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Administrative Review
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October 5, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman 
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Final Results of the Antidumping
Duty Administrative Review: Brass Sheet and Strip from
Germany; 2013-2014

I. SUMMARY

This review¹ covers ten companies,² three of which we continue to find had no shipments during the period of review (POR).³ We find that subject merchandise has been sold at less than normal value by seven of the companies subject to this review.⁴ Further, we determine that the use of adverse facts available (AFA) is appropriate with respect to Messingwerk, the sole company selected for individual examination in this review.

¹ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 FR 24398 (April 30, 2014) (*Initiation*).

² The ten companies include: Aurubis Stolberg GmbH & Co. KG, Carl Schreiber GmbH, KME Germany AG & Co. KG, Messingwerk Plettenberg Herfeld GmbH & Co. KG (Messingwerk), MKM Mansfelder Kupfer & Messing GmbH, Schlenk Metallfolien GmbH & Co. KG, Schwermetall Halbzeugwerk GmbH & Co. KG (Schwermetall), Sundwiger Messingwerke GmbH & Co. KG, ThyssenKrupp VDM GmbH (ThyssenKrupp), and Wieland-Werke AG (Wieland).

³ See *Brass Sheet and Strip from Germany: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2013-2014*, 80 FR 18357 (April 6, 2015) (*Preliminary Results*), and accompanying "Preliminary Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Brass Sheet and Strip from Germany; 2013-2014" from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, dated March 31, 2015 (Preliminary Decision Memorandum). The three producers or exporters which we determine had no shipments are Schwermetall, ThyssenKrupp, and Wieland.

⁴ The seven companies include Aurubis Stolberg GmbH & Co. KG, Carl Schreiber GmbH, KME Germany AG & Co. KG, Messingwerk, MKM Mansfelder Kupfer & Messing GmbH, Schlenk Metallfolien GmbH & Co. KG, and Sundwiger Messingwerke GmbH & Co. KG.



II. BACKGROUND

The Department of Commerce (the Department) initiated this administrative review of the antidumping duty (AD) order on brass sheet and strip from Germany on April 30, 2014, for each of the aforementioned respondents.⁵ On April 6, 2015, the Department published the *Preliminary Results* of this administrative review and invited interested parties to comment.⁶

On April 27, 2015, Kern-Liebers USA, Inc. (KL USA) filed its entry of appearance as an importer of subject merchandise from Germany during the POR.

On May 1, 2015, KL USA submitted a letter requesting an extension of the deadline for filing case briefs until 30 days after a decision by the Department as to whether to place additional information on the record, which KL USA claims is necessary to corroborate any AFA rate used.

On May 6, 2015, the Department issued an extension to all interested parties to provide an opportunity to submit factual information on the record of this review to rebut, clarify, or correct factual information placed on the record of the proceeding by the Department in the *Preliminary Results* and to extend the briefing schedule.⁷

On May 6, 2015, the Department placed the margin output data from the 1992/1993 and 2008/2009 administrative reviews in response to KL USA's May 1, 2015 argument that additional information from prior reviews needed to be placed on the record of this review to corroborate the 55.60 percent AFA margin assigned to Messingwerk in the preliminary results of this review.⁸

On May 26, 2015, the Petitioners submitted comments regarding the additional margin output data that the Department placed on the record on May 6, 2015.⁹

On May 26, 2015, KL USA submitted factual information to rebut the information that the Department placed on the record as the basis of its AFA dumping margin assigned to Messingwerk in the *Preliminary Results*.¹⁰

On June 8, 2015, KL USA submitted a case brief.¹¹ On June 15, 2015, the Petitioners¹²

⁵ See *Initiation*.

⁶ See *Preliminary Results*.

⁷ See Memorandum to All Interested Parties titled, "Deadline for Comments on Factual Information and Revised Briefing Schedule," dated May 6, 2015. The Department subsequently extended the deadline to file rebuttal information as to the Department's information placed on the record as to AFA to May 26, 2015, based on a request from KL USA submitted on May 18, 2015.

⁸ See the Memorandum to the File titled, "BPI Documents Released to Interested Party and Margins from Prior Reviews," dated May 6, 2015.

⁹ See Petitioners' letter titled, "Petitioners' Comments on Additional Margin Output Data Placed on Record," dated May 26, 2015.

¹⁰ See KL USA's letter and factual information submission dated May 26, 2015.

¹¹ See KL USA's case brief dated June 8, 2015 (KL USA's case brief).

¹² Petitioners are GBC Metals, LLC, of Global Brass and Copper, Inc., dba Olin Brass, Heyco Metals, Inc., Aurubis Buffalo, Inc., PMX Industries, Inc., and Revere Copper Products, Inc.

submitted a rebuttal brief.¹³ A hearing was not requested by any interested party. On July 20, 2015, the Department issued a memorandum extending the time period for issuing the final results of this administrative review from August 4, 2015, to October 5, 2015.¹⁴

The POR is March 1, 2013, through February 28, 2014.

III. SCOPE OF THE ORDER

The scope of the order covers shipments of brass sheet and strip, other than leaded and tinned, from Germany. The chemical composition of the covered products is currently defined in the Copper Development Association (CDA) 200 Series or the Unified Numbering System (UNS) C2000; this review does not cover products the chemical compositions of which are defined by other CDA or UNS series. In physical dimensions, the products covered by this review have a solid rectangular cross section over 0.006 inches (0.15 millimeters) through 0.188 inches (4.8 millimeters) in finished thickness or gauge, regardless of width. Coiled, wound-on-reels (traverse wound), and cut-to-length products are included. The merchandise is currently classified under Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7409.21.00.50, 7409.21.00.75, 7409.21.00.90, 7409.29.00.50, 7409.29.00.75, and 7409.29.0090. Although the HTSUS item numbers are provided for convenience and customs purposes, the written description of the scope of this order remains dispositive.

IV. NO SHIPMENT DETERMINATION

Based on Schwermetall, ThyssenKrupp, and Wieland's assertions of no shipments and confirmation of that claim by CBP data, we determine that Schwermetall, ThyssenKrupp, and Wieland had no sales to the United States during the POR. Because "as entered" liquidation instructions do not alleviate the concerns which the May 2003 clarification was intended to address, we find it appropriate in this case to instruct CBP to liquidate any existing entries of merchandise produced by Schwermetall, ThyssenKrupp, or Wieland and exported by other parties at the all others rate base on our determination that Schwermetall, ThyssenKrupp, and Wieland had no shipments of subject merchandise from Germany.¹⁵ See the "Assessment Rates" section of the accompanying *Federal Register* notice.

V. LIST OF COMMENTS

Company-Specific Issues

- Comment 1: Whether the Adverse Facts Available (AFA) Rate is Probative for the POR
- Comment 2: Whether the AFA Rate is Aberrant
- Comment 3: Whether the AFA Rate is Incorrect based on Verification in the Investigation
- Comment 4: Whether the AFA Rate is supported by the Department's Rationale

¹³ See Petitioners' rebuttal brief dated , June 15, 2015 (Petitioners' rebuttal brief).

¹⁴ Because October 3, 2015 is a Saturday, the deadline for the final results is Monday, October 5, 2015.

¹⁵ See, e.g., *Certain Frozen Warmwater Shrimp from India: Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 77610, 77612 (December 19, 2008).

Comment 5: Whether the Department Provided Documentation to KL USA to Support the AFA Rate

VI. Analysis of Comments

Comment 1: Whether the Adverse Facts Available (AFA) Rate is Probative for the POR

KL USA's Case Brief:

- The 55.60 percent AFA rate that the Department applied to Messingwerk in this review is from a 1986 petition, *i.e.*, it is three decades old and cannot be corroborated using data from the 1990s because it fails to meet the applicable legal requirements.
- The AFA rate applied does not apply to the 2013-14 POR product sold by Messingwerk because the brass sheet and strip that Messingwerk sold to the United States during the 2013/14 POR, in which KL USA was the U.S. customer, was a specific grade meeting European DIN norms and product requirements that U.S. producers cannot meet.
- The particular brass sheet grade imported from Germany during the 2013/14 POR was not imported during the earlier periods (including most notably 1991-92 and 1992-93) that were the basis of the Department's AFA calculation in this proceeding.
- Pricing data on the record from the current POR show that the mandatory German respondent Messingwerk is not dumping.
- The 1986 dumping margin used as AFA in this proceeding is outdated and any dumping margin findings as to the review or investigation periods on which AFA is based (1986 and 1991-1993) are not probative as to the current March 2013 to February 2014 review period because of the very significant changes in prices (as reflected in U.S. Customs data) that have occurred over the intervening decades.

Petitioners' Rebuttal Brief:

- Citing *Second Remand: Ad Hoc Shrimp*,¹⁶ the Court has held that the age of the information alone does not call into question the relevance of the chosen dumping rate the Department, as clearly noted in the comment portion of the margin program used in the *Preliminary Results*.
- While nominal prices might not remain the same over time, margins of dumping are not subject to inflation or deflation because they are a measure of relative price discrimination, *i.e.*, the levels at which exporters sell below the normal value in the U.S. market.
- As in the *GOES Final Determination*,¹⁷ countless proceedings administered by the

¹⁶ See *Results of Redetermination Pursuant to Court Remand: Ad Hoc Shrimp Trade Action Committee v. United States*, CIT Court No. 11-00335 (Department of Commerce November 7, 2013) (second remand) at 15 & n.79 (*Second Remand: Ad Hoc Shrimp*). *affd Ad Hoc Shrimp Trade Action Committee v. United States*. 992 F. Supp. 2d 1285 (Ct. Intl Trade 2014) appeal pending Fed. Cir. Appeal No. 14-1514 ("In addition, the age of the information alone does not call into question the relevance of the chosen rate.") (citing *Peer Bearing Co.-- Changshan v. United States*. 587 F. Supp. 2d 1319, 1328 (Ct. Intl Trade 2008)).

¹⁷ See *e.g.*, *Grain-Oriented Electrical Steel From Germany, Japan, and Poland: Final Determinations of Sales at Less Than Fair Value and Certain Final Affirmative Determination of Critical Circumstances*, 79 FR 42501, 42502 (July 22, 2014)(*GOES Final Determination*), wherein the Department found company specific dumping margins of 241.91 for Germany, 172.30 percent for Japan, and 99.51 percent for Poland.

Department have resulted in dumping margins well above the petition rate in this proceeding.

- There is no expiration or obsolescence associated with dumping margins, contrary to KL USA's assertions. Accordingly, the AFA rate selected cannot be rejected based on the date of the margin.

Department's Position: On June 29, 2015, the President of the United States signed into law the Trade Preferences Extension Act of 2015 (TPEA), which made numerous amendments to the AD and countervailing duty (CVD) law, including amendments to section 776(b) and 776(c) of the Act and the addition of section 776(d) of the Tariff Act of 1930, as amended (the Act).¹⁸ The amendments to the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this investigation.¹⁹

In the absence from the record of Messingwerk's POR sales data, we agree with Petitioners that the corroborated petition rate of 55.60 percent for the same class or kind of merchandise as KL USA imported is relevant, reliable and a sufficiently product-specific margin. We disagree with KL USA's argument that the rate of 55.60 percent applied as AFA for Messingwerk is flawed on the grounds that it is obsolete, does not apply to the same product that was sold in the instant review, is "outdated" and "wrong."²⁰ We find that dumping margins are a measure of relative price discrimination (*i.e.*, the levels at which exporters sell below the normal value in the U.S. market). While nominal prices may not remain the same over time, the margins of dumping are not subject to obsolescence in terms of inflation or deflation. Furthermore, the amended adverse facts available statutory provisions provide that the Department may "use any dumping margin from any segment of the proceeding under the applicable antidumping duty order" pursuant to Section 776 of the Act. There is no statutory restriction or concern for using older margin data in the statute. The Court has held that the age of the information alone does not call into question the relevance of the chosen dumping rate.²¹

When a respondent is not cooperative, such as Messingwerk in this review, the Department has the discretion to presume that the highest prior dumping margin, including petition rates, is the most probative evidence of the current weighted-average dumping margin.²² If this were not the case, the party would have produced current information showing its rate to be less.²³ Further, by using the highest prior dumping margin that can be corroborated, we offer the assurance that

¹⁸ See TPEA, Pub. L. No. 114-27, 129 Stat. 362 (2015). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced applicability dates for each amendment to the Act, except for amendments contained to section 771(7) of the Act, which relate to determinations of material injury by the International Trade Commission. See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015) (*Applicability Notice*). The text of the TPEA may be found at <https://www.congress.gov/bill/114th-congress/house-bill/1295/text/pl>.

¹⁹ See *Applicability Notice*, 80 FR at 46794-95.

²⁰ See KL USA's Case Brief at 1-16.

²¹ See *Association of American School Paper Suppliers v. United States*, 32 CIT 1196, 1203, Slip Op. 08-122 at 65 Consol. Court No. 06-00395 (November 17, 2008) (*Paper Suppliers*).

²² See *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990)).

²³ See *Rhone Poulenc*, 899 F.2d at 1190.

the exporter will not benefit from refusing to provide information.

KL USA makes certain claims specific to the product that it imported from Messingwerk and the pricing of German producers (*e.g.*, claims that the export pricing of subject German product to the United States is many multiples higher during the 2013/14 POR than it was during the periods upon which the AFA is based). Under the TPEA, the Department is not required to determine, or make any adjustments to, an antidumping duty rate based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.²⁴ Even if we were to examine KL USA's business proprietary information concerning the merchandise that it purportedly imported from Messingwerk during the POR, the information appears to indicate that merchandise was of the same class or kind as that examined in the Petition and is covered by the scope of the order.²⁵ There is no requirement that the AFA rate for a company must match the identical merchandise. The order is issued on a single class or kind of merchandise. Thus, a dumping rate derived from any product or combinations of products within the class or kind is at the appropriate level of specificity. KL USA has not argued that the product at issue is a separate class or kind of merchandise. If the producer had provided the data, as requested in the Department's initial questionnaire, the Department would have been able to calculate a margin for that producer based on its specific products and trading activity and the concomitant importer specific assessment rates, including for KL USA's purchases. However, Messingwerk chose not to participate in the administrative proceeding and all importers of its products will receive Messingwerk's AFA rate as their assessment rate.

We are unable to rely on KL USA's data submissions because Messingwerk, the producer/exporter under individual examination, was an uncooperative mandatory respondent which failed to participate in this review and failed to respond to the Department's questionnaire. Accordingly, the product specifications, pricing and details regarding KL USA's imports from Messingwerk involve unsubstantiated claims that are not supported by the administrative record and are unverifiable. The dumping margin calculation is dependent on a comparison of the producer/exporter trading activity in different markets, the U.S. market, home market or third country market and costs. Having KL USA's purchasing information only provides half of the calculation and does not provide any of Messingwerk's home market or cost information necessary to determine Messingwerk's specific dumping rate for its sales to KL USA. Our finding on this point is consistent with the Department's prior practice.²⁶ For this reason, we continue to find that we based the AFA rate assigned to Messingwerk on an appropriate "class or kind" of merchandise. As a result, we find that KL USA's arguments do not render the selected

²⁴ See section 776(b)(1)(B) of the Act; TPEA, section 502(1)(B).

²⁵ See Petition for the Imposition of Antidumping Duties: Brass Sheet and Strip from West Germany, dated March 10, 1986, Table 5, at 18-19 (Petition).

²⁶ See, *e.g.*, *Notice of Preliminary Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From Japan*, 60 FR 52649, (October 10, 1995), (which states, "{w}e note that one respondent submitted a section A response which contained some pricing information. However, because of the danger of self-serving statements by respondents who do not cooperate, such information cannot be used to adjust the margin alleged in the petition."), unchanged in the Final Determination. See *Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from Japan*, 61 FR 14063 (March 29, 1996).

AFA margin obsolete or irrelevant. Thus, we determine that the AFA rate assigned to the uncooperative respondent, Messingwerk, is probative and relevant.

Comment 2: Whether the AFA Rate is Aberrant

KL USA's Case Brief:

- The weighted-average dumping margins that the Department identified and verified, *i.e.*, in all reviews conducted over the past 30 years, all indicate that the 55.60 percent AFA dumping margin from the 1986 Petition is an aberrant outlier, unlawful for use as AFA.
- The AFA margin should be considered aberrant not only based on comparisons to calculated margins applied to cooperative respondents, but also because the original petition alleged other margins as low as 2.71 percent.
- The Department indicates that it cannot use the 2008/09 review period dumping margin as AFA (or corroboration of AFA) because the 2008/09 dumping margin is for one sale. However, as explained in *Wooden Bedroom Furniture*,²⁷ the Department often uses an AFA margin based on one sale.
- The Department also indicates that it cannot use the 2008/09 review period dumping margin as AFA because it is *de minimis*. This concern is misplaced. The purpose of corroboration is to ensure that a dumping margin is probative of the commercial reality as to any dumping during the review period to which it is applied. If the current review period dumping margins are 0 percent, then a prior positive dumping margin is not probative of the current period.
- The Department may not summarily dismiss record evidence just because the evidence is not convenient. This approach violates the statutory requirement that the Department's decisions must be supported by substantial evidence.
- The transaction-specific margins from the petition are aberrant and are not probative as to what is not aberrant.
- The Department impermissibly assumes, without any support, that any transaction-specific dumping margin is not aberrant, and so may be used as AFA.
- In response to KL USA's comments on the deficiency of the evidence on the record, the Department provides a partial record from the 1992-93 review that is not legible and lacks the corresponding electronic files.

Petitioners' Rebuttal:

- As indicated in *Koehler S.E.*,²⁸ the Department has a longstanding practice of selecting a

²⁷ See *Wooden Bedroom Furniture from China*, 71 FR 70,739, 70,740 (December 6, 2006) (final results of 2004-05 new shipper review) (citing *Honey from China*, 70 FR 59031 (Oct. 11, 2005)) (*Wooden Bedroom Furniture*).

²⁸ See *Papierfabrik August Koehler S.E. v. United States*, 7 F. Supp. 3d 1304, 1315-16 (Ct. Intl Trade 2014) (*Koehler S.E.*) ("Commerce is expressly permitted by the statute to rely on secondary information such as the petition rate when applying AFA.") (citing 19 U.S.C. § 1677e(b), *Hubscher Ribbon Corp. v. United States*, 979 F. Supp. 2d 1360, 1369 (Ct. Intl Trade 2014) ("Although courts are generally suspicious of petition rates, . . . Congress has not foreclosed their use."); and Second Remand: *Ad Hoc Shrimp* at 13-14 ("The CAFC has affirmed the Department's use of an AFA rate that is supported . . . by evidence submitted with the petition...." (citing *KYD, Inc. v. United States*, 607 F.3d 760, 767 (Fed. Cir. 2010)) and "The CAFC has also upheld an AFA rate that was corroborated using a single transaction and an AFA rate where only 0.5 percent of the respondent's sales were above

- petition margin as AFA and this practice has repeatedly been affirmed by the Courts.
- KL USA's reliance on *Paper Suppliers*²⁹ is misplaced because the facts were significantly different, as that case dealt with the examination of a range of transaction margins calculated from a cooperative respondent's data.
 - Contrary to KL USA's characterization that the Department "effectively claims that it may *per se* use the highest calculated dumping margin as AFA," as in *Paper Suppliers*, the AFA margin selected in the instant review was not the highest possible margin. Rather the margin assigned as AFA was within the range of margins examined for corroboration, but was not the highest possible.

Department's Position: We agree with Petitioners and find that the AFA rate assigned to Messingwerk in the *Preliminary Results* is not aberrant based on the range of alleged petition margins. KL USA does not contest the use of AFA but rather contests the rate that was chosen. For purposes of the final results, we have continued to assign to Messingwerk the corroborated petition margin of 55.60 percent as AFA because it is in accordance with the Department's longstanding practice to assign a rate from the petition to an uncooperative respondent.³⁰ Contrary to KL USA's assertions, the margin from the 2008-2009 review is not appropriate for use as an AFA margin for Messingwerk. The zero percent rate calculated in the 2008-2009 review was based on data submitted to the Department by a cooperative respondent, Wieland-Werke AG, which was subject to full reporting of sales and cost data and verification by the Department.³¹ Messingwerk refused to participate in the instant administrative review and was found to have, by its failure to participate and provide relevant verifiable data, not been cooperative and thus, subject to an adverse facts available selection. As such, we find that a zero percent rate is not adverse.

We disagree with KL USA's assertion that the AFA rate assigned to Messingwerk is incorrect. In the *Preliminary Results*, the Department examined the transaction-specific rates from the petition, which range from 2.71 to 63.14 percent.³² The only other available data that we could rely on for corroboration is from the 1991/1992 POR. While we cannot use the weighted average margins from the 1991/1992 review results, because those rates were calculated using the zeroing methodology, there are a number of individual transactions rates from that review on the record of the instant review. Such transactions are not impacted by the Department's prior zeroing methodology. Further, these data represent a set of calculated rates for a German producer of the same general class or kind of subject merchandise. The petition rate of 55.60 percent falls within the range of transactions for the 1991/1992 POR. As a result, we find the

that rate.") (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) and *PAM S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009)).

²⁹ See *Association of American School Paper Suppliers v. United States*, 32 CIT 1196, 1203, Slip Op. 08-122 at 7 (November 17, 2008) (*Paper Suppliers*).

³⁰ See *Koehler S.E.*

³¹ See *Brass Sheet and Strip From Germany: Amended Final Results of Antidumping Duty Administrative Review*, 75 FR 66347, 66348 (October 28, 2010).

³² See Memorandum from George McMahon, Case Analyst, to the file, titled "Brass Sheet and Strip from Germany: Preliminary Results Calculation Memorandum" at Attachment 1, dated March 31, 2015 (Calculation Memorandum for Messingwerk).

55.60 percent margin to be corroborated “to the extent practicable.”³³

In the *Preliminary Results*, the Department stated that “[w]e do not consider the information from the 2008/2009 review relevant for corroboration of the petition rate because it is the Department’s practice not to rely on a *de minimis* rate for purposes of corroborating an AFA rate.”³⁴ Therefore, beyond the fact that the 2008/2009 review was based on a single U.S. sale transaction, it is unreasonable for the Department to rely on a *de minimis* rate for purposes of assigning an AFA rate, because such a practice to use a zero percent rate would only induce respondents not to participate in any antidumping/countervailing duty proceedings, which would not be adverse to the respective party at issue. Relying on the 2008/2009 review information would defeat the purpose of applying a dumping margin that is based on adverse facts available and would wrongly reward Messingwerk for failing to cooperate in this review. For the same reasons that a *de minimis* rate cannot be used as AFA, we find that it cannot be used for corroboration of an AFA rate, as this method would eliminate from consideration any rates for corroboration that would be sufficiently high enough to deter non-compliance. Thus, we find that the AFA rate of 55.60 percent is supported by the record, is non-aberrant, and corroborated to the extent practicable.

With respect to KL USA’s argument that the 55.60 percent AFA rate is not representative of commercial reality as to the 2013/2014 POR, pursuant to the TPEA, we find that the Department is not obligated to determine whether an AFA rate is consistent with commercial reality or what an uncooperative respondent would receive if it had fully participated in this review.³⁵

KL USA also argues that the AFA margin should be considered aberrant not only based on comparisons to calculated margins applied to cooperative respondents, but also because the original petition alleged other margins “as low as 2.71 %.” We disagree with this premise because reliance on the rates calculated for cooperative respondents is not logical in this case, as explained above, or consistent with our practice of relying on the petition for the selection of an AFA rate.³⁶ Further, the fact that another petition rate is higher or lower than the corroborated AFA rate of 55.60 percent is not evidence that this AFA rate is aberrant. Accordingly, we determine that the assertions regarding the pricing of Messingwerk’s products are unsupported by complete and verifiable questionnaire responses, and thus, we continue to find that no information has been presented in the current review that calls into question the relevance or reliability of the petition rate. We, therefore, determine that the AFA rate of 55.60 percent is corroborated for purposes of this administrative review.

³³ See section 776(c) of the Act; SAA, at 870; 19 CFR 351.308(d).

³⁴ See Preliminary Decision Memorandum at 8.

³⁵ See section 776(d)(3) of the Act; TPEA, section 502(3).

³⁶ See *Koehler S.E.*

Comment 3: Whether the AFA Rate is Incorrect based on Verification in the Investigation

KL USA's Case Brief:

- The Department states that the petition alleged margins averaged 22.61 percent. However, in the underlying investigation the Department calculated a company-specific margin for the mandatory respondent of 8.87 percent. The Department based the margin based on extensive information from the mandatory respondent that was subject to verification.
- Nonetheless, the Department impermissibly based the AFA margin in the instant review on a margin from the 1986 Petition, despite the fact that the company-specific margin calculated in the investigation demonstrates that the Petition margin is inaccurate. Thus, the Department's approach in the *Preliminary Results* is unlawful

Petitioners' Rebuttal Brief:

- The positive transaction-specific margins from the 1991/1992 proceeding constitute a reasonable basis for corroborating the AFA margin.
- KL USA's suggestion that the Department should have benchmarked the AFA rate against weighted average margins that the Department calculated for cooperative respondents, including the 0.46 percent rate from the 1992/1993 review, the 2.37 percent rate from the 1991/1992 review, and the 8.87 percent rate in the original investigation is erroneous and misplaced because the Department is not seeking to ascertain what Messingwerk's margin would have been if it had cooperated and had successfully undergone verification.
- The goal of AFA analysis is to use a reasonable margin that is "sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated."³⁷
- If the Department assigned a margin that was very low, or even zero to Messingwerk as AFA, this would clearly have the opposite effect of encouraging exporters to refuse to answer the Department's requests for information.

Department's Position: We find that it is not appropriate to apply the rates calculated for cooperative respondents that have fully participated in the investigation and undergone verification as AFA for a non-cooperative respondent. It is, furthermore, not consistent with our practice of relying on the petition data for the selection of an AFA rate. Moreover, the individual weighted-average margins calculated for the respondents in the investigation may not be considered because they are based on calculations that permitted zeroing and thus cannot be used as a benchmark for any other rates.

³⁷ Petitioners cite the Preliminary Decision Memorandum at 7 and fn 35 (citing *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010)).

Comment 4: Whether the AFA Rate is Supported by the Department's Rationale

KL USA's Case Brief:

- In the prior reviews (*i.e.*, for 1996/1997 and 1997/1998 PORs), the Department applied a 16.18 percent AFA dumping rate and that equal to the highest prior weighted-average dumping margin and was based on a zeroing methodology that it no longer uses. However, the Department's zeroing methodology inflates weighted average dumping margins, *i.e.*, by treating negative dumping margins as zero, rather than offsetting positive dumping margins. Thus, based on the Department's rationale, the elimination of zeroing should reduce these weighted-average dumping margins.
- An uncooperative respondent would have expected the AFA rate to be something less than 16.18 percent because that AFA rate was itself the product of calculations that incorporated the Department's now defunct zeroing methodology. Thus, an uncooperative respondent could reasonably expect that an AFA margin that was not based on the zeroing methodology would be lower than the previous 16.18 percent AFA rate.
- Therefore, the Department should calculate the AFA rate by recalculating the dumping margin from the database that led to the 16.18 percent rate, but now not zeroing.
- Further, the Department's selection of an AFA rate that is higher than the 55.60 percent AFA rate is not supported by the Department's rationale that 16.18 percent cannot be used, as inflated by zeroing.

Petitioners' Rebuttal Brief:

- KL USA's argument should be rejected because the Department has no duty to work within limits that allow uncooperative respondents some predictability as far as the AFA margin.
- Even if it was clear to Messingwerk and other parties that the 1997/1998 rate was off the table, the only certainty was that the Department would use a different rate, which may be higher or lower than 16.18 percent.
- The prior AFA rate does not represent a permanent ceiling on potential AFA rates.
- The Department is assigning a different AFA rate that meets its goals of being reasonably corroborated while ensuring that Messingwerk does not obtain a more favorable result by failing to cooperate.

Department's Position: We agree with Petitioners. The Department is assigning a corroborated AFA rate that ensures that Messingwerk does not obtain a more favorable result by failing to cooperate. The Department has previously applied an AFA rate of 16.18 percent to certain respondents in prior segments of the proceeding.³⁸ However, the rate of 16.18 percent was based on the original investigation and relied on the zeroing methodology, which is no longer used by the Department based on the *Final Modification*.³⁹ Pursuant to the methodological change, the Department did not rely on the prior AFA rate of 16.18 percent in the *Preliminary*

³⁸ See, *e.g.*, *Final Results of Antidumping Duty Administrative Review: Brass Sheet and Strip From Germany*, 64 FR 43342 (August 10, 1999).

³⁹ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012).

Results.

KL USA argues that an uncooperative respondent would expect a rate that is lower than 16.18 percent after the elimination of zeroing and asserts that the Department should recalculate the data from the investigation without zeroing, instead of relying on a margin from the petition as AFA. We find that KL USA's expectations for an AFA rate are incorrect based on the purpose of the AFA provision, which is to select a rate which would induce cooperation. The 16.18 percent rate did not induce Messingwerk to cooperate, thus it was too low. The Department is not limited by the prior AFA rate of 16.18 percent and finds it significant that this rate was not sufficiently adverse to induce Messingwerk's participation in this review. With respect to KL USA's suggested use of a database from the original investigation, the statute does not require, when a respondent fails to provide the requested information, the Department to expend extraordinary time and resources transferring all prior databases, which have changed form significantly over the years, to the record of the current review, and recreate statistical programs and/or adjust the margin calculations from past reviews in order to arrive at an AFA rate. That would not be "practicable," which is all that the statute requires. The statute and the Department's practice contemplate going back and selecting from already existing margins including petition rates, a rate to be used as the AFA rate. Under certain circumstances, which exist in this case, the statute requires that the rate selected be corroborated. One way that the Department corroborates its AFA selections is with transaction-specific margin data, which it has done in this case.⁴⁰ Accordingly, the Department used a petition rate that met the statutory criteria including that of being corroborated to the extent practicable and has ensured that Messingwerk did not obtain a more favorable result by failing to cooperate.

Comment 5: Whether the Department Provided Documentation to KL USA to Support the AFA Rate

KL USA's Case Brief:

- In response to KL USA's comments on the deficiency of this record, the Department provided a partial record as to the 1992/93 review.⁴¹
- The printout is limited to only a few pages, is not legible, and contains no electronic files for data analysis. The rest of the administrative record from that review is not on the record of the instant review. The Department considered this 1992/93 review to corroborate here, and so the complete case record needs to be included in the record of the instant review.
- The full case record is required for KL USA to assess the adequacy of that information, determine whether the Department's decision is supported by substantial evidence, and

⁴⁰ See *Stainless Steel Sheet and Strip in Coils from Japan: Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 18369 (April 11, 2005) (unchanged in the Final Results, 70 FR 37759 (June 30, 2005)), in which the Department applied AFA. The respondent failed to respond to the Department's antidumping questionnaire. The application of facts available was, therefore, warranted in determining the dumping margin for the respondent, and, since the respondent had not acted to the best of its ability to comply with the Department's request for information, the Department applied AFA. The dumping margin was based on the highest margin alleged in the petition for any Japanese producer, which was the highest rate on the record of the proceeding.

⁴¹ KL USA's case brief at page 12 cites to the Department's May 6, 2015 document titled "BPI Documents Released to Interested Party and Margins from Prior Review," Attachment 1 (regarding the 1992/93 review).

fully defend its interests.

Petitioners' Rebuttal Brief:

- Contrary to its assertions, KL USA has been afforded all information necessary to analyze and assess the Department's analysis and has not been denied the right to defend its interests, as KL USA claims.
- The Department provided complete, detailed information underlying the selection and corroboration of the 55.60 percent AFA margin.

Department's Position: The Department provided complete, detailed information underlying the selection and corroboration of the 55.60 percent AFA margin, including detailed listings of the 38 transaction-specific margins from the petition, ranging from 2.71 percent to 63.14 percent, as well as the complete positive transactions margins from the 1991/92, and 1992/93 reviews.⁴² Further, the data from the original investigation, the 1991/92 and 1992/93 reviews are maintained by the Department in microfiche/microfilm format only and, thus, the placement of electronic databases on the record was not possible. Therefore, we find there is no need, as KL USA suggests, for further details.

KL USA did not identify any specific pages or notations in the released copies that it was unable to read, and the Department was able to identify the printed data used to support the AFA rate assigned. As such, we find that the Department released legible copies of the data and calculations used in the *Preliminary Results* and, therefore, has met its disclosure obligations and provided KL USA and interested parties an opportunity to fully defend their respective interests in this review.

VII. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of this review and the final dumping margins in the *Federal Register*.

Agree: Disagree:



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

5 OCTOBER 2015

Date

⁴² See the Preliminary Calculation Memorandum for Messingwerk at Attachments IB and IIIB.