Beijing B&H Associates
P.R.C Lawyers

Rm 1205, Beiguang Plaza, No.23,Huangsi Street,
Xicheng District,Beijing 100120, P.R.China
Telephone: +8610-8223-0591/2/3/4
Facsimile: +8610-8223-0598
www.bohenglaw.com

Please reply to Mr. LAN, Xiong
Direct: +8610-8223-0597
Fascimile: +8610-8223-0598
Email: lx@bohenglaw.com

January 31, 2013

The Director
Operations 2, International Trade Remedies Branch,
Australian Customs and Border Protection Service
Customs House
2 Constitution Avenue
CANNERRA ACT 2601

Public file

Re: Resumption of investigation into alleged dumping in respect of formulated glyphosate exported to Australia from the People's Republic of China

Our client: Jiangsu Good Harvest Weien Agrochemical Co.LTD (Good Harvest)

Dear Sir,

We refer to the resumption of investigation into alleged dumping in respect of formulated glyphosate exported to Australian from the PRC, as initiated on November 15, 2012, and the case management review report ("case management report") as released dated January 17, 2013 therein.

By this letter, we would like to supplement addressing the substantive issues in relation with whether Good Harvest's normal value should be assessed in accordance with s.269TAC(2)(d) of the Act in this proceeding, in addition to our submission in confidential and non confidential version dated November 29, 2012.

As indicated in the case management report, 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. ……And 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.

We firmly submitted by this letter that:

- the applicant submission should be disregarded at its entirety due to its extreme late time of presentation to the Customs and Border Protection, and its speculation should NOT be allowed.

- the quality & quantity of third country information as provided by the applicant was not reliable;

- it was not practicable to use third country information as available on the record at that late proceeding to calculate normal value as accurate as possible;

- In contrast to the third country sales, it was more suitable to construct normal value in accordance with s.269TAC(2)(c) under these circumstance in the original investigation, with more accurate and verified data and less disputed information.

1、The applicant's submission should not be considered due to its extreme late presentation to the Customs and Border Protection in the original investigation

We understand that we should refer to the circumstance at the time in the original investigation in determining the suitability or more suitability in normal value determination either **s.269TAC(2)(c) or s.269TAC(2)(d).**

As indicated in TMRO recommendation, the applicant provided submission or put in information made it incumbent upon the Customs to give substantive consideration as to whether the sales to third countries was a more appropriate or suitable method in assessing the normal value for Good Harvest.[1] See TMRO recommendation and Good Harvest submission dated November 29, 2012.

There comes to us whether the applicant filed its submission in a timely manner or should be considered under that circumstance in the original investigation.

As recalled, it was the first time by the applicants, *as late as several days before SEF response due*, or say more than ten days after the SEF as published[2], to raise the concern to assert normal value based on sales to third countries, and then provided *new factual information*, i.e. the Chinese export sales to third countries date in confidential attachment. See the applicant submission Re: Good Harvest visit report on July 6, 2012.

Firstly, we understand that the applicant have the sufficient time to provide those factual information or suggestions if true in this whole proceeding[3]. However, the

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[1] in the TMRO decision at 69, "it is satisfactory for Customs to ordinarily proceed with calculating a normal value under s 269TAC(2)(c) in accordance with its general preference to use that provision, unless there are circumstances which give rise to a reasonable suggestion that s.269TAC(2)(d) might provide a more appropriate method of assessing normal value."

2 As indicated In the Case management report, the submission was made at approximately ten days after the release of SEF183.

[3] The standard questionnaire as issued by the Customs requested summary data on third country sales, rather than detailed transaction base. And the applicant should have noted that this requirement, and then should have filed comments addressed at earlier so as for the Customs

applicant elected NOT to do so.

Although the applicant alleged a response to Good Harvest visit report, the Good Harvest visit report was put on public record at early as June 2012, and the applicant understand the SEF would be published on June 25, 2012, but the applicant purposely elected not to provide comments or data or otherwise raised the issues in this whole proceeding before that date[4], but provided those information as late as the SEF response due, when almost investigation factual records closed.

It is indeed a 100% speculation by the applicant in this matter! It should have been seriously delayed or even prevented the investigation process in publishing the final reports as the ACT as required. Furthermore, it would deprive the opportunity for the interested parties to comment against such submission, in particular the accuracy or reliability of those extremely NEW factual information.

In particular, if we re-read the wording in the initiation notice No.2012/05 at February 6, 2012, it was required for all submissions before 19 March 2012 in this proceeding.

> "Interested parties are invited to lodge submissions concerning the publication of the dumping duty notice sought in the application no later than the close of business on 19 March 2012.
>
> Interested parties wishing to participate in the investigation must ensure that submissions are lodged ***promptly***. Interested parties should note that the CEO is ***not obliged to have regard to a submission*** received by Customs and Border Protection ***after*** the end of the period mentioned above if to do so would, in the CEO's opinion, prevent the timely placement of the statement of essential facts (SEF) on the public record.
>
> Interested parties may reply to matters raised by other parties during the course of the investigation and in response to the SEF.
>
> ……
>
> The dates specified in this notice for lodging submissions ***must*** be observed to enable Customs and Border Protection to report to the Minister within the legislative timeframe. A statement of essential facts will be placed on the public record by 29 May 2012, or by such later date as the Minister may allow in accordance with section 269ZHI of the Act. The statement will set out the essential facts on which the CEO proposes to base a recommendation to the Minister. That statement will invite interested parties to ***respond to the issues raised*** within 20 days of the statement being placed on the public record."

We understand that the initiation notice or its wording would be controlling and applies to all interested parties, including the applicant and respondents in this proceeding. The submissions, in particular in relation with factual records, should be filed promptly, and the CEO is ***not obligated to*** have regard to a submission received after the end of periods mentioned if to do so, in the CEO opinion, prevent the timely placement of the statement of SEF on the public record.

In this original investigation, the applicant elected to file those factual third country sales information rather than case arguments at more than ten days late after SEF

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request more detailed information, if the applicant thought the case in assessing normal value by a third country sale in this proceeding.

[4] At the bottom, the applicant should have provided those information before the verification so as to provide the verification team the opportunity to request or address this concern at the verification or at least before the publishment of SEF.

published[5].

And as a matter of certainty, the applicant via experienced consultant should have noted or familiar of the critical importance of the SEF in an antidumping investigation in accordance with the WTO framework or Australian regulations, where the investigating authority would have relied in reaching the final determination after the consideration of the comments by interested parties, **and it is not the time for interested parties to submit new factual information after SEF.**

Therefore we firmly submitted that the applicant should have made such submission earlier, i.e. at least before the verification visits (if not strictly before the stated deadline as indicated in the initiation notice), and the CEO should have the right to disregard such submission, if in the CEO opinion, to do so would prevent the timely investigation process in this proceeding, as like in this instant proceeding.

Furthermore, allowing such a late submission, i.e. extreme new factual information, as the applicant did, would provide unfair advantage or reward to those submitter for their speculation[6], and thus not fair for all interested parties to comment its reliability or meritness, and would significantly prevent the normal investigation process by the Customs.

Therefore, we submitted that those submissions by the applicant in the original investigation were disregarded due to its late presentation in consideration of justice and due process for all interested parties, and if so, there would be no assertions or suggestions by the applicant to raise the circumstance in assessing normal value by third country sale, as like Rainbow in this same proceeding.[7]

2、The information as submitted by the applicant was not reliable, and its submission contained apparent deficiency as a presentation to the Customs for a reasonable suggestion in determining normal value with sale to third country

The information as provided by the applicant was not reliable. Needless to say, the applicant did not disclose the information source in the public version[8], and Good Harvest could not have a reasonable opportunity to comment against the reliability of that data due to its late submission in any manner. **And the Customs should not use that unverifiable data or information in an administrative proceeding in any event.**

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[5] We understand that the applicant have the right to respond to the SEF as published, but it should be limited to the response to **the issues as raised in the SEF**, rather than file new factual information, if to do so would significantly prevent the investigation process or depriving the opportunity from interested parties to provide comments against it.

6 **It would have established a very bad precedent for future similar proceeding, and interested parties would elect to speculate and file critical information as late as possible, to delay the investigation process, if in that case.**

7 TMRO report at 73. "[I note for clarification that I am not satisfied that Customs erred by proceeding directly to s 269TAC(2)(c) in relation to Rainbow without consideration of s 269TAC(2)(d) because in relation to this exporter, there was no information before Customs to suggest that its reasons for preferring s 269TAC(2)(c) might need to be the subject of further consideration.]"

[8] In the case management report, it is indicated that it was from a third party source.

Good Harvest strongly disputed or challenged the integrity of those data or information as provided by the applicant.

- Since those information or data are business confidential information, as the applicant put into the confidential submission only, how could an alleged "third party" obtain those confidential data in a legal manner? Good Harvest never possibly provided those confidential business information to a "third party" in any event.
- Or if those data could be obtained by a "third party", why it should be treated as confidential information as the applicant did?
- Or if those "confidential" information were obtained from alleged official sources, how it could be possibly provided to the applicant as they were confidential business sensitive information?
- If those information was alleged from "official source" and accurate, why the applicant could not have provided earlier in that proceeding, so that interested parties could have opportunity to comment or even verify them?

Since the applicant could not indicate the source and lawful manner in obtaining those purported information or data as of yet, Good Harvest formally reserved the right thereon to take legal action in appropriate Courts against the applicant and/or its consultant for their misrepresentation if those data were incorrect but filed in this proceeding, or misconduct or unlawful behaviours if they obtained those information through any other unlawful manner.

Good Harvest strongly disputed the accuracy of the data as provided by the applicant. In particular, those data as provided by the applicant was extremely wrong, for example, the applicant indicated that Good Harvest exported approximately 20,000 MT of grade 450 in 2011. See the applicant submission dated November 30, 2012. This figure was apparently overstated by a significant percentage, as comparing with Good Harvest verified exports data by the Customs.

Therefore the Customs should not play any weight over the unverified or unreliable information or data as provided by the applicant. And the Customs should, at the bottom, verify those disputed information with greatest care in an appropriate manner, before the Customs intended to rely on those data or information for any purpose in this proceeding.

Moreover, the applicants did not nominate ***a* third country** which they considered would be suitable to be used as a basis to determine normal values. In identifying an appropriate third country, several complexities would be apparent. These include the need to consider different market characteristics (i.e. barriers to entry, market regulations and level of competition), product differences (i.e. variances in formulated glyphosate active concentrations levels and surfactants (including quality)), packaging type variances and different commercial relations (i.e. number of customers, levels of trade and any commission arrangements). See TER 183 at 46.

Therefore the applicant assertion should NOT be seriously considered as the appropriate or reasonable circumstance in assessing normal value by third country sale as

required by the Act.

In contrast, the Customs have verified the exports data to third countries by Good Harvest in an appropriate manner. See TER 183 at P.45. Therefore those data or information as provided by Good Harvest had been fully verified by the Customs on the site.

Thus there were more reliable and accurate data on the record than the data as provided by the applicant, in assessing whether the sale to third country could be an appropriate method. And the data as provided by the applicant should have been disregarded as incorrect figures or information as the circumstances warranted in the original investigation.

As verified, in the third country sales by Good Harvest, the averaged unit price was at similar level as the unit price to Australia in the POI. See Good Harvest Submission dated November 29, 2012. There would have NOT such a reasonable circumstance that the sale to third country could have been used to assess the normal value for Good Harvest in this proceeding, and the applicant assertion was incorrect at its entirety.

As indicated in the TMRO decision at 71, **"substantive consideration may have shown the data provided by the applicant to be incorrect or irrelevant";**

It is the real case here. The applicant filed incorrect or unverified data at late submission. The customs could have derived the conclusion that **the verified third country sales were much more reliable, and the data as provided by the applicant was not correct!** And there were no indication or circumstance that third country sale would have been used appropriately in assessing normal value for Good Harvest in this proceeding.

3、There were no reasonable circumstance that the export sales to third country being more appropriate than constructed method in the normal value determination

As verified, there was significant low volume of sales to most third countries by Good Harvest. Customs and Border Protection found that for Good Harvest's third country export sales, the low volume threshold would not have been met when assessing export volumes to certain individual third countries. See TER 183 at 46. And only sale to few countries would have met the 5% threshold, i.e. marginally higher than 5%, See Good Harvest submission dated November 29, 2012.

The unit price as verified by the Customs, there were lower than the unit value to Australian in the similar sales terms CIF or FOB to the extent possible fair comparison. We did not see such a reasonable circumstance as discussed in TMRO recommendation or basis for assessing normal value by third country sales.

If there have been dumping to Australia, Good Harvest may have been more likely dumped into other third country. Therefore this third country method may not be appropriate (at least not "more appropriate") for assessing normal value in this instant proceeding. And the applicant assertion of higher profit margin for third country sale was

meritless at its entirety. See Good Harvest submission at November 29, 2012.

Furthermore, it seems not possible or practical to assess the normal value by third country sale in this proceeding as per the record information as available in the original investigation, since the applicant did not address it at earlier stage for the Customs request more information over it for fair comparison purpose if any.

There was no reasonable circumstance that the third country would be more appropriate than constructed method9 in any event, in particular,

- **Different physical characteristics in relation with sales to different country, there were nothing on the record for a reasonable adjustment in the normal value determination.**

Since different physical characteristic would be relevant for a specific country, and different packing requirement[10]. And it would not be appropriate to assess the normal value by third country sale in terms of fair comparison purpose, since difference cost component or surfactant, or packing materials may be used in the finished goods production, and the export sales were production to order basis, as the officials verified.

In particular, the below are illustrative list of difference as sold to third countries, See Good Harvest Submission dated November 29, 2012.

- **Different product type was sold for third countries, as the data verified.**

As for Australian sales, the majority sales were for 450G/L IPA salt, see Visit report at 19, This particular product type was designed or sold for Australia only. There would be no appropriate model in the sales to third country for comparison purpose.

However, the applicant intended to base on “wrong” information and calculate the alleged dumping margin at 14.35%, by comparing the price of Grade 450 to Australia and weighted averaged price to third countries. See the applicant submission dated November 30, 2012. This statement was not sensible. It is fully recognized in the industry that Grade 450 was designed and sold for Australia only, and there were no comparable model for sale to third country for fair comparison purpose, therefore the applicant misleading statement should be disregarded at its entirety.

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9 As we understand that the general third country sales information were requested in the exporter questionnaire, and it would be very difficult to rely on that information to calculate a normal value. And it would be by default the secondary alternative for normal value purpose in the normal dumping investigation by the Customs, in particular for those cases as involved complexity of products, as like in this case, there were diversified concentration and great complexity in physical characteristic for different product models, like goods, and different cost structure, etc as maybe for those sales to third countries, and it would not be feasible to calculate normal value directly from those general third country sales information as originally requested in the Exporter Questionnaire.

10 The finished goods sold to Australia are branded using the importing customers own brand. This is also true of the large sized 1000L and 1250KG drums which also carry the importers brand. Good Harvest explained that the importer resells these products without any repacking. Good Harvest likened such sales to an OEM sale – there are no sales of Good Harvest brand to Australia. See visit report.

- **Different packing was required for third country sale, as verified.**

There would be required different packing manner and packing materials incorporated different labor for the sale to third countries, in comparison with Australian Sales.

- **Different surfactant would be used for sales to third countries.**

As verified, there may be potentially different surfactant as used for sales to different countries, which would be very important factor in the fair comparison purpose.

- **There were significant factors in the consideration of ordinary course of trade by sales to third countries NOT available on the record for the normal value assessment**

In addition to small or immaterial sales quantity for third country sale, as verified, there were many other factors in determination of ordinary course of trade by the sales to third countries before it could be appropriately used to assess normal value, in particular,

- Date of sale issue, whether the sale to third country should be relied on the same criteria in the date of sale;
- Customer type
- Level of trade
- Sales terms
- Payment terms
- Freight expenses as incurred
- Any other adjustment

Since there were no information as available on the record in the original investigation, nor the applicant provided information thereon, it was not possible to assess normal value with sales to third country by Good Harvest for the fair comparison purpose.

- **Different third countries have different market entry barriers**

As see Good Harvest submission dated November 29, 2012, there would different market entry barriers or regulations, level of competitions from one country to the other, for example, the registration cost or timing requirement, there would significant higher cost for product registration in the US, EU, or Japan Market than Australia, which definitely would be incorporated in the selling price decision by the Chinese exporters. Normally it required more than 2-5 years to register the goods under consideration in US, EU or Japan, costing more than 2-5 million US dollars, but however it only required at nominal cost for registration of the goods under consideration in Australian market. In addition, there were few companies registered in Japan, where dozens of companies registered in Australia, therefore we submitted that significant market situation or barriers were apparently at issue for different third country to render it inappropriate to assess normal value by a third country sale.

- **Different sales arrangements may have existed for third country sale, as verified.**

As verified, significant sales arrangement existed for third country sales, in particular,

there would have been subject to certain commission arrangement. See Visit Report at P.22-23. The particular level of competition or arrangement from third country would render it not appropriate in assessing normal value for Sales to Australia.

- **Third country sales would have been sold at loss or say not in the ordinary course of trade, rendering it not appropriate to assess normal value in this proceeding**

See Good Harvest submission dated November 29, 2012, those sales to third country would have been sold at a loss, in consideration of the selling prices and CTMS as reported. Moreover, as per the income statement as provided and verified, there were no reason to tell that Good Harvest should sell at positive profit for third country sales.

4、It would be more appropriate to assess normal value with constructed method as the circumstance warranted in the investigation

As discussed above, there were significant defect in the determination of normal value by the sales to the third country with information on the records, and even it was not practical or feasible to determine the normal value for fair comparison purpose in the original investigation.

We even did not know how the Customs could determine the normal value by sale to third country based on either the information or data as provided by the applicant, or any other information on the records in the original investigation to calculate the dumping margin as accurate as possible.

For example, as required by s.269TAC(2)(d),

- How could the Customs determine an appropriate third country?
- How the Customs could determine the third country sales were at arm length?
- How the Customs could determine the third country sales were at ordinary course of Trade?
- How the Customs could determine the “like goods’ for the third country for fair comparison purpose?
- How the Customs could determine the appropriate adjustment for fair comparison purpose?

The applicant requested the Customs to establish normal value on the basis of ***weighted average*** export prices to third countr***ies***,[11] since this data was specific to glyphosate. See the applicant submission dated November 30, 2012. This suggestion was not sensible in fact and in law.

Needless to say this unverified data, the dumping margin calculation was not simply straight forward as the applicant intended, but was required by the law to take different product type, and its applicable adjustment into consideration. Neither the applicant provided relevant information, nor any other available records allowed such a consideration in this proceeding.

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[11]It is apparent nor consistent with the law ”d) if the Minister directs that this paragraph applies - the price determined by the Minister to be the price paid or payable for like goods sold in the ordinary course of trade in arms length transactions for exportation from the country of export to ***a third country*** determined by the Minister to be an appropriate third country” . see **s.269TAC(2)(d)**

In contrast, there were much more reliable and verified CTMS data on the record, which the Customs could easily rely on in the normal value determination to the extent as accurate as possible and then calculate the dumping margin as accurate as the Act required to do.

As the 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). The circumstance in this investigation best warranted that the constructed method would be **more appropriate** than sales to third country, unlike the applicant suggested.

And in the submission by the applicant dated November 30, 2012, the applicant appeared to mislead the Customs in that Good Harvest sold at lower prices than other two respondents and should have higher dumping margin. This statement is meritless. As verified by the Customs, Good Harvest had different production process than the other two respondents, and different company had different sales pattern, and the dumping margin calculation were based on company verified data. The price variance if any between respondents was not relevant in the dumping margin calculation, since the price variance would be reflective of different cost component, including SG&A, and any other factors incorporated in the selling prices, in particular, those three respondents located at different province/area in China, and their production/costing experience were sensibly not the same. Therefore the applicants statement should not be considered in any event.

5、The Reasonable indication existed that there would be no dumping even if third country sale as verified were used to assess the normal value for Good Harvest

As discussed, the third country sale could not be used to assess normal value in this proceeding. However if the Customs continue to designate a third country sale, it would have been no dumping in this proceeding. See Good Harvest Submission dated November 29, 2012. The sales to Australia would have been significant higher than sales to third country for the same product to the extent possible fair comparison. For example, the selling price to the next largest country was 30% lower than with Australian Sales in the same or similar product type 01.04.02.03.08. See Good Harvest submission dated November 29, 2012.

6、Conclusion

As discussed above, we submitted that there were no reasonable circumstance to warrant the normal value determination by sales to third country than constructed method, therefore no dumping in relation with Good Harvest should be confirmed, without any changes in this current resumed investigation.

Please let us know if there were other questions.

Yours sincerely,

Lan Xiong /s/

Consultant to Good Harvest