inquiry period out, which causes export price difficult to be ascertained and thus makes the dumping calculation also tricky. To Rainbow Chemical, this brings big uncertainty. It is more reasonable/meaningful to use the order date as the date of sale. Even if the use of invoice date is preferred, we believe the Commission shall be flexible under the particular circumstance of this case.

An approach that respects the legal requirement on deciding the date of sale by the establishment of terms of sale and also ensures the availability of export data during the inquiry period shall be taken as it better achieves the goal of the inquiry. No other information, e.g., export prices of other exporters or export prices of Rainbow Chemical ascertained in other proceedings, can be better than using the prices of export products ordered during the inquiry period especially when the invoice dates were only [Commercially Sensitive Information: number of days] days after the ending of the inquiry period.

The ADRP's ruling also supports that when no invoice occurred during the inquiry period, the verified information during the inquiry period is preferred. The ADPR report on Steel Reinforcing Bar stated that "*I found it significant that that **none of the***

*invoices or correspondences occurred in relation to Australian sales during the POI, but occurred later in [...], at a time when the date of sale 'issue' was already under consideration by the ADC. I consider that there is merit in Nervacero's view that this unverified information relating to sales outside of the POI should not have been preferred to Nervacero's verified information and sales practices for the POI, without further consideration and clarification."*⁹ [emphasis added]

To sum up, Rainbow Chemical submits that its exports to Australia with invoice dates between [Commercially Sensitive Information: number of days] days after the end of the inquiry period, while the orders were placed during the inquiry period, shall not be disregarded.

IV. Conclusion

Rainbow Chemical submits that the order date for its Australian sales is a legitimate and proper option of date of sale. Such a practice is not seldom in Commission's former cases.

Special consideration shall be given to the lack of invoices during the inquiry period, to regard the order date as the date of sales to solve the problem.

Rainbow Chemical opposes any unlikely possibility that data were cherry-picked to keep the dumping duty high.

Thank you for your kind consideration. Rainbow Chemical is at your disposal if there are any questions or instructions.

Sincerely Yours,

Zhong Lun Law Firm



⁹ ADRP Report No. 80 – Steel Reinforcing Bar Exported to Australia from Greece, the Republic of Indonesia, Spain, Taiwan and the Kingdom of Thailand, paragraph 290.

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