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DATE: September 18, 2002

MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Richard W. Moreland
Deputy Assistant Secretary
Import Administration, Group I

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Investigation of Sulfanilic Acid from Portugal; Final Determination

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SUMMARY

We have analyzed the briefs and rebuttal briefs of interested parties in the antidumping duty investigation of sulfanilic acid from Portugal. As a result of our analysis, we have made changes to the margin calculations. We recommend that you approve the positions we have developed in the Discussion of Issues section of this memorandum. Below is a complete list of the issues in this investigation for which we received comments and rebuttals by parties:

Comment 1: Date of Sale: Contract Date versus Invoice Date
Comment 2: Overhead: Straight Line Depreciation versus Accelerated Depreciation
Comment 3: Net Interest Expense Ratio
Comment 4: Selling, General, and Administrative Expense Ratio
Comment 5: Constructed Value Profit Ratio
Comment 6: Corrections and Clarifications to the Verification Report

BACKGROUND

On May 6, 2002, the Department of Commerce ("the Department") issued the preliminary determination of this antidumping duty investigation of sulfanilic acid from Portugal. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Sulfanilic Acid From Portugal, 67 FR 30362 (May 6, 2002) ("Preliminary

Determination”). The period of investigation (“POI”) is July 1, 2000, through June 30, 2001. We invited parties to comment on the Preliminary Determination.

DISCUSSION OF ISSUES

Comment 1: Date of Sale

Respondent’s Argument: The respondent argues that the Department should view the various sales agreements entered into by Quimigal as long-term contracts. The date of each sale agreement should in turn be considered the date of sale instead of the date of invoice as was done at the Preliminary Determination.

According to the respondent, the Department has consistently interpreted “date of sale” to be when the material terms of sale are set for long-term contracts. The respondent defines the “material terms” of a contract to be the price and quantity. However, the respondent contends that the price and quantity do not need to be stated exactly, but, must be determinable from the contract. For example, the respondent references Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review , 64 FR 11825, 11829 (March 10, 1999) (“Flat Steel from the Netherlands”), in which, according to the respondent, the Department found that the date of contract was the date of sale under certain long-term contracts despite deviations in quantity up to ten percent which were considered normal in the steel industry. Furthermore, the respondent states that the Department will determine the appropriate source of the date of sale on a case by case basis.

For the calendar year 2000 the respondent argues that all of its sales of subject merchandise to the United States and third-country markets were based on a long-term contract made prior to the POI. According to the respondent, this contract established in “extreme” detail the terms and conditions of the shipments at issue. The respondent states that a subsequent sales agreement was made on March 26, 1999 establishing the price and quantity for shipments in 2000. During 2000, the respondent notes, the March 1999 agreement was modified twice. However, the respondent contends that in all other respects the agreement between the parties remained constant. For this reason the respondent argues that none of its 2000 sales should be included in the Department’s margin calculation because all of the respondent’s shipments were the subject of a long-term contract made prior to the POI. As for 2001, the respondent states that the record confirms that on January 1, 2001 a unit price was established and was not altered throughout the whole year. Therefore, the respondent argues that all shipments made during the calendar year 2001 have a date of sale in the POI. To support this position the respondent cites Flat Steel from the Netherlands, 64 FR 11829.

Petitioner’s Argument: The petitioner supports the Department’s finding at the Preliminary Determination and argues that the Department should not alter this decision in its final determination. The petitioner states that the material terms of the alleged “contract (or contracts)” fluctuated before and during the POI, as verified by the Department, which confirms the Department's preliminary determination.

To support this position, the petitioner cites 19 CFR 351.401(i), which states that the date of sale "normally" will be the sales invoice date and that a different date will be used only where the Department is "satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." According to the petitioner, the respondent's burden of proof is to demonstrate that the material terms of sale are firmly established on a date other than the invoice date. The petitioner contends that Quimigal did not meet this burden and has not sufficiently demonstrated that the long-term contract dates "better reflect" the date on which Quimigal established the material terms of sale within the meaning of 19 CFR 351.401(i). The fact that after verification it is still unclear whether a single contract was continually modified or multiple independent contracts were agreed upon, the petitioner argues serves as sufficient evidence to convince the Department that the sales invoice date more accurately reflects date of sale.

The respondent argues that the sales in calendar year 2000 were determined by a long-term contract agreed to in March 1999. However, the petitioner contends that the only evidence of this long-term contract is a fax with no proof that the respondent ever accepted the offer written on the fax. Moreover, the petitioner argues that this agreement did not remain in effect for what would be considered long-term. Instead it was altered twice throughout 2000. One of these amendments to the agreement was because of a sales opportunity in the United States. Finally, the petitioner states that the terms of sale were altered again as of January 1, 2001 for all future sales and did not revert to the original contract negotiated with the buyer. The petitioner alleges that the few faxes, internal memos, and missing and unsigned agreements that established the changes discussed above are not sufficient evidence to demonstrate that the terms of sale were "firmly established."

The petitioner argues that none of the parties involved in the March 1999 sales agreement truly accepted that agreement or any other agreement and that each party expected payment on subsequent shipments to be based on the amount actually invoiced per any subsequent renegotiations. Based on the fluctuations in prices and quantities throughout 2000, the petitioner argues that the key material terms were not firmly established by the 1999 agreement and should not be the basis for determining date of sale. Furthermore, the petitioner strongly disagrees with the respondent's contention that the Department use the January 1, 2001 contract as the date of sale for all shipments in 2001. The petitioner argues that this contract was never signed by the respondent. Therefore, in the petitioner's view, this contract does not exist and to use it as the date of sale would be "absurd."

Department's Position: Under our current practice, as codified in 19 CFR 351.401(i), in identifying the date of sale of the subject merchandise, the Department will normally use the date of invoice, as recorded in the producer's records kept in the ordinary course of business. See Notice of Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part: Canned Pineapple Fruit From Thailand, 66 FR 52744 (October

9, 2001) and accompanying Decision Memorandum at Comment 12. However, in some instances, it may not be appropriate to rely on the date of invoice as the date of sale, because evidence may indicate that the material terms of sale were established on some date other than invoice date. See Antidumping Duties; Countervailing Duties; Final Rule ("Preamble"), 62 FR 27296, 27349 (May 19, 1997).

As noted by both parties, in determining the date of sale, the key element to consider is which date better reflects the date on which the exporter or producer establishes the material terms of sale. It is the Department's well-established and long-standing practice to consider a sale as completed within the meaning of the Tariff Act of 1930, as amended ("the Act") when the essential terms, i.e., usually price and quantity, are definite and firm. Additionally, the Department often looks to the course of conduct between the parties in evaluating whether a written document represents a binding agreement. See Notice of Final Determination of Sales at Less than Fair Value: Polyvinyl Alcohol from Taiwan, 61 FR 14064, 14067 (March 29, 1996) ("Polyvinyl Alcohol from Taiwan").

Upon review of the agreements entered into by Quimigal with its customer, we agree with the respondent that the evidence on the record does establish that contract date best represents the date of sale, although we differ on which exact date constitutes the appropriate date of sale. We first note that the original contract establishing terms of sale between these two parties was a three-year contract signed in January 1998, with an effective date of October 1998, in which the agreed price and quantity were set based on expected production capacities of Quimigal. When Quimigal was unable to meet expected production capacity, in March 1999, the parties amended the price and quantity terms of the contract. Two subsequent changes were made to the price in February and April 2000. Then in January 2001, the parties allegedly entered into a new sales contract.

With regard to the January 1998 contract, it is apparent from the record that the parties did enter into a long-term contact in which it was intended that price and quantity would be set for a three year period, beginning on the effective date of October 1998. Although there were certain subsequent modifications to the original sales contract, we are satisfied that the parties acted in a manner consistent with a "meeting of the minds" to be bound by the terms of the original contract and only modified certain aspects of the agreement when anticipated production quantities could not be met. See Polyvinyl Alcohol from Taiwan. Thus, the evidence in this case supports that the terms of sale for reported shipments in 2000 were set on some date other than the invoice date. Since the contract price did change in February 2000, and for one specific market situation again in April 2000, and these prices were adhered to until a new contract was drafted in January 2001, we find these price changes constitute amendments to the original January 2000 contract and as such the appropriate date of sale is the date of the amendment to the contract. As the record evidence shows that the price for all shipments during the 2000 portion of the POI was set according to the amendment to the contracts made prior to POI, we have excluded these shipments from our calculation of sales at less than fair value.

Similarly, we find the January 1, 2001 contract to be appropriate for establishing the date of sale. In accordance with this contract, Quimigal and the buyer established a fixed price and the terms of sale. Accordingly, we are satisfied that shipments made during the POI in 2001 were subject to the terms of this agreement. Therefore, the appropriate date of sale for these shipments in 2001 is January 1, 2001.

Comment 2: Depreciation

Respondents' Argument: The respondent argues that Quimigal's accelerated depreciation methodology overstated the depreciation rate used in the Department's cost of production analysis at the Preliminary Determination and does not accurately reflect the average useful life of Quimigal's assets. Citing to sections 773(b)(3) and 773(f)(1)(A) of the Act, the respondent argues that U.S. law requires the Department to allocate costs according to the particular "factual circumstances of the individual case" and on a "case-by-case" basis rather than according to a legislatively-mandated methodology. Particularly, the Department should consider the evidence presented on a case-by-case basis when amortization and depreciation are concerned. Therefore, the Department should revisit the methodology used to calculate depreciation expense and the corresponding cost of production analysis in favor of a more accurate depreciation expense calculated using the straight line methodology.

The respondent argues that its depreciation rates recorded in its financial statements, and verified by the Department, are calculated using the accelerated method for tax purposes only. The respondent claims that the accelerated method, using an average useful life ("AUL") of six years, significantly overstates Quimigal's depreciation expense and does not match the realistic AUL of the company's assets. Therefore, while the use of these rates reduced Quimigal's tax liability, the respondent argues these rates distorted the company's depreciation expense in the Department's cost of production analysis. Accordingly, the respondent argues that the Department should focus on an alternative method for calculating the depreciation expense in its cost of production analysis to more accurately reflect the value of the company's actual assets. The respondent argues that the Department should use the straight line depreciation methodology and an AUL of 10 years to calculate the company's depreciation expense as this method more accurately reflects Quimigal's actual depreciation costs.

The respondent cites to several cases that it believes provide precedent where the Department used alternative data sources to calculate that company's depreciation expense rather than the data presented in an investigated company's financial records. The respondent argues that the Issues and Decision Memorandum for the Antidumping Duty Investigation of Steel Concrete Reinforcing Bars from the Republic of Korea, 66 FR 33526 (June 14, 2001) provides precedent where the Department reviews the "reasonableness" of the allocation methodology on a "case-by-case" basis. Correspondingly, the respondent argues that in *Ipsco, Inc. v. United States.*, 701 F. Supp. 236 (Ct. Int'l Trade 1988) the Department relied on depreciation periods used in a producer's records only where the records were not shown to conflict with reality. In conjunction, the respondent also cites to Certain Cold-rolled and Corrosion-Resistant Carbon

Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review, 63 FR 13170 (March 18, 1998) as evidence where the Department chose not to use a respondent's depreciation figures when such figures were inconsistent with economic reality even though they were in accordance with the country's GAAP. Furthermore, the respondent cites to Final Negative Countervailing Duty Determination: Stainless Steel Plate in Coils From the Republic of Korea, 64 FR 15530 (March 31, 1999) as evidence of a case in which the Department determined the respondent's data did not represent the average useful life of the company's assets. In this case, the Department resorted to the IRS depreciation tables for data. Similarly, the respondent cites to *Thai Pineapple Public Co., Ltd. v United States*, 946 F.Supp. 11, 20 (Ct. Int'l Trade 1996) ("*Thai Pineapple*") as prior precedent where the Department chose not to rely on respondent's cost allocation methodology when the methodology does not "reasonably" reflect actual costs as required by the statute. Thus, whether or not a company's cost allocation methodologies are consistent with the country's GAAP becomes a moot point if the methodologies do not reflect actual costs. The respondent also cites *Thai Pineapple* as precedent that a company can contest its own depreciation methodology rules where such data does not reflect actual costs. In a similar vein, the respondent argues that *NTN Bearing Corp. of America v. United States,* 826 F.Supp. 1435 (Ct. Int'l Trade 1993), *aff'd in part and rev'd in part on other grounds*, as precedent where the Department revised its cost allocation methodology to more "accurately reflect" the cost of production. The respondent also argues that U.S. accounting principles indicate that companies have significant latitude in estimating the useful life of an asset as long as the entity meets the goal of depreciation.

The respondent further argues that Quimigal does not include depreciation in its books and records as part of cost of manufacturing. According to the respondent, the accelerated depreciation rates reported in Quimigal's financial statements were never intended to reflect the actual useful life of Quimigal's assets but were simply a means to reduce Quimigal's tax liability. Similarly, the respondent argues that Quimigal was in a "ramp up mode" during the POI, which included the addition of more work shifts and labor. According to the respondent, this reveals a "production profile" inconsistent with the expected useful life of the assets represented by the recorded depreciation expense in Quimigal's books. Therefore, the respondent argues that the accelerated depreciation claimed by Quimigal does not represent economic reality nor the actual cost of production that Quimigal incurs.

The respondent notes that, according to the petitioner, the depreciation expenses associated with the three processes upstream from the sulfanilic acid conversion step should be included in the Department's constructed value calculation. In response, the respondent argues that the Memorandum from Case Analysts to File: "Verification of the Questionnaire Responses of Quimigal - Quimica de Portugal, S.A. ("Verification Report") reference to these additional depreciation expenses simply demonstrates the flaw in the approach used by the Department in the Preliminary Determination.

In conclusion, the respondent proposes that the Department should adjust the accelerated depreciation methodology that would apply to both the sulfanilic acid and the additional depreciation expense noted at verification or employ what the respondent considers the "correct" approach. This "correct" approach would be to recalculate the depreciation expense using a straight line method over a ten-year period as noted above.

Petitioner's Argument: The petitioner argues that the Department should continue to calculate fixed overhead for the cost of production and constructed value in its final determination using Quimigal's accelerated depreciation reported in its financial statements. Citing to *American Silicon Technologies v. United States*, 261 F. 3d 1371 (Fed. Cir. 2001) ("*American Silicon Technologies*"), the petitioner argues that this decision confirmed the Department's practice of using depreciation expenses as reported according to GAAP unless there is an extreme allocation of depreciation to the first year, no depreciation expense due to idle assets, a change in depreciation methodology, or a shifting of cost away from the subject merchandise. According to the petitioner, Quimigal does not allege any of these exceptions. The petitioner contends the respondent instead suggests that the POI was a period of low production but does not provide any comparison analysis for prior or subsequent years or otherwise document this claim; nor does Quimigal explain how this claim satisfies one of these previously mentioned exemptions.

Petitioner claims that rather than distinguishing its situation to meet the exceptions noted above, the respondent merely "rehashes" its "old complaint" that the use of accelerated depreciation methodology distorts the "true" cost and increases the amount of depreciation allocated to the POI. The petitioner argues that this claim is not persuasive in light of *American Silicon* noted above. Moreover, the petitioner argues that the respondent should not be allowed to "reinvent" its actual reported cost for the Department's investigation while, at the same time, benefitting from the accelerated methodology in reporting its costs and paying its taxes. Therefore, the petitioner argues, based on current practice and case decisions, the Department should continue to calculate fixed overhead for cost of production and constructed value in its final determination using the depreciation methodology as reported in its financial statements and records.

In addition, the petitioner notes that the Department discovered at verification that Quimigal failed to include depreciation expenses in calculating the production cost of its upstream products, nitric acid, nitrobenzene and aniline. Thus, the petitioner argues that the Department should include these depreciation expenses in the calculation of constructed value of the subject merchandise for the final antidumping duty margin.

Department's Position: We agree with the petitioner, and consistent with the Preliminary Determination, we continue to use the depreciation expense recorded in Quimigal's normal books and records for the final determination. The Handbook of Accounting Practice[1] defines depreciation as the "systemic and rational allocation of the cost of tangible assets to future years which are expected to be benefitted by the acquisition of these assets." Thus, depreciation is an

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[1] Jay Ruben, Handbook of Accounting Practice (Englewood Cliffs, N.J.: Prentice-Hall, 1992) p. 151.

estimated, allocated expense, rather than an "actual," measurable, out-of-pocket expense. Consequently, the Department's long-standing practice, codified at section 773(f)(1)(A) of the Act, is to rely on data from the respondent's normal books and records where those records are prepared in accordance with home-country GAAP and reasonably reflect the costs of producing the merchandise, especially with regard to depreciation expense. See Final Results of Antidumping Duty Administrative Review: Certain Preserved Mushrooms from India, 66 FR 42507 (August 13, 2001), and accompanying Issues and Decision Memorandum at Comment 5 ("Mushrooms from India") and Final Results of Antidumping Administrative Review: Greenhouse Tomatoes from Canada, 67 FR 8781 (February 26, 2002), and accompanying Issues and Decision Memorandum at Comment 4 ("Tomatoes from Canada").

In the normal course of business, Quimigal uses an accelerated depreciation method in accordance with Portuguese GAAP to value its assets. In the course of the Department's investigation we did not find its use of accelerated depreciation to be unreasonable. In Mushrooms from India, Tomatoes from Canada, and Final Determination of Antidumping Duty Administrative Review: Certain Cold-Rolled Steel Flat Product from Korea, 63 FR 781, 804 (January 7, 1998) ("Cold-Rolled from Korea"), the respondents claimed that the depreciation expense recognized in their respective GAAP-based financial statements was based on "accelerated" tax methodologies and should be adjusted to reflect "GAAP" depreciation. The Department rejected the proposed adjustments in these cases and instead relied upon the total depreciation expense as reported in the companies' GAAP-based financial statements. These cases demonstrate that it has been the Department's practice to base reported costs on the normal books and records of the respondent prepared in accordance with home country GAAP, i.e., the audited financial statements. Although we recognize that the statute and the various court cases referenced by the respondent could support the Department's use of alternative methodologies besides a company's GAAP-based financial statements when warranted by the evidence of the case, we are not persuaded that this applies to the respondent's case.

Therefore, for the final determination, we have continued to calculate Quimigal's fixed overhead costs using the depreciation recognized in the audited financial statements of the respondent company.

Finally, we agree with the petitioner and have included the depreciation expenses associated with the production costs of Quimigal's upstream production in the Department's valuation of Quimigal's cost of production. For more discussion, see the Memorandum from Case Analyst to File: "Final Determination Calculation Memorandum for Quimigal - Quimica de Portugal S.A.," dated September 18, 2002 ("Calculation Memo").

Comment 3: Net Interest Expense

Respondent's Argument: The respondent believes that the Department should revise the interest calculation as applied in the Preliminary Determination. The respondent notes that in the Preliminary Determination the Department calculated Quimigal's financial expenses based upon the interest costs of a parent company two levels above Quimigal, the Jose de Mello Group ("JDMG"). According to the respondent, this approach is inconsistent with the statute, which does not provide for the calculation of different segments of general expenses over different universes of products.

The respondent states that the statute provides that constructed value includes the "actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product." See section 773(e)(2)(A) of the Act. According to the respondent, the statute clearly states that the selling, general, and administrative ("SG&A") expenses will be calculated for the specific exporter or producer and does not specify multiple exporters or producers. In this case, the respondent notes that it is clear that Quimigal is the exporter and producer of subject merchandise under investigation. Also, the respondent argues that the only authority for including financial expenses, if any, would be under general and administrative ("G&A") expenses. There is nothing to suggest that different general and administrative expenses can be calculated over different product universes.

The respondent contends that in the Preliminary Determination, the Department calculated general expenses for Quimigal based on Quimigal's financial information while calculating the net interest expense applied to Quimigal from JDMG's financial information. The respondent argues that using JDMG's financial information to calculate Quimigal's net interest expense violates the statute by including the broader product universe of the companies consolidated into JDMG. According to the respondent, the statute specifies that general and administrative expenses will be calculated in connection with the production and sale of a foreign like product. The respondent argues that the statute does not contemplate multiple product universes, which the Department effectively used in allocating general expenses at both the Quimigal and the JDMG levels.

Additionally, the respondent argues that the facts of the case clearly indicate that JDMG does not provide financing for Quimigal. Therefore, the respondent contends that nothing about the facts of the case would lead the Department to decide, in contravention to the statute, to calculate financial expenses at a different level than other general and administrative expenses.

According to the respondent, the U.S. Court of Appeals for the Federal Circuit requires that the Department examine the facts of each case to determine the best approach for calculating financial expenses. See *E.I. Dupont de Nemours & Co. United States*, No. 00-1100, 2001 WL 120076 at *3 (Fed. Cir. Feb. 12, 2001). The respondent argues that when there is no intra-company borrowing, the court has rejected the Department's use of consolidated financial statements and required the Department to look only to the financial expenses of the particular company that produced and sold the subject merchandise, which, in this case is Quimigal. In further support of this position, the respondent cited the following cases: *AIMCOR v. United States*, 69 F.Supp.2d 1345, 1354 (Ct. Int'l Trade 1999) and *American Silicon Technologies v. United States*, No. 97-02-00267, slip op. 99-34, 1999 WL 354415 at *8 (Ct. Int'l Trade April 9, 1999).

Finally, in regard to the petitioner's argument below that the Department revise its calculation of the net interest expense used at the Preliminary Determination, the respondent contends it has no merit. According to the respondent, the change suggested by the petitioner reflects the actual adjustments the Department made when calculating the net interest expense for the Preliminary Determination and therefore requires no further action by the Department.

Petitioner's Argument: The petitioner notes that in the Verification Report, the Department details the tracing and reconciling of Quimigal's reported financial expenses. The petitioner states that the Verification Report noted that part of the interest income earned that the Department used as an offset in calculating Quimigal's net interest expense was related to equity holdings and income from trade securities. Therefore, the petitioner proposes that the Department not include this part of the offset for interest income in its financial expense calculation for Quimigal.

According to the petitioner, Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review, 67 FR 6488 (February 12, 2002) ("Silicon Metal from Brazil") and accompanying Issues and Decision Memorandum, at Comment 11 ("Silicon Metal from Brazil: Decision Memo") established that the respondent has the burden of proof to demonstrate that proposed offset income is earned on short-term investments of working capital. See Silicon Metal from Brazil: Decision Memo at Comment 12. The petitioner contends that the respondent has failed to demonstrate that this income related to "equity holdings" and "trade securities" is appropriate as an offset to interest expense because there is no evidence that the reported "investment" income includes only interest income earned on short-term investments of working capital. Furthermore, the petitioner argues that the Department never confirmed that any of JDMG's specific interest income is only short-term. Accordingly, the petitioner argues that the Department should exclude this offset from its net financial expense calculation.

In response to the respondent's position above, the petitioner argues that the Department's use of the parent company to calculate the financial expenses is a well established practice. According to the petitioner, the respondent's claim to the contrary is wrong. The petitioner cited to the Silicon Metal from Brazil: Decision Memo, to support this position. Furthermore, the petitioner notes that the Department used data provided by Quimigal to calculate the financial expenses. Moreover, the petitioner states that the Department verified this data. For Quimigal to now quarrel with the basic source of the data used to calculate the interest and G&A expenses, argues the petitioner, undermines the respondent's own submissions and leaves only alternative information that was not verified. According to the petitioner, Quimigal should have raised its objections prior to verification so that the alternative data could have been verified.

Additionally, the petitioner states that the respondent's claim that it fits within an exception to the Department's standard practice should be rejected. The petitioner contends that the respondent does not demonstrate in its briefs that there is absolutely no intra-company borrowing and the respondent's failure to bring this issue to the Department's attention prior to verification precluded the Department from verifying the veracity of the respondent's position. It is the petitioner's position that the Department would have had to verify back many years to confirm that there was no long-term intra-company borrowing.

Nevertheless, the petitioner argues that there is evidence on the record that there were intra-company transfers and borrowing with JDMG. The petitioner states that the JDMG annual report notes that its consolidated liabilities grew considerably and that "these funds were applied namely in financial investments and in the increase in shareholder's loans and funding to the holding's associates." See Petitioner's Rebuttal Brief at page 11. The petitioner also references the annual report of Companhia Uniao Fabril ("CUF") (JDMG owns 100 percent of CUF and CUF owns 100 percent of Quimigal), which the petitioner contends demonstrates that CUF undertook significant debt through loans and that its "corporate purpose {is} the management of investments in other companies, as an indirect way of performing business activities, and the rendering of technical administration and management services to some or all of the companies in which it has investments or to those with which it has subordination contracts." See Petitioner's Rebuttal Brief, at page 11. The petitioner further points to the fact that Quimigal's annual report notes that it is benefitting from CUF's technical administration and management support: "The implementation of the management information system based on the SAP R/3, and extended to the various companies of the CUF Group continued in 2000." See Petitioner's Rebuttal Brief, at page 11. The petitioner argues that the SAP project must have involved substantial investment and the incurring of debt on behalf of the Group. According to the petitioner, it was most likely that the parent incurred the debt because it could use its larger size to wield more market power when assuming the debt. Moreover, the petitioner states that Quimigal itself details, within its case brief, other intra-company transfers when discussing the general and administrative expenses that likely are related to intra-company borrowing.

Department's Position: We agree with the petitioner's position regarding the removal of gains on equity holdings and income from traditional securities from Quimigal's reported interest income offset. It is the Department's normal practice to exclude gains on equity holdings and income from traditional securities because they related to investment activity. Consistent with the Preliminary Determination, we excluded these line items from our calculation of the net interest expense ratio. See Memorandum from Case Analyst to File: "Preliminary Determination Calculation Memorandum for Quimigal - Quimica de Portugal S.A.," dated May 6, 2002.

In regard to the appropriate source (i.e., consolidated or unconsolidated financial statements) to be used to calculate Quimigal's net interest expense, we disagree with the respondent. It is the Department's longstanding practice to base net financing expenses on the full-year interest expense and cost of sales from the audited fiscal year financial statements at the highest level of consolidation that correspond most closely to the POI. See Notice of Final Determination of

Sales at Less Than Fair Value: Structural Steel Beams from South Africa, 67 FR 35485 (May 20, 2002) and accompanying Issues and Decision Memorandum ("Beams from South Africa: Decision Memo") at Comment 7 and Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to- Length Carbon-Quality Steel Plate Products from France, 64 FR 73143, 73152 (December 29, 1999). In Beams from South Africa: Decision Memo, we found that this practice recognizes the fungible nature of invested capital resources (i.e., debt and equity) within a consolidated group of companies. In addition, we found that it recognizes that the controlling entity within a consolidated group (i.e., JDMG) has the ultimate power to determine the capital structure and financial costs of each member within the group. As noted in Beams from South Africa: Decision Memo, there is a presumption that consolidated statements are more meaningful than separate statements and that they are usually necessary for a fair presentation when one entity directly or indirectly has controlling financial interest in another entity. The usual condition for a controlling financial interest is ownership of a majority voting interest and, therefore, as a general rule, ownership by one company, directly or indirectly, of more than 50 percent of the outstanding voting shares of another company is a condition that requires consolidation.

This view is supported by the position the Department took in Notice of Final Determination of Sales at Less than Fair Value: Low Enriched Uranium From France, 66 FR 65877 (December 21, 2001), and accompanying Issues and Decision Memorandum ("Uranium from France: Decision Memo") at Comment 14, where we stated that:

> {C}ompanies finance operations through various forms of debt transactions, stock transactions, cost sharing and reimbursement schemes, and even corporate operating transactions. These financing activities are conducted both with internal and external parties. In such circumstances, the controlling management of the group coordinates these activities in order to maximize the benefit to the group as a whole. A few examples of these types of activities include, but are not limited to, debt moved to specific companies in order to shield assets in other companies from creditors; monies moved through manipulated transfer prices to avoid tax liabilities or currency restrictions; sharing or undertaking strategic costs such as research and development; or conversions of debt into equities (or vice versa) to present a group member in a more favorable financial position. The important point here is that the corporate control on the financing operations of individual group member companies may exist even in the apparent absence of specific inter-company financing transactions.

Thus, the Department's general rule is to calculate financial expense using information from the highest consolidated level.

In Beams from South Africa: Decision Memo, the Department listed various reasons why the financial expenses based on consolidated figures are better than financial expenses based on respondent's own financials statements. A respondent's financial statements, or those at a lower level of consolidation, only reflect the financial position that the management of the group wishes to present for that particular subsidiary or group of subsidiaries. In order to see the true economic picture, it is necessary to eliminate all inter-company holdings (i.e., shares in affiliates and debts between affiliates) and inter-company transactions (i.e., inter-company sales, receivables, payables, etc.) and to account for the capital structure of the other consolidated companies. This results in "an untainted picture of the financial expense incurred to produce the products of the group." See Beams from South Africa: Decision Memo, at Comment 7. Additionally, it also results in a cost-of-sales figure free of inter-company transactions, which can be used to allocate the true financial expense to the products produced within the group.

Finally, as noted in Beams from South Africa: Decision Memo, at Comment 7,

> {I}t is the Department's position that the consolidated financial statements themselves constitute substantial evidence that the true financial position of a respondent is that which is shown on the consolidated financial statements rather than its own. The fact that a respondent is consolidated into a group typically means that the home country's GAAP require such a consolidation for fair presentation, as would U.S. GAAP. This presentation requirement is present in GAAP around the world because, as observed earlier, the majority of the board of directors, and by extension management, of each group member is ultimately controlled by each higher-level board of directors, up to the highest level board of directors and management. Given that each level of companies within the group controls lower level companies through their ownership of stock, it is reasonable to conclude that the overall strategic operations are guided from above.

Therefore, for the final determination, we have continued to calculate Quimigal's net interest expense using the consolidated financial statements.

Comment 4: SG&A

Respondent's Argument: According to the respondent, the Department's G&A calculations used in the Preliminary Determination and raised in the Verification Report require further explanation and correction.

The respondent argues that the Department's decision to use multiple sources for its calculations of G&A expenses is directly contrary to the requirements of section 773(e)(2)(A) of the Act. The respondent asserts that this provision directs the Department to focus on the sale of the like product by the specific exporter or producer in the foreign country. According to the respondent, if the Department determines that JDMG is the exporter or producer and uses JDMG's financial information to calculate Quimigal's financial interest expenses, the Department cannot switch sources of financial information (i.e., use Quimigal's financial information) to calculate the other general expenses. The Department's approach at the Preliminary Determination, argues the respondent, artificially created a cost structure representing no company's actual costs, when actual data from Quimigal, CUF, or JDMG were plainly available and on the record.

The respondent also argues that the Department should exclude from its G&A expense calculation amounts not "...related to any G&A expenses incurred in the sale of sulfanilic acid." See Quimigal's August 21, 2002 submission, at page 26. In support of this position the respondent cites to the following cases: Final Determination of Sales and Less than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong, 55 FR 30733 (July 27, 1990) ("Sweaters from Hong Kong"), at Comment 12, and Final Determination of Sales at Less than Fair Value: Mechanical Transfer Presses from Japan, 55 FR 335 (January 4, 1990) ("Mechanical Presses from Japan"), at Comment 3. According to the respondent, in these determinations the Department stated that it "...did not include other miscellaneous expenses in the production costs because we found that the expenses were (1) non-operating expenses or intra-company transfers, and (2) unrelated to either production or sales of the products under investigation." See Sweaters from Hong Kong, at Comment 12. For these reasons, the respondent argues that the Department should exclude from the G&A expense calculation the specified amount as recorded in Quimigal's account 911201622361.

The respondent also voiced concern over the description in Section IV of the Verification Report, which according to the respondent suggests that the Department is considering whether to include amounts recorded for fines, donations, and other items identified as extraordinary costs in account 974. The respondent states that these expenses were properly recorded as extraordinary costs and are unrelated to the sale of the like product in the foreign country. Therefore, these costs should not be included in the G&A expense calculation.

In response to the petitioner's argument below, the respondent reiterated its arguments noted above and agreed that the G&A expense should be revised, but downward, not upward as argued by the petitioner.

Petitioner's Argument: The petitioner states that at verification the Department noted that Quimigal excluded some common costs for fiscal year 2000 from its G&A expense calculation. The petitioner contends that the Department should include in its G&A expense calculation these common costs verified by the Department and use the resulting higher G&A ratio in calculating the constructed value of the subject merchandise.

The Department's Position: We do not agree with the respondent's position that the Department inappropriately used Quimigal's G&A expenses as calculated from Quimigal's 2000 financial statements. It is the Department's practice in accordance with section 773(b)(3) of the Act to calculate "...an amount for SG&A expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question" (emphasis added). There is no question that Quimigal is the producer and exporter of the subject merchandise during the POI. Moreover, as noted in the Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada 67 FR 15539 (April 2, 2002) and accompanying Issues and Decision Memorandum at Comment 19, the Act does not define what a G&A expense is or how the G&A expense rate should be calculated. Therefore, the Department has developed a consistent and predictable practice for calculating and allocating G&A expenses based on the unconsolidated financial statements of the respondent company including an allocated portion of the parent company's G&A expenses if the parent company provides services to its subsidiaries. See also Silicon Metal from Brazil, 64 FR 6311. Therefore, in accordance with section 773(e)(2)(A) of the Act for the final determination we continued to calculate Quimigal's SG&A expenses using Quimigal's financial information.

Upon review of Quimigal's financial information during the course of verification, we noted certain G&A expenses that were not included in Quimigal's G&A expense rate calculation. See Quimigal's April 15, 2002 submission, at Exhibit SSSD-1 and Verification Report at pages 10 and 18. Specifically, in the normal course of business Quimigal incurs certain common costs and certain expenses related to fines, donations, and Quimigal's portion of its parent company G&A costs (i.e., contribution costs). According to the respondent, these costs should be excluded from the G&A expense rate because they have nothing to do with the sale of the like product in the foreign country and because they were properly recorded in Quimigal's records as extraordinary costs. We do not agree.

As noted in Sweaters from Hong Kong, the Department generally includes donations as part of G&A expenses as "this type of expense cannot be tied to a specific product and is normally treated as an overall cost of business operations" (see Sweaters from Hong Kong, 55 FR 30741). See also Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From France, 64 FR 30820 (June 8, 1999) and accompanying Issues and Decision Memorandum at Comment 22. ("We agree with the petitioners that some of the omitted expenses in question should be included in the calculation of the G&A expense rate. For instance, we agree that contributions (i.e., donation and football expenses) should be included in the calculation of G&A expense because these expenses are a part of Usinor's overall administrative expenses attributable to all production, including production of subject merchandise.") Additionally, as noted in Silicomanganese from India: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination, 67 FR 15531 (April 2, 2002), and accompanying Issues and Decision Memorandum at Comment 14, the fact that company contributions or income is labeled by a respondent as "extraordinary" in its financial records is in no way conclusive. Therefore, we are including these contribution costs as well as the incurred common costs noted in the Verification Report (at pages 10 and 18) in the G&A expense rate calculation for the final determination. For a more detailed discussion about the Department's revised G&A expense rate calculation see the Calculation Memo.

Additionally, we did not exclude certain intra-company transfers when calculating Quimigal's G&A expense rate as argued by the respondent. In determining whether it is appropriate to include particular items in G&A, the Department reviews the nature of the items and their relationship to the general operations of the company. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Italy, 67 FR 3155 (January 23, 2002) and accompanying Issues and Decision Memo at Comment 46. At verification, we reviewed invoices related to these intra-company transfers and noted that they were for services rendered by the parent company to Quimigal that in our opinion benefitted Quimigal as a whole. See Verification Report, at Exhibit 13. As such, we determined that these expenses incurred for these services related to Quimigal's general operations and have not, therefore, excluded these transfers in the G&A ratio calculation for the final determination. See Notice of Final Determinations of Sales at Not Less Than Fair Value: Low Enriched Uranium From the United Kingdom, Germany and the Netherlands, 66 FR 65886 (December 21, 2001) and accompanying Issues and Decision Memorandum at Comment 19 ("The SAP division provides information technology services for the company as a whole, and as such, this activity is related to the general operation of the company.").

Comment 5: Constructed Value Profit Ratio

Respondent's Argument: The respondent argues that the Department should revisit its calculation of constructed value profit and its subsequent calculation of constructed value made in the Preliminary Determination. The respondent argues that the Department used "inconsistent" definitions of "'foreign like product'" in its calculation of constructed value ("CV") profit resulting in a CV profit rate that was unreasonably high.

For price-to-price comparisons of identical products, the respondent argues that the Department identified the "foreign like product" as sulfanilic acid. Therefore, the "foreign like product" identical to each product sold in the United States is sulfanilic acid. However, the respondent argues, the Department abandoned this definition in its calculation of constructed value when the Department used Quimigal's company-wide net income before taxes to value the CV profit. According to the respondent, this use of Quimigal's profit effectively "redefined 'foreign like product'" as the aggregate of all sales by Quimigal, a definition the respondent views as much broader than that used for price-to-price comparisons. The respondent also argues the Department's decision to "redefine" the term "foreign like product" for the purposes of its price-matching methodology conflicts with the fundamental rules of statutory construction. The respondent argues that under normal rules "'identical words used in different parts of the same act are intended to have the same meaning.'" The respondent also cites to *SKF v. United States*, 263 F.3d at 1382 (Fed. Cir. 2001) as further case precedent that the term "foreign like product" should be defined "consistently."

The respondent argues that, had the Department used a "consistent" definition of "foreign like product," the Department would have determined that the CV profit for sales of sulfanilic acid was zero. The respondent argues that the data submitted to the Department pertaining to every sale of sulfanilic made by Quimigal to every market during the year 2000 and 2001 is plainly available and shows a zero profit. The respondent argues this should be the end of the analysis.

The respondent also argues that, if the Department proceeds with its calculation of CV profit as at the Preliminary Determination despite arguments to the contrary, then the Department's analysis of profit must be extended to the "same general category of products." Therefore, the Department should base the profit calculation on the profitability of Quimigal's parent company

CUF, not Quimigal. The respondent argues verification clarified that CUF was responsible for the chemical "operations" of the JDMG. Similarly, the respondent argues that the Department is already considering "transfers" from Quimigal to CUF in other contexts, such as calculation of G&A expenses. In addition, the respondent argues that, if the Department is going to determine profits on a basis other than sales of sulfanilic acid, it would be "more reasonable and more consistent" to base the calculations on CUF's operations.

Petitioner's Argument: The petitioner argues that the Department correctly determined that Quimigal had no home market sales and based normal value on third-country sales to the United Kingdom. Similarly, the petitioner also stated that the Department correctly determined that, according to a sales below the cost of production test, all of Quimigal's sales to the United Kingdom were made below the cost of production. Accordingly, the Department could not use the methodology for calculating CV profit set forth in section 773(e)(2)(A). In addition, the petitioner argues that, because the Department did not have data solely on sales of the same general category of products consumed in Portugal or data on the profitability of other producers in Portugal (since there are none), it could not rely on section 773(e)(2)(B)(i) or (ii). The petitioner claims the Department relied on Section 773(e)(2)(B)(iii), which, the petitioner argues, permits profit to be "based on any other reasonable method" subject to a "profit cap" that limits the amount allowed for profit to that normally realized by exporters or producers (other than the one at issue) on sales consumed in the relevant foreign country.

In addition, the petitioner argues that the respondent's criticism of the Department's methodology for calculating CV profit "misplaces" and "ignores" what the Department actually did in the <u>Preliminary Determination</u>. The petitioner argues that the Statement of Administrative Action ("SAA") to the Uruguay Round Agreements Act makes clear that when the Department does not have the necessary data to apply the alternatives of section 773(e)(2)(B), it may use facts available. Accordingly, in this case, the Department did not have data to calculate either alternative 773(e)(2)(B)(i) or (ii) and, instead, chose to use as facts available Quimigal's overall profit based on its year 2000 financial statements. However, the petitioner argues, the respondent fails to recognize that the Department could not use data on home market sales of the subject merchandise to calculate profit because the home market was determined not to be viable. The petitioner also argues the respondent failed to realize that data on the relevant third-country sales of the subject merchandise could not be used to calculate profit because these sales, disregarded as below cost of production, are considered outside the ordinary course of trade. The petitioner argues the respondent "misses the point" when it claims that the data on sulfanilic acid sales to every market are available. The petitioner argues that, while these data may be on the record, they cannot be used for CV profit because the home market was not viable and the relevant third-country sales that could have formed the basis for a CV profit were all disregarded as below the cost of production.

Moreover, the petitioner argues that the respondent's argument with respect to using the profitability of Quimigal's parent company and not Quimigal as a basis for calculating CV profit is incorrect. The petitioner argues that the Department's choice of facts available is specific to the actual producer in question and is "at least as specific as can be to the same general category as the subject merchandise." Moreover, the petitioner argues that the CV profit ratio determined at the Preliminary Determination is not "outrageous" or "abnormally high." Therefore, the petitioner argues that the Department should use the same profit ratio in the final determination as facts available if normal value is based on constructed value and all relevant third-country sales are below the cost of production.

Department's Position: Quimigal did not have any above cost comparison market sales (i.e., third-country sales) of foreign like product. Therefore, the Department has not determined the CV profit under section 773(e)(2)(A) of the Act, which requires sales by the respondent to be made in the ordinary course of trade (i.e., sales that pass the cost test). In situations where we cannot calculate CV profit under section 773(e)(2)(A), section 773(e)(2)(B) of the Act sets forth three alternatives. The SAA states that "section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods." See SAA at 840 (H.R. Doc. 103-316 (1994))

Section 773(e)(2)(B)(i) specifies that profit may be calculated based on "actual amounts incurred by the specific exporter or producer on merchandise in the same general category" as subject merchandise. Quimigal also produces and sells aniline, which as a major input of sulfanilic acid could be considered as the same general category of merchandise as sulfanilic acid. However, there is insufficient information on the record for us to determine the profit rate for Quimigal's sales of aniline because sales of aniline were not required to be reported.

Alternative (ii) of this section provides that profit may be calculated based on "the weighted average of the actual amounts incurred and realized by {other} exporters or producers that are subject to the investigation." However, because there are no other respondents in this case, the Department cannot calculate profit based on alternative (ii) of this section.

Thus, we must calculate CV profit for Quimigal under section 773(e)(2)(B)(iii)("alternative (iii)"). Pursuant to alternative (iii), the Department has the option of using "any other reasonable method," as long as the result is not greater than the amount realized by the exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise," the so-called "profit cap." However, the profit cap cannot be calculated in the instant case because, as we noted above, we do not have information allowing us to calculate the amount normally realized by exporters or producers (other than respondent) in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category. Therefore, we are applying option (iii) based on facts available (i.e., without quantifying a profit cap). See SAA at 841.

To determine an appropriate profit rate under alternative (iii), the Department usually considers several factors. Among them are: (1) the similarity of the potential surrogate companies' business operations and products to the respondent's; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; and (3) the contemporaneity of the surrogate data to the POI. See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel, 66 FR 49349 (September 27, 2001) and accompanying Issues and Decision Memorandum at Comment 8. The greater the similarity in business operations and products, the more likely that there is a greater correlation in the profit experience of the two companies. Concerning the extent to which U.S. sales are reflected in the surrogate's financial statements, because the Department is typically comparing U.S. sales to normal value from the home market or third-country, it does not want to construct a normal value based on financial data that contains exclusively or predominantly U.S. sales. Further, in accordance with section 773(e)(2)(B) generally, we seek home market profit experience to the extent possible. See Uranium from France: Decision Memo at Comment 16.

In the instant case neither the respondent nor the petitioner suggested surrogate company data. Therefore, consistent with section 773(e)(2)(B)(iii) of the Act, we have obtained publicly available information from a Portuguese company, Resiquimica - Resinas Quimicas, LDD ("Resiquimica"). From the available company-specific information, we find Resiquimica's financial data to offer the best publicly available information for calculating a surrogate profit. We find Resiquimica to be similar to the respondent in business operations and products produced (i.e., industrial chemicals) as well as to have home market sales and an international component reflective of the respondent. As to contemporaneity, the Department has placed on the record Resiquimica's 2000 fiscal year financial information, which is contemporaneous with the POI.

Based on this analysis, and as neutral facts available, we applied a CV profit rate calculated from Resiquimica's 2000 financial information for the final determination.

Comment 6: Corrections and Clarifications to the Verification Report

Respondent's Argument: The respondent made several clarifying and correcting comments regarding the Verification Report in its case brief. See Quimigal's August 21, 2002 submission, at pages 34-35.

Petitioner's Argument: The petitioner made no comment in regard to this issue.

The Department's Position: We have reviewed these comments and concur with all.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination of this investigation and the final weighted-average dumping margin for the investigated firm in the Federal Register.

AGREE __________ DISAGREE __________

____
Faryar Shirzad
Assistant Secretary
for Import Administration

____
Date