Australian Government
Anti-Dumping Review Panel

ADRP REPORT No.79

Dichlorophenoxy-acetic acid from the People's Republic of China

August 2018

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Abbreviations

Term	Meaning
Act	***Customs Act 1901***
ADC	Anti-Dumping Commission
ADC Report	REP 430
ADN	Anti-Dumping Notice
Assistant Minister	Assistant Minister for Science, Jobs and Innovation and Parliamentary Secretary to the Minister for Jobs and Innovation
China	People's Republic of China
Commissioner	The Commissioner of the Anti-Dumping Commission
GUC	Goods under consideration
Inquiry period	1 July 2016 to 30 June 2017
Manual	Dumping and Subsidy Manual April 2017
Minister	Minister for Jobs and Innovation
Nufarm	Nufarm Limited
Parliamentary Secretary	The Parliamentary Secretary to the Minister for Jobs and Innovation
Rainbow	Shandong Weifang Rainbow Chemical Co., Ltd
Regulation	***Customs (International Obligations) Regulation 2015***
REP 430	The report published by the ADC in relation to export of dichlorophenoxy-acetic acid (2,4-D) exported from the People's Republic of China on 5 March 2018
Reviewable Decision	The decision of the Assistant Minister made on 5 March 2018 to secure the continuation of measures applying to 2,4-D
Reinvestigation Report	Reinvestigation report made by the ADC to the Review Panel in relation to REP 430 in August 2018

VAT	Value Added Tax

Summary

1. This is a review of the decision of the Assistant Minister to secure the continuation of anti-dumping measures applying to dichlorophenoxy-acetic acid (2,4-D) exported from the People's Republic of China (China). The applicant for the review was Shandong Weifang Rainbow Chemical Co., Ltd (Rainbow), an exporter of 2,4-D to Australia.

2. For the reasons given in this report, my recommendation is to revoke the reviewable decision and to substitute it with another decision which is to secure the continuation of the measures but with a different normal value and dumping margin for Rainbow's exports of 2,4-D to Australia.

Introduction

3. Rainbow applied pursuant to s.269ZZC of the ***Customs Act 1901*** (the Act) for review of a decision of the Assistant Minister made on 5 March 2018 to secure the continuation of the anti-dumping measures then applying to the export of 2,4-D exported to Australia from China.

4. The application for review was accepted and notice of the proposed review as required by s.269ZZI of the Act was published on 16 April 2018. As Senior Member of the Review Panel, I directed in writing pursuant to s.269ZYA of the Act that the Review Panel for this review be constituted by me.

Background

5. On 26 June 2017, Nufarm Limited (Nufarm) applied to the Commissioner of the Anti-Dumping Commission (ADC) for a continuation of the anti-dumping measures then applying to 2, 4-D exported from China. On 20 July 2017 the Commissioner initiated an inquiry into whether the continuation of the anti-dumping measures was justified[1].

[1] ADN 2017/102.

6. The anti-dumping measures, in the form of a dumping duty notice, were initially imposed on 24 March 2003 and had been continued in 2008 and 2013. They were due to expire on 24 March 2018.

7. The inquiry period for the inquiry was 1 July 2016 to 30 June 2017. A Statement of Essential Facts was published on 19 December 2017 and a report to the Assistant Minister was made in February 2018 (ADC Report). The Commissioner recommended to the Assistant Minister that he take steps to secure the continuation of:

    - the dumping duty notice applicable to the 2,4-D exported from China; and
    - the variable factors for the dumping duty notice be altered in relation to all exporters from China.

8. The Assistant Minister accepted the recommendations of the Commissioner and made the reviewable decision.

Conduct of the Review

9. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the review, s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it were the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

10. With limited exceptions[2], in carrying out its function the Review Panel is not to have regard to any information other than to "relevant information" as that

[2] The exceptions are in s269ZZK(4A) and s.269ZZHA(2).

expression is defined in s.269ZZK(6). For the purpose of the review, the relevant information is that to which the Commissioner had, or was required to have, regard when making the findings set out in the report to the Minister.

11. With one exception, the Review Panel may not make a recommendation to the Minister to revoke the reviewable decision and substitute another decision unless the new decision is materially different from the reviewable decision.[3] The exception does not apply to this review. Accordingly, any new decision which I recommend must be materially different to the reviewable decision.

12. The ADC provided relevant documents containing confidential information which were part of the material relied upon by the Commissioner in making the recommendations to the Minister. These documents and any correspondence with the ADC concerning them were not made publicly available.

13. In addition to relevant information, the Review Panel may have regard to conclusions based on relevant information that are contained in the application for review and any submissions received under s.269ZZJ of the Act. A submission was received from Nufarm within the 30 days required by s.269ZZJ.

14. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information and to conclusions reached at the conference based on that relevant information. A conference was held with representatives of the ADC on 23 May 2018. A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1)(iv) of the Act.

[3] S.269ZZK(1A).

15. Unless otherwise indicated, in conducting this review, I have had regard to the application (including documents submitted with the application or referenced in the application) and the submission received pursuant to s.269ZZJ, insofar as it contained conclusions based on relevant information. I have had regard to the ADC Report and information relevant to the review which was referenced in the ADC Report, including the Exporter Verification Report for Rainbow. I have also had regard to information provided at the conference to the extent it related to relevant information.

16. On 8 June 2018, pursuant to s.269ZZL(1) of the Act, I requested the Commissioner to reinvestigate a specific finding which formed the basis of the reviewable decision. The Commissioner provided a report on the result of that reinvestigation on 7 August 2018. As required by s.269ZZK(4A) of the Act, I had regard to the report of the Commissioner.

Grounds for Review

17. The following grounds of review were accepted:
    - A VAT based adjustment should not have been made in calculating the normal value for Rainbow's Australian sales.
    - In the alternative, even if a VAT adjustment was required, the adjustment had not been calculated correctly.
    - The ADC's determination of profit under s.45(2) of the Customs (International Obligations) Regulation 2015 (the Regulation) by using data relating to the production and sale of like goods by the exporter in the ordinary course of trade was not the correct or preferable decision.
    - In the alternative, Rainbow submits that s.45(2) was not the correct or reasonable basis for calculating the normal value, because Rainbow's domestic sale of 2,4-D was not in the ordinary course of trade.

Consideration of Grounds

VAT Adjustment

18. The ADC found that there was an insufficient volume of domestic sales made in the ordinary course of trade for any of the model groups of 2,4-D exported by Rainbow to Australia during the inquiry period. Accordingly, the ADC constructed normal values in accordance with s.269TAC(2)(c) of the Act.[4] To construct the normal value, the ADC used:
    - the cost of production for Australian export sales; plus
    - selling, general and administrative costs applicable to the sale of like goods sold on the domestic market; plus
    - an amount of profit.[5]

19. Rainbow takes issue with the normal value calculation in that the ADC made an upwards adjustment to account for the cost of non-refundable VAT costs. The adjustment was made under s.269TAC(9) on the basis that it was necessary to ensure a fair comparison of normal values and export prices.[6]

20. The calculation of the adjustment is set out in Confidential Attachment 5.3 to REP 430 and appears to be the difference between a rate of 17% and the rate of VAT refunded being either 5% or 13%. The basis for the adjustment is not set out in REP 430 but the Exporter Verification Report for Rainbow states:

    > "It was noted that an upward adjustment is required for value added tax (VAT), to reflect net VAT liability for the exported goods. The exporter incurred an un-refundable VAT expense on export sales to Australia during the inquiry period. Consequently the visit team recommends upward adjustments of the weighted average

[4] REP 430, section 7.3.2 at page 31.

[5] As above at page 32.

[6] As above.

difference between VAT expensed and VAT recovered be applied to the normal value of export sales to Australia. "[7]

21. The first argument made by Rainbow is that there was no basis or evidence that the adjustment should be applied at all in relation to Rainbow. Rainbow argues that there was no evidence to suggest that the VAT liability difference affected Rainbow's domestic prices differently as compared to Rainbow's export prices to Australia.

22. The submission by Rainbow points to the fact that Rainbow's business was overwhelmingly reliant on export sales. In this circumstance, Rainbow argues, it was incorrect for the ADC to assume that any VAT liability associated with Rainbow's export sales was not taken into account in Rainbow's operations as a normal cost of the entire business. Given the negligibility of Rainbow's domestic sales, it contends, that any VAT liability would have had no impact on Rainbow's export pricing as compared to its domestic pricing.

23. The submission by Rainbow asserts a negative (i.e. that the VAT liability on exports sales was not a factor in pricing) and then argues that there was nothing identified to establish that this was not the case. The difficulty with this argument is that whereas Rainbow asserts that there is no evidence to establish that the VAT liability affected pricing, it does not itself point to any evidence before the ADC, other than the volume of export sales compared to domestic sales, to establish that the VAT liability did not affect pricing.

24. Rainbow argues that the assumption cannot be made that the VAT liability was not taken into account in Rainbow's operations as a normal cost of the entire business. However, it is equally arguing for an assumption to be made that it was taken into account. Rainbow has not pointed to any evidence in support of its

[7] EPR 430 Doc 007 Exporter Verification Report.

contention regarding the impact of the liability on pricing and I would not be prepared to make the assumption that there was no impact based only on the difference in the volume of the export and domestic sales.

25. I note that the normal value for Rainbow's exports which is being adjusted under s.269TAC(9) is a constructed normal value. The normal value constructed for Rainbow's exports did not include any VAT component similar to the residual VAT liability incurred in relation to Rainbow's export sales.[8] Accordingly, an adjustment under s.269TAC(9) would seem appropriate.

26. For the above reasons, I do not consider that Rainbow's submission establishes that there was an error by the ADC in making the adjustment to the constructed normal value in accordance with s.269TAC(9) and the Dumping and Subsidy Manual.[9]

27. In its application for review, Rainbow also contends that the use of the rate of 17% was an error. Rainbow's submission is that a VAT rate of 13% applies to the sale of agricultural products in China and 2,4-D products are sold as agricultural products. In support of its contention, Rainbow referred to two sales, the documents for which were before the ADC during the continuation inquiry. The documents for one of the sales support the contention that the applicable rate is 13%. The documents for the other sale do not appear to do so.

28. During a conference with representatives of the ADC, I was advised that the rate of VAT for 2,4-D products sold in China may change depending on the state of production of the product being sold. However, it was not possible to determine whether this was the case from the documents which were available to me. It was also unclear from the available material what rate of VAT should be used for the calculation of the upwards adjustment.

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[8] Confidential Attachment 5.3 to REP 430.
[9] Dumping and Subsidy Manual at page 64.

29. I note that Rainbow did not raise this issue with the ADC during the continuation inquiry. This does not prevent it raising it as an issue in its application for review. The fact that an issue was not raised during an investigation or inquiry can sometimes affect the credit to be given to the new assertion. However, in this case, Rainbow was able to refer to material before the ADC which appeared to support its case.

30. Given the above, I requested the Commissioner to reinvestigate the finding as to the normal value of Rainbow's exports[10]. The Commissioner provided a report on his reinvestigation which found:

- no adjustment to the normal value calculated under subsection 269TAC(9) for Rainbow in respect of 2,4-D in technical form is warranted, as there is no residual VAT liability on export sales of those goods to Australia;
- the adjustment calculated in relation to 2,4-D in soluble and emulsifiable concentrate forms in REP 430 was incorrect;
- after correcting the adjustments required as part of this reinvestigation, Rainbow's normal value has reduced; and
- the dumping margin applicable to 2,4-D exported to Australia by Rainbow is 22.3 per cent.[11]

31. I have accepted the new finding by the Commissioner with regard to the changes to the normal value for Rainbow's exports and the consequential change to the dumping margin for those exports.

Profit

32. As noted above, the ADC constructed a normal value for Rainbow's exports under s.269TAC(2)(c). According to the ADC Report, the amount of profit was

[10] Letter to the Commissioner from the Review Panel dated 20 June 2018.

[11] Reinvestigation Report, Section 1.1 at page 3.

worked out under s.45(2) of the Regulation. Section 45(2) provides that the Minister must, if reasonably practicable, work out the amount of profit by using the data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade.

33. Rainbow contends that the determination of profit was not the correct or preferable decision as the domestic sale on which the ADC relied was not of "like goods" to the goods exported by Rainbow to Australia and were made outside the ordinary course of trade. I deal with these arguments in turn.

No domestic sale of like goods

34. The submission by Rainbow refers to the basis upon which the ADC departed from s.269TAC(1) to work out the normal value and, in particular, refers to two findings by the ADC, namely that:
    - There was not a sufficient volume of domestic sales made in the ordinary course of trade; and
    - There were significant "specification differences between the "domestic like goods sales" and the exported goods, and that those differences were too great to be accounted for.

35. I do not consider that the findings made by the ADC for the purpose of not determining the normal value of Rainbow's exports under s.269TAC(1) are of assistance to Rainbow's submission. The ADC did not conclude that there were no domestic sales of like goods during the inquiry period and the fact that there were insufficient sales of like goods to determine the normal value under s.269TAC(1) does not mean that such sales should not be used for the determination of profit under s.45 of the Regulation.[12]

[12] For a discussion on this issue see ADRP Report No 33, paragraphs 31 to 34, pages 8 to 10.

36. Rainbow contends that, although the goods sold domestically came within the description of the goods under consideration, this does not mean that those goods were like goods to the goods exported. In its submission, Rainbow describes the technical differences between the [redacted] product it sold domestically and the 2,4-D products it exported. It argues that the [redacted] product is not of the same type as any of the 2,4-D products it exported to Australia during the inquiry period.

37. It is correct, as Rainbow asserts, that the fact that a product comes within the goods under consideration does not mean that it is a like good to all of the other products that come within that description. However, the ADC did consider whether the product sold domestically by Rainbow was a like good to the goods exported to Australia. There was a specific finding that the 2,4-D produced by Rainbow for domestic sale had characteristics closely resembling those of the goods exported to Australia and are therefore 'like goods' in accordance with subsection 269T(1) of the Act.[13]

38. The finding by the ADC regarding the domestic sales being of like goods is consistent with the information provided by Rainbow in its Exporter Questionnaire Response.[14] It specifically referred to the domestic sales as being sales of like goods and provided details of them in Exhibit D-4. These are the sales used by the ADC to determine the profit to be included in the constructed normal value for Rainbow's exports.

39. During the inquiry, Rainbow made a submission to the ADC with respect to the determination of profit.[15] In that submission, it was confirmed that Rainbow made domestic sales of like goods. While Rainbow took issue with the determination of

[13] EPR 430 Doc 007 Exporter Verification Report at 2.4, page 5.

[14] EPR 430 Doc 004 Exporter Questionnaire Response at pages 37-38.

[15] EPR 430 Doc 008 Submission from Zhong Lun Law Firm dated 14 December 2017.

profit on other grounds, it did not dispute that the domestic sales were sales of like goods.

40. The argument now made by Rainbow is that over [redacted]% of Rainbow's Australian sales were of the fully formulated product rather than a "technical" product which is the category into which the product sold domestically falls. The principal difference is that a formulated product can be applied directly to crops, once diluted with water whereas technical products cannot.

41. In support of its argument, Rainbow refers to the description of the 2,4-D production process in the ADC Report.[16] It contends that the two products acid/ technical and formulated are produced in industrial processes that are not parallel but subsequent to each other. Rainbow also contends that the production processes impart entirely different qualities to each other.

42. It is difficult to assess an argument such as that now made by Rainbow which was not raised during the inquiry and therefore did not receive the detailed analysis by the ADC which it otherwise would have. I am not convinced by the submission Rainbow now makes that the finding by the ADC regarding the domestic sales being of like goods was not correct.

43. I note that Rainbow's submission concedes that the product sold domestically in China was a type of technical product. It has the same function as the other technical 2,4-D products which were exported to Australia, being used as raw material for the production of formulated products. I also note that if the [redacted] sold domestically had been exported to Australia, it would have been classified under the same tariff classification as the technical products which were exported. Finally, I do not consider that the conversion of the technical

[16] REP 430, section 4.3, pages 14 and 15.

products to a formulated one, in order to allow application as a herbicide means they are not like goods within the meaning of s.269T(1) of the Act.

No domestic sales in the ordinary course of trade

44. In its submission, Rainbow also argues that s.45(2) should not have been used in the calculation of the normal value of Rainbow's exports as Rainbow's domestic sale of 2,4-D was not in the ordinary course of trade. This argument was made during the inquiry and was addressed by the ADC in the ADC Report. The ADC rejected the argument and Rainbow submits that this rejection reflected a misunderstanding of the circumstances presented by Rainbow or was driven by policy factors which were not in the Manual and would be inconsistent with law.

45. The factors relied upon by Rainbow for its contention that the domestic sales were not made in the ordinary course of trade were summarised in the ADC Report as:

- the sale was made in contravention of Rainbow's internal policy;
- the [redacted] transaction which occurred in the inquiry period;
- the sale was to [redacted] the domestic market;
- the selling price, [redacted];
- the profit margin on the sale [redacted] profit of the GUC exported by Rainbow and other agrochemical producers in China; and,
- the profit margin prevented fair comparison between export price and normal value.[17]

[17] REP 430 section 7.3.4 at pages 34 and 35; confidential material of Shandong Weifang Rainbow Chemical Co., Ltd.

46. With regard to the first point above, the ADC found that the sales data indicated that Rainbow made numerous sales of its products on the Chinese domestic market during the inquiry period. Further, of the [redacted] products which were sold, [redacted].[18]

47. In response, Rainbow disagrees with the ADC and contends that Rainbow's business is export oriented and its submission provided details of the percentage of domestic sales as a percentage of its total turnover. It does not cross reference this detail to material before the ADC during the inquiry. However, I do not think that this matters as the fact that its domestic business was a small percentage of its total business does not of itself make its domestic sales not in the ordinary course of trade.

48. Rainbow also argues that the small number of domestic sales demonstrates that its internal sales policy was being implemented. I do not consider this is the case but, in any event, the ADC found that there were numerous domestic sales. Whether or not the company policy was not to engage in domestic sales, the evidence found by the ADC was that it did in fact engage in such sales.

49. Another argument by Rainbow is that the ADC was wrong to find that Rainbow's domestic sale of 2,4-D was not of an insignificant volume. The ADC found that the Rainbow's domestic sale of 2,4-D was not insignificant as it represented [redacted]% of Rainbow's Australian sales of the 2 4-D technical product. Rainbow's submission points out that the 2,4-D technical product only represented [redacted]% of Rainbow's Australian sales of the goods under consideration.

50. I do not consider that the fact that the domestic sales were a small percentage of the export sales makes those sales not in the ordinary course of trade. As noted

[18] As above at page 35.

above, the fact that domestic sales were only a small part of its business does not, of itself, mean that they were not made in the ordinary course of trade.

51. With respect to the argument based on the end use of the product, Rainbow had submitted to the ADC that the 2,4-D being sold was to be converted into a [redacted]. In its consideration of this argument, the ADC noted that [redacted] Rainbow's submission takes exception to this.

52. Rainbow argues that the domestic sale was not considered by it to be a sale of a 2,4-D product to be used as a herbicide, which is the ordinary use and market for most 2,4-D products. Further, this contributed to the decision to depart from the normal sales policy and to engage in an exceptional one-off transaction at what was an irregularly high price.

53. It is possible that the terms of a sale could make the sale so exceptional that it was outside the ordinary course of trade. However, Rainbow does not rely on specific terms of the domestic sale but rather on its understanding of the end-use of the product. There is no reference made by Rainbow to any term of the sale restricting the end use or to how this affected the price at which the product was being sold. There is also no reference to documents created at the time of the negotiations or sale which were provided to the ADC to establish the restriction on the end-use.

54. I do not consider that Rainbow has established that the terms of the domestic sale of 2,4-D were such that it made the sale so exceptional that it was outside the ordinary course of trade.

Non-comparative and unreasonable sale

55. Rainbow submits that the Review Panel should recommend to the Minister that it was not reasonably practical for the profit to be determined pursuant to s.45(2) of the Regulation. The basis put for this submission is the "clear differences"

between the product sold by Rainbow in the domestic market and all or most of the 2,4-D exported by Rainbow to Australia, in terms of "physical characteristics; commercial and functional differences; patterns of sales; the significant volume difference; Rainbow's sales policy and practices; and the exceptional nature of the domestic sale".[19]

56. The basis for the submission that it was not practical to determine the profit under s.45(2) is presumably based on the words in s.45(2) that the Minister must "if reasonably practical" work out the amount of the profit by using the data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade. I do not consider that any of the matters relied upon by Rainbow affect the practicality of using the data from Rainbow's domestic sales. In any event, I have dealt with those arguments above. I do not consider that those matters have been established such that they make the use of s.45(2) not reasonably practical.

57. A further argument made by Rainbow is that the normal value determined by the ADC was flawed because it did not represent a fair comparison with the corresponding export price as required by s.269TACB of the Act. Rainbow argues that the significant differences associated with the domestic sale mean that it is inappropriate for the profit to be used. It does not, Rainbow contends, accommodate the correspondence required under s.269TACB(1).

58. In support of its argument, Rainbow points to the differences between the profit made on the domestic sales used by the ADC and the gross profit made by it on other sales and to the gross profit made by another company on its sales of agrichemical products. The profit made by Rainbow on the domestic sales used by the ADC for the normal value was [redacted].

[19] Attachment B to the application for review, page 20.

59. Section 269TACB(1) provides for the comparison of the export prices established in accordance with s.269TAB with the normal values in respect of like goods established in accordance with s.269TAC to determine whether dumping has occurred. I agree that the comparison has to be fair in the sense that the export price and the normal value have to be properly comparable. This is the basis for adjustments to be made under s.269TAC(8) or (9).

60. The fact that the domestic sales used for the normal value have a [redacted] profit than other sales does not of itself mean that the profit from those sales cannot be used to work out the profit on a constructed normal value under s.45(2) of the Regulation. A significant difference could of course indicate that the sales producing such a profit were not made in the ordinary course of trade. If so, then s.45(2) cannot be used.

61. It is important to note that the domestic sales relied upon by the ADC for the purpose of working out the profit under s.45(2) were the result of an arms-length transaction. The submission by Rainbow does not establish why there was such a [redacted] profit. While various factors are mentioned which, it is contended, make the sale not in the ordinary course of trade, these factors do not explain the [redacted] profit. In particular, I note the argument based on the end use of the product. Even if there were restrictions on the end-use, this would not explain the [redacted] profit.

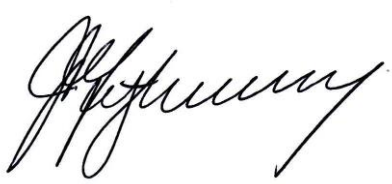
62. Whatever the reason for the difference in the profit made by Rainbow on its export and domestic sales, it has not been established that it is as a result of a factor which would take the sales outside the terms of s.45(2) and does not mean that the domestic sales cannot be used for the working out of the profit under s.45(2). I do not consider that Rainbow has established that the use of those sales was not permitted under s.45(2) or that the use has meant that the reviewable decision is not the correct or preferable decision.

Recommendations/Conclusion

63. Rainbow has established that the original adjustment under s.269TAC(9) for the residual VAT liability on its exports was not correct. Apart from this, I do not consider that Rainbow has established that the reviewable decision was not the correct or preferable decision.

64. Pursuant to s.269ZZK(1) of the Act, I recommend that the reviewable decision be revoked and substituted with a new decision which is in the same terms as the reviewable decision except that the normal value applicable to Rainbow's exports is [redacted] per litre or kilogram and the dumping margin for Rainbow's exports of 2,4-D is 22.3 per cent.

65. For the purpose of s.269ZZK(1A), I advise that the new normal value and dumping margin are materially different from those fixed under the reviewable decision.



Joan Fitzhenry
Senior Panel Member
Anti-Dumping Review Panel
24 August 2018

[20] Confidential information of Shandong Weifang Rainbow Chemical Co., Ltd.