



中倫律師事務所  
ZHONG LUN LAW FIRM

北京市朝阳区金和东路 20 号院正大中心 3 号楼南塔 22-31 层，邮编：100020  
22-31/F, South Tower of CP Center, 20 Jin He East Avenue, Chaoyang District, Beijing 100020, P. R. China  
电话/Tel: +86 10 5957 2288 传真/Fax: +86 10 6568 1022/1838  
网址: www.zhonglun.com

**Non-Confidential**

**On Behalf of**

**Shandong Weifang Rainbow Chemical Co., Ltd**

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**Comments on the STATEMENT OF ESSENTIAL  
FACTS of the Antidumping Continuation Inquiry  
for 2,4-Dichlorophenoxyacetic acid (2,4-D)**

**Zhong Lun Law Firm**

**November 6, 2022**

**Counsel for Shandong Weifang Rainbow Chemical Co., Ltd**

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**RE: Comments on the Statement of Essential Facts 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 Statement of Essential Facts (“SOE”) of the antidumping continuation inquiry for 2,4-Dichlorophenoxyacetic acid (2,4-D), released on October 24, 2022.

**Executive summary:**

Rainbow Chemical noted that it is stated in the SOE that “*The Commissioner has formed the preliminary view that the expiration of the measures would be likely to lead to a recurrence of dumping and the material injury that the measures intend to prevent*”. Rainbow Chemical cannot agree for reasons which will be discussed in more detail below. Please see section I of this submission.

Rainbow Chemical also noted that the Commission did not change its view in the Verification Report on whether Rainbow Chemical, the only Chinese exporter which cooperated and submitted response to the RFI in this inquiry, has export to Australia during the inquiry period. It is stated in paragraph 2.3.4 of the SOE that “*The commission found Rainbow did not export the goods during the inquiry period*”. Rainbow Chemical also cannot agree with this finding. Rainbow Chemical has already elaborated in its comments to the Verification Report submitted on September 13, 2022, concerning why such “no export” finding is incorrect, and wants to repeat/reiterate the reasoning/arguments in this comment. Please see section II.

## **I. The proposed continuation of anti-dumping measures is lack of factual and legal basis**

Article 269TM of Customs Act 1901, which is about the “Periods during which certain notices and undertakings to remain in force”, states that:

*“(1) Subject to subsection (1A), if a notice is published ... in respect of goods of a particular kind, that notice expires 5 years after the day on which it is published unless it is revoked before the end of that period.”*

Rainbow Chemical understands that relevant law or regulations allow the anti-dumping measures be prolonged when certain criteria are met, however, the anti-dumping measure currently imposed on 2,4-D products from China has lasted for almost 20 years from March 2003<sup>1</sup>, and such a long time period should have been more than enough for the industry to adjust itself and become healthy and competitive as a market operator. Even though WTO Anti-dumping Agreement (hereinafter referred to as “WTO ADA”) as well as the Australia legislation does not limit times to prolong/extended the measures for another five years, the spirit of both WTO ADA, which reflected WTO members’ consensus on the establishment of the so call “sun set” scheme at the establishment of the world trade organization, and the Australia legislation is to limit or avoid infinite imposition of the trade remedy measures, including anti-dumping measure. To further extend the current anti-dumping measure on Chinese 2,4-D beyond 20 years by additional five years is unreasonable and unacceptable.

Figure 4 (see below) and relevant narrative description of the SOE made it clear that since 2018 (the last continuation inquiry determination – REP 430) till early 2022, imports from China declined to almost zero while at the same time, imports from other

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<sup>1</sup> , Australian Customs Dumping Notice (ACDN) 2003/11, 24 March, 2003.

countries increased dramatically.

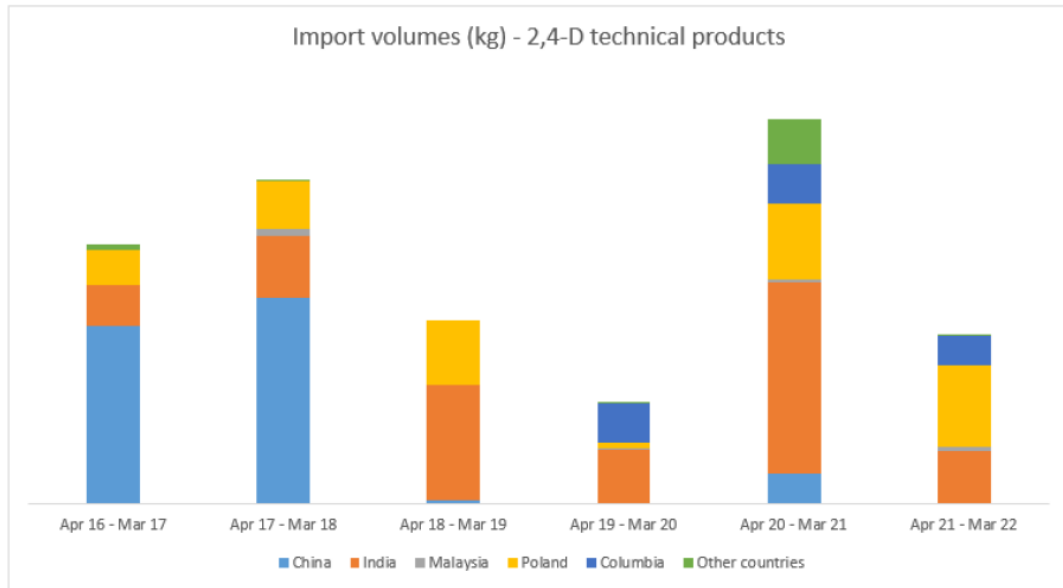
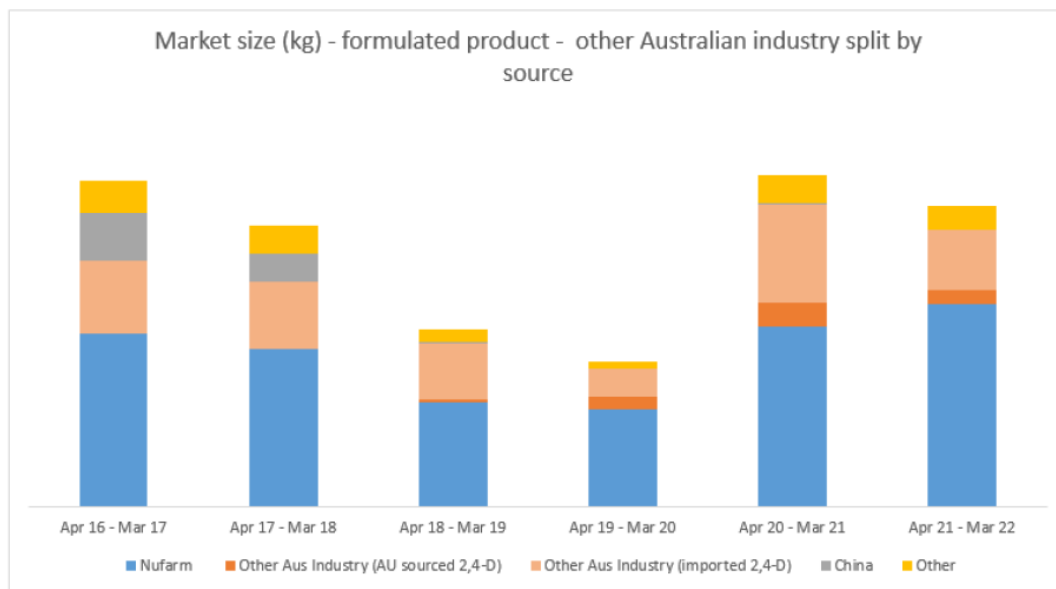


Figure 4: Import volumes of technical 2,4-D used in formulated 2,4-D products

Figure 4 shows that prior to the last continuation of measures, the largest source country of 2,4-D used by other Australian industry members in formulated products was China. Similar to the patterns shown with exports of actual 2,4-D formulated products from China (Figure 3 refers), exports of 2,4-D acid and intermediate products declined to almost zero following the finalisation of the last continuation of measures (REP 430). India became a larger source country of 2,4-D acid and intermediate products from the 12 months commencing April 2018. Volumes remained reasonably steady from Poland, while exports from Columbia began in 2019. There were some export volumes from China again in the year ended 31 March 2021. This coincides with the largest year for volumes of all 2,4-D products sold in Australia since the year ending 31 March 2017.

On the same time the petitioner, Nufarm, enjoyed a substantial increased domestic market performance in both absolute and relative terms.

Figure 3 below shows the Australian 2,4-D market sales volume in terms of the country of origin for formulated product. The data represented is inclusive of all forms of 2,4-D sold by the applicant and the volumes of imported goods. Other Australian industry members are split into source of purchased technical/intermediary input 2,4-D, imported or Nufarm sourced.



**Figure 3: Australian market size – formulated product – other Australian industry split by source of 2,4-D input product.**

With regard to the likelihood of recurrency of dumping and/or (the threat of) injury if current measure expires, Rainbow Chemical would like to draw the Authority’s attention to the facts that, along with the fast development and the substantial increase of China’s national economic, more funds and resources have been put into agriculture industry, characterized by the intensified agriculture. The consequence of this status quo is that much more agriculture chemical, including herbicide are consumed by domestic users. On the other hand, with more strict, enhanced environment protection regulations and standards coming into force, the costs on environment protections and wastes treatments is increasing, pushing up the market prices of the chemicals concerned. Under such a circumstance, even if the current measure expires, there won’t be an increase of exports with low/dumped price from China.

Rainbow also believes that to further prolong the anti-dumping measure is against the overall economic interests of Australia, at least for below reasons: first, the anti-dumping duty ranging from 22.3% to 35.3%, has almost stopped imports from China.

As illustrated by Figure 4 of the SOE, under such a high additional tariff protection, the Australian market became over protected, with reduced/limited market competitions and therefore distorted market. Downstream industry or end users only access to limited options of purchases. Secondly, protecting a domestic industry which consists of only one fully integrated manufacturer of 2,4-D in Australia, with an anti-dumping measure lasting almost forever may deprive any willingness or initiative of the protected party to improve or to adjust itself to become more adapt to market competition and be ready to meet the needs of customers.

Therefore, Rainbow Chemical respectfully requests the Authority and the Ministry to stop imposing anti-dumping duty on imported 2,4-D products from China.

With regards to the Commission recommendation to retain Rainbow Chemical's dumping duty rate unchanged, at 22.3%, Rainbow Chemical holds that this finding is against the market reality, especially when Rainbow Chemical has provided all information and supporting documents on sales it made during, or, as the Commission held, at a time very adjacent to the inquiry period. It is obvious that since the continuation inquiry decision has been made by the Authority in Continuation Inquiry 430 in 2018, the market situation, costs and prices of Rainbow Chemicals have encountered big changes, therefore retaining an anti-dumping duty or keeping variable factors unchanged after 4 to 5 years since last case, cannot reflect the current market situation.

## **II. Rainbow Chemical's comments on the Commission's "no export" finding**

Rainbow Chemical cannot agree with the Commission on the finding that it has no export to Australia during the inquiry period. Rainbow Chemical noted that the

Commission did not accept or provide any meaningful response to Rainbow Chemical's claim regarding this issue in its comments to the Verification Report submitted on 13 September, 2022, Rainbow Chemical therefore believes it's necessary to repeat/reiterate its comments here.

To find Rainbow Chemical did not have export of product under consideration to Australia during the inquiry period, the Commission explained, in paragraph 2.3.4 of the SOE that "*While Rainbow's Australian customers ordered the goods during the inquiry period, Rainbow invoiced and exported the goods after the inquiry period*". It seems that the Commission and Rainbow Chemical do not disagree on the fact, but on how the date of sale shall be determined.

Although the Commission has discretion on issues such as how to determine the date of sale, but such discretion is not unlimited. Both the legislation and practice of the Commission indicate that the invoice date is not the only option in determine the date of sale, and what matters, as stated in the Dumping and Subsidy Manual (the Manual), is whether "*it best reflects the material terms of sale*". Unfortunately, in the current case, the Commission did not give any meaningful explanation on why the sales order date, as claimed by Rainbow Chemical in its questionnaire as the date of sale, supported by abundant evidence, which was reiterated and further explained in its comments to the Verification Report, was not accepted, and why the date of sale proposed by Rainbow Chemical did not best reflect the material terms of sale.

Because of this unfortunate situation, Rainbow Chemical hereby repeats what it has elaborated in its Comments to the Verification Report:

**1. 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 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.<sup>2</sup> 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.<sup>3</sup>

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

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<sup>2</sup> 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.

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

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?*

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 on which date the material terms of sale is 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.

## **2. 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.*”<sup>4</sup>  
[emphasis added]

In addition, Rainbow Chemical has provided all the Australian export documents for

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<sup>4</sup> 604-2,4-D Response to Exporter Questionnaire-Rainbow Chemical, Page 14.

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.

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.*”<sup>5</sup> 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.*”<sup>6</sup> [emphasis added]

The precedent clearly shows that ADRP prefers the date “*confirming and establishing the material terms of the sale between the parties*”<sup>7</sup> 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.*”<sup>8</sup> [emphasis added]

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.

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

**3. 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 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, was regarded 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 unable 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 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 1 to 28

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.**"*<sup>9</sup> [emphasis added]

To sum up, Rainbow Chemical submits that its exports to Australia with invoice dates between 1 to 28 days after the end of the inquiry period, while the orders were placed during the inquiry period, shall not be disregarded.

Rainbow Chemical again 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.

### **III. Conclusion**

Rainbow Chemical submits that the proposed continuation of the anti-dumping measures is lack of factual and legal basis, and respectfully requests the termination of the measure of the measure.

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<sup>9</sup> 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.

In case the Authority eventually determines to extend the anti-dumping measure, the anti-dumping duty rate or variable factors shall be redetermined based on the factual information provided by Rainbow Chemical.

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

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