

June 30, 2008

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination in
the Less-Than-Fair-Value Investigation of Sodium Nitrite from the
Federal Republic of Germany

Summary

We have analyzed the case and rebuttal briefs submitted by the petitioner¹ and the sole mandatory respondent² in this investigation. As a result of our analysis, we have not made any changes in the margin calculations for the final determination. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments from the interested parties:

Comment 1: Selection of the Adverse Facts Available Rate for BASF

Comment 2: Selection of the All-Others Rate

Background

On April 23, 2008, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value investigation (LTFV) of sodium nitrite from the Federal Republic of Germany (Germany). See Notice of Preliminary Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany, 73 FR 21909 (April 23, 2008) (Preliminary Determination). The products covered by this investigation are all forms of sodium nitrite at any purity level, which may or may not contain an anti-caking agent. The period of investigation (POI) is October 1, 2006, through September 30, 2007. For a detailed discussion of the events which have occurred in this investigation since the Preliminary

¹ The petitioner in this investigation is General Chemical LLC.

² The mandatory respondent in this investigation is BASF AG (BASF).

Determination, see the “Background” section of the Federal Register notice which this memorandum accompanies. We provided the petitioner and BASF with an opportunity to comment on our Preliminary Determination. Based on our analysis of the comments received, we have not changed the adverse facts available (AFA) rate assigned to BASF or the rate assigned to all others.

Discussion of the Issues

Comment 1: Selection of the Adverse Facts Available Rate for BASF

In the Preliminary Determination, we assigned BASF the highest margin alleged in the petition, as referenced in the notice of initiation of this investigation (*i.e.*, 237.00 percent), as AFA pursuant to sections 776(a)(2) and (b) of the Tariff Act of 1930, as amended (the Act), because it failed to respond to the Department’s antidumping questionnaire and thus did not cooperate to the best of its ability in the investigation. This AFA rate was based on a constructed value (CV)-to-export price (EP) comparison in the petition, where EP was based on average unit values (AUVs) from U.S. import statistics. We also stated in the Preliminary Determination that to the extent practicable, we corroborated the AFA rate in accordance with section 776(c) of the Act. See Preliminary Determination, 73 FR at 21910-21912.

BASF disagrees with this AFA rate assignment, arguing that the Department should have based its AFA rate on the highest rate calculated in the petition when comparing CV to constructed export price (CEP) (*i.e.*, 151.98 percent), rather than the rate calculated when comparing CV to EP (*i.e.*, 237.00 percent). Specifically, BASF contends that assigning BASF the 151.98 percent rate is sufficiently adverse and reasonably reflects the evidence on the record with regard to BASF’s commercial practices. BASF points out that evidence contained in the petition establishes that the only U.S. importer of sodium nitrite from Germany is BASF’s U.S. subsidiary, BASF Corporation, and that this fact indicates that all sales by BASF to the United States were CEP sales transactions. In light of this information in the petition, BASF contends that it is inappropriate for the Department to base the AFA dumping margin for BASF on a calculation using EP. BASF argues that the CEP-based petition margin is more appropriate for AFA-rate assignment purposes because it bears a rational relationship to BASF’s commercial practices, as indicated in the petition. Moreover, BASF claims that the relevance and reliability of the CEP-based margin is further supported by the fact that the evidence used to establish the CEP-based margin is actual price quotes made by BASF’s U.S. subsidiary rather than AUVs from U.S. import statistics which reflect customs values instead of the selling price to the first unaffiliated customer in the United States. Therefore, BASF asserts that if the Department properly weighs the record evidence, it should find that the highest CEP-based margin is sufficiently adverse to ensure that it does not obtain a more favorable result by failing to cooperate than if it had cooperated fully, and is a reasonably accurate estimate of its actual margin with some built-in increase intended as a deterrent to non-compliance. In support of its argument, BASF cites to F. Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (De Cecco v. United States).

The petitioner contends that the Department properly assigned the highest margin on the record of this proceeding to BASF, as this is the Department's practice when a respondent fails to cooperate in a proceeding. The petitioner maintains that choosing a lower margin derived from a CV-to-CEP comparison rather than a CV-to-EP comparison, as requested by BASF, would not fulfill the statutory intent of the AFA provision. Moreover, the petitioner states that, according to case law, the dumping margin based on AFA should be reasonably accurate and include some built-in increase intended as a deterrent to non-compliance. As the Department corroborated the 237 percent margin (i.e., the highest petition margin) in the Preliminary Determination and found it to be reasonably accurate, the petitioner asserts that the Department would simply be rewarding BASF for not participating in the investigation if it were to replace the highest petition margin with the lower CEP-based petition margin as the AFA rate. In addition, the petitioner notes that because BASF refused to participate in the investigation, there is no probative evidence on the record that BASF's U.S. sales are exclusively CEP transactions and, therefore, no basis on which to assign BASF a lower AFA rate.

Department's Position:

We agree with the petitioner. BASF does not contest the use of AFA but rather contests the rate that was chosen. For purposes of the final determination, we have continued to assign to BASF the corroborated petition margin of 237.00 percent as AFA because it is in accordance with the Department's longstanding practice to assign the highest corroborated rate from a LTFV investigation or any administrative review to an uncooperative respondent. This practice has been upheld by the courts. See e.g., NSK Ltd. v. United States, 346 F. Supp. 2d 1312, 1331-35 (CIT 2004); and Koyo Seiko Co., Ltd. v. United States, 92 F.3d 1162, 1167 (Fed. Cir. 1996). Furthermore, given that BASF failed to respond to the Department's questionnaire in this investigation, we have no basis upon which to assign it any other rate. Moreover, because of its failure to cooperate in this investigation, we have no evidence to conclusively determine the type of sales (i.e., EP or CEP) BASF made to the U.S. market during the POI or whether BASF sold all of its subject merchandise through its U.S. affiliate during the POI.

Section 776(b) of the Act authorizes the Department to use, as AFA, information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record. In cases involving uncooperative respondents, the discretion granted by the statute is particularly great, allowing the Department to select among various secondary sources as a basis for its adverse inference. See Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1338-39 (Fed. Cir. 2002). In selecting a rate as AFA, the Department selects one that is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998). It is the Department's practice in an investigation to select, as AFA, the higher of the (a) highest margin alleged in the petition, or (b) the highest calculated rate for any respondent in the investigation. See Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From the People's Republic of China, 65 FR 34660 (May 21, 2000), and accompanying Issues and

Decision Memorandum, at “Facts Available.” Section 776(c) of the Act states that when the Department relies on secondary information in selecting an AFA rate, such as information from the petition, the Department must corroborate, to the extent practicable, that information from independent sources that are reasonably at its disposal. In this case, as AFA, the Department selected the highest margin alleged in the petition, 237.00 percent, as referenced in the notice of initiation, because there are no other respondents with calculated rates in the investigation to consider. See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose From Finland, 69 FR 77216, 77218 (December 27, 2004) (unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Purified Carboxymethylcellulose From Finland, 70 FR 28279 (May 17, 2005)). In doing so, we corroborated the highest petition margin by relying upon our pre-initiation analysis, finding that this margin has probative value for the purpose of AFA-rate assignment to BASF. See Preliminary Determination, 73 FR at 21912. Specifically, we examined the key elements of the U.S. price and normal value (NV) calculations used in the petition to derive margins. We also examined information from various independent sources provided either in the petition or in supplements to the petition that corroborated key elements of the U.S. price and NV calculations used in the petition to derive estimated margins. See Preliminary Determination, 73 FR at 21910-21911.

Regarding BASF’s reliance on the court’s decision in DeCecco v. United States in support of its claim that the Department’s selection of an AFA rate should bear a rational relationship to BASF’s commercial practices, we find that the circumstances in that case do not apply to the instant case. In DeCecco v. United States, the U.S. Court of Appeals for the Federal Circuit held, *inter alia*, that the Court of International Trade: 1) properly rejected the AFA margin³ the Department assigned to the respondent De Cecco in the final determination of the LTFV investigation of certain pasta from Italy, as discredited and uncorroborated by the Department’s calculated margins for the other respondents (in particular other high-end Italian pasta producers similar to DeCecco) in the investigation, which were significantly lower than the selected AFA rate; and 2) properly suggested a possible alternative rate based in the verified dumping margins of the cooperating respondents in the investigation. The appellate court reasoned, in light of the statutory requirement for corroboration, that Congress intended for an AFA rate be a “reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.” See DeCecco v. United States, 216 F.3d at 1032. In the instant investigation, BASF, the sole respondent, refused to cooperate; there are no other respondents with calculated margins against which to compare the highest petition margin selected as the AFA rate. Moreover, unlike the rate in DeCecco v. United States, the selected AFA rate in this case was corroborated in the Preliminary Determination and is based on AUVs which reasonably reflect the value of subject merchandise exported from Germany during the POI. Given that BASF is the largest known exporter of the subject merchandise and accounted for the vast majority of U.S. imports of the subject merchandise during the POI,⁴ based upon the information

³ This AFA rate was based on the simple average of the margins in the petition.

⁴ See Memorandum to James Maeder, Director Office 2, from the Team, regarding “Antidumping Duty Investigation of Sodium Nitrite from the Federal Republic of Germany - Selection of Respondents for Individual Review,” dated

available on the record, we find that the margin based on AUV data is a reasonably accurate estimate of BASF's actual rate and is sufficiently adverse to effectuate the purpose of the facts available rule. Therefore, we find meritless BASF's reliance on DeCecco v. United States as the basis for its argument that the Department should change the AFA rate assigned to it in the final determination.

Comment 2: Selection of the All-Others Rate

As noted above, BASF, the only mandatory respondent in this investigation, failed to cooperate to the best of its ability and thus was assigned an AFA rate based on the highest margin alleged in the petition. Therefore, consistent with the Department's most recent practice under these circumstances, in the Preliminary Determination, we based the all-others rate for exporters and producers not individually investigated on the simple average of the margins in the petition. See Preliminary Determination, 73 FR at 21912.

The petitioner maintains that there is no reason to create an all-others rate different from the AFA rate applied to BASF, as the record shows that BASF is the only producer of sodium nitrite in Germany. Given that BASF is the only German producer of the subject merchandise and has chosen not to cooperate with the Department in this investigation, the petitioner reasons that establishing a lower all-others rate might encourage an exporter or reseller in Germany to ship using the all-others rate even though the sodium nitrite was manufactured by BASF. The petitioner claims further that by not assigning BASF's rate as the all-others rate, the Department provides an advantage to other "potential" exporters simply because BASF refused to cooperate in this investigation. Therefore, in order to avoid potential circumvention, the petitioner maintains that the all-others rate should be set equal to the AFA rate assigned to BASF. In support of its argument, the petitioner cites to Notice of Final Determination of Sales at Less than Fair Value: Steel Wire Rod from Venezuela, 63 FR 8946, 8948 (February 23, 1998) (Steel Wire Rod from Venezuela).

BASF did not comment on this issue.

Department's Position:

We disagree with the petitioner. For purposes of the final determination, we have continued to base the all-others rate on the average of the rates in the petition, rather than on BASF's rate, because it is in accordance with the Department's current practice.

Section 735(c)(5)(B) of the Act provides that, where the estimated weighted-averaged dumping margins established for all exporters and producers individually investigated are zero or de minimis, or are determined entirely under section 776 of the Tariff Act, the Department may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated. Our recent practice under these circumstances has been to assign as the all-others rate the simple average of the margins in the petition. More specifically, in

investigations such as the instant one, where the sole respondent's margin is based on total AFA under section 776 of the Act and where we have multiple rates in the petition from which to choose, we use the average of those rates to establish the all-others rate. See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Turkey, 73 FR 19814 (April 11, 2008) (unchanged from the Notice of Preliminary Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Turkey, 73 FR 5508, 5513 (January 30, 2008); and Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Glycine from Japan, 72 FR 67271, 67272 (November 28, 2007).

Regarding the petitioner's reliance on Steel Wire Rod from Venezuela to support its argument, that case was conducted by the Department more than 10 years ago and does not reflect the Department's current practice in assigning the all-others rate. Moreover, Steel Wire Rod from Venezuela is silent on the matter of potential circumvention. Finally, we find the petitioner's argument regarding circumvention to be speculative and there is no evidence on the record to support assertions of circumvention in this investigation. It is well established that mere speculation does not constitute substantial evidence and the latter is the standard for substantiating an agency finding. See Certain Steel Concrete Reinforcing Bars From Turkey: Final Results of Antidumping Duty Administrative Review and New Shipper Review and Determination to Revoke in Part, 72 FR 62630 (November 6, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

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 determination of this investigation and the final margins for the investigated firm (i.e., BASF) and all others in the Federal Register.

Agree ____

Disagree ____

David M. Spooner
Assistant Secretary
for Import Administration

(Date)