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DATE: October 22, 2012

MEMORANDUM TO: James Maeder
Director, Office 2
AD/CVD Operations

THROUGH: Shawn Thompson
Program Manager, Office 2
AD/CVD Operations

FROM: Elizabeth Eastwood
Senior Analyst, Office 2
AD/CVD Operations

RE: 2011-2012 Antidumping Duty Administrative Review of Solid
Fertilizer Grade Ammonium Nitrate from the Russian Federation

SUBJECT: Rescission of Administrative Review

Summary

On June 28, 2012, the Department of Commerce (the Department) issued a memorandum notifying interested parties of its intent to rescind this administrative review because information from U.S. Customs and Border Protection (CBP) indicated that the respondents had no entries of subject merchandise during the period of review (POR). We invited parties to comment on this memorandum. After analyzing those comments, we continue to recommend finding that it is appropriate to rescind this administrative review.

Background

On May 29, 2012,¹ we initiated an administrative review covering the period May 2, 2011, through March 31, 2012, for two producers/exporters of ammonium nitrate, JSC Acron (Acron) and MCC EuroChem (EuroChem), based on timely-filed review requests. On the same date, we issued the antidumping questionnaire to these companies. In addition, we requested information from CBP on imports of subject merchandise from these respondents during the POR, in accordance with our practice. In June 2012, we received the requested CBP information, which showed that neither Acron nor EuroChem had entries of the subject merchandise during the POR. On June 5, 2012, we placed a memorandum on the file stating that our review of the CBP database showed no POR entries of subject merchandise by the respondents.

¹ See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 77 FR 31586, 31570 (May 29, 2012).



On June 20, 2012, Acron submitted its response to section A of the Department's antidumping questionnaire, which indicated that Acron had a shipment of subject merchandise to the United States in March 2012; however, the entry documentation submitted with this response showed that the entry associated with this shipment was not made until [] (i.e., after the end of the POR). See Acron's June 20, 2012, submission at Exhibits 1 and 19. This information is consistent with the CBP information placed on the record on June 5, 2012.

On June 22, 2012, EuroChem submitted a partial response to section A of the Department's antidumping questionnaire, which stated that EuroChem also had a shipment of ammonium nitrate to the United States in March 2012. Unlike Acron, however, EuroChem provided a CBP 7501 form indicating that the entry associated with this shipment occurred on March 26, 2012 (i.e., five days before the end of the POR). See EuroChem's June 22, 2012, submission at Exhibit 2. Because this information was not consistent with the information in the June 5 memorandum and the underlying CBP data, on June 25, 2012, we queried the CBP database as to the status of the particular entry in question. The CBP database showed that, although EuroChem submitted its entry documentation on March 26, 2012, the entry [] and not accepted by CBP as entered until April 2, 2012 (i.e., two days after the end of the POR).

Because neither respondent had an entry of subject merchandise into the United States during the POR, on June 28, 2012, the Department placed a memorandum on the record notifying interested parties of its intent to rescind the 2011-2012 administrative review of ammonium nitrate from Russia. See the June 28, 2012, memorandum from Holly Phelps, Analyst, to James Maeder, Director, Office 2, entitled, "Intent to Rescind Administrative Review: 2011-2012 Antidumping Duty Administrative Review of Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation" (Intent to Rescind Memo). We invited parties to comment on our Intent to Rescind Memo.

On July 9, 2012, we received comments from Acron and EuroChem, and on July 16, 2012, we received rebuttal comments from CF Industries, Inc. and El Dorado Chemical Company (collectively, the petitioners). In these comments, the respondents argued that the Department should not rescind this administrative review for three reasons: 1) CBP incorrectly assigned the entry date to EuroChem's shipment (and thus it did, in fact, have an entry during the POR); 2) the Department's regulations permit the Department to conduct an administrative review if there are exports or sales of subject merchandise during the POR, independent of whether there was a POR entry; and 3) it would be unfair for the Department to deny the respondents an opportunity to obtain a revised cash deposit rate for future entries because the current cash deposit rate is not only prohibitively high but it also was set using a non-market economy (NME) methodology.

On September 24, 2012, EuroChem submitted additional comments in which it argued that a decision by the Court of International Trade (CIT) made on September 20, 2012, compels the Department to continue its review of EuroChem. See Hubbell Power Systems, Inc. v. United States, Slip Op. 12-123 (CIT 2012) (Hubbell). EuroChem maintains that Hubbell applies here because the CIT required the Department to reinstate a review for a company having sales and shipments but no entries during the review period.

The arguments made by interested parties are addressed below.

ISSUES REGARDING THE RESCISSION OF THE REVIEW

Issue 1: Whether EuroChem had an Entry of Subject Merchandise during the POR

A. Applicable Statutory and Regulatory Provisions

Section 751(a)(2) of the Tariff Act of 1930, as amended (the Act), directs the Department to determine the normal value and export price (EP) (or constructed export price (CEP)) of each entry of the subject merchandise. CBP's regulations defining entry date are found at 19 CFR 141.68.

B. Arguments by Interested Parties

EuroChem acknowledges that it had a single shipment of subject merchandise during the POR with an entry date of April 2, 2012. However, EuroChem claims that CBP made an error when it assigned this entry date because, under CBP regulations, EuroChem was entitled to designate the date of entry and in this case the date EuroChem chose was March 26, 2012. EuroChem asserts that it has requested that CBP correct this error.

Specifically, EuroChem notes that it had a single shipment of subject merchandise in March 2012, and it claims that the entry date into U.S. customs territory for this shipment should have been March 26, 2012, pursuant to CBP's regulations. In support of this argument, EuroChem cites 19 CFR 141.68(c), which states:

When merchandise is released under the immediate delivery procedure. The time of entry of merchandise released under the immediate delivery procedure will be the time the entry summary is filed in proper form, with estimated duties attached.

EuroChem asserts that, consistent with this regulation, its customs broker filed the requisite entry summary on March 26, 2012. EuroChem concedes that this summary contained an error in the port code and consequently was rejected by CBP, but it maintains that its broker revised the paperwork, resubmitted it on the same date, and then received confirmation from CBP that the goods had been released. EuroChem provided a log of transmissions between its broker and CBP as evidence that this occurred.

EuroChem further contends that, as of March 26, 2012, the cargo was legally no longer under CBP's custody, pursuant to 19 CFR 142.22(b). This regulation states:

Merchandise for which a special permit for immediate delivery has been issued under § 142.21 of this part shall be considered to remain in CBP custody until the filing of one of the following:

- (1) An entry summary for consumption with estimated duties attached; an entry summary for consumption without estimated duties attached, if entry/entry summary information and a valid scheduled statement date (pursuant to §2.25 of this chapter) have successfully been received by CBP via the Automated Broker

Interface; and entry summary for warehouse; or an entry summary for entry temporarily under bond, which may be filed in any of the circumstances under §142.21 of this part except for merchandise released from warehouse under §142.21(f) of this part.

EuroChem states that the second option (*i.e.*, “an entry summary for consumption without estimated duties attached, if entry/entry summary information and a valid scheduled statement date (pursuant to §2.25 of this chapter) have successfully been received by CBP via the Automated Broker Interface”) is the relevant portion of this regulation because EuroChem’s broker filed the CBP 7501 form containing entry summary information on March 26, 2012, along with a scheduled statement (*i.e.*, payment) date, and it received confirmation of this filing’s successful receipt by CBP via CBP’s Automated Broker Interface (ABI). Thus, EuroChem claims that, as of March 26, 2012, the merchandise was in the importer’s custody, given that it had cleared U.S. customs.

EuroChem asserts that the above actions occurred while the subject ammonium nitrate was on a ship within the port of New Orleans limits (at the mouth of the Mississippi river), and thus they meet the requirements of CBP’s regulations. EuroChem notes that CBP’s computer system updated the release date to April 2, 2012, when the cargo physically arrived at the New Orleans port on April 2, 2012; however, EuroChem contends that this computer function does not change the correct and actual entry date of March 26.

EuroChem asserts that, if its request that CBP modify the entry date of its sale is successful, its transaction would be: 1) liquidated at the conclusion of this review at the 253.98 percent cash deposit rate; and thus 2) precluded from review next year. Given that EuroChem itself requested a review of this sale, EuroChem insists that such a result would be unfair.

Finally, EuroChem claims the Department has reviewed entries when there was a possibility that they might be subject to antidumping duties, and it has continued to conduct reviews where entries are under protest and thus may be subject to the results of review. As support for this claim, EuroChem cites Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 70 FR 72789 (Dec. 7, 2005) (SSPC from Belgium), and accompanying Issues and Decision Memorandum at Comment 7; and Carbazole Violet Pigment 23 from India: Final Results of Antidumping Duty Administrative Review, 73 FR 19811 (Apr. 11, 2008) (CVP from India), and accompanying Issues and Decision Memorandum at Comment 1. EuroChem requests that the Department do the same here.

The petitioners argue that CBP did not err when assigning the entry date to its sale. The petitioners point out that EuroChem’s shipment did not physically arrive at the port of entry until April 2, 2012. According to the petitioners, pursuant to 19 CFR 141.68(e), the CBP entry date cannot precede the physical arrival of the merchandise at the port, even if all entry documentation has been completed. Specifically, the petitioners note that 19 CFR 141.68(e) states:

When merchandise has not arrived. Merchandise will not be authorized for release, nor will an entry or an entry summary which serves as both the entry and

entry summary be considered filed or presented, until the merchandise has arrived within the port limits with the intent to unlade.

The petitioners argue that CBP, in analyzing this regulatory provision, has recently held that, although an importer may place a particular entry date on CBP Forms 3461 and 7501, CBP is not bound by that entry date. As support for this argument, the petitioners cite Customs Headquarters Ruling HQ HI211420 (May 17, 2011) at 7, which states “the cargo release date in ABI is simply an estimate and is dependent on whether the cargo has actually arrived. The cargo cannot be released before it physically arrives at the port.”

Furthermore, the petitioners assert that even the regulatory provision cited by EuroChem (*i.e.*, 19 CFR 142.22(b)) requires CBP to have physical custody of the merchandise prior to release. The petitioners assert that CBP could not have had physical custody of it prior to April 2, 2012. In fact, the petitioners maintain that the ABI entry information provided by EuroChem shows that March 26, 2012, was only the “estimated date of arrival” of the merchandise, not the release date. Thus, according to the petitioners, EuroChem is incorrect in claiming that its cargo entered for consumption on March 26, 2012. The petitioners maintain that the April 2, 2012, actual release date shown in the ABI report is consistent with the CBP entry date recorded for this shipment.

In any event, the petitioners maintain that the Department does not have the authority to “correct” the entry date recorded by CBP and must accept it. As a practical matter, the petitioners note that the Department does not possess the resources to investigate every claim of CBP error raised in antidumping duty proceedings, nor do the Department’s statutory deadlines permit it to await the outcome of every CBP protest. Further, the petitioners dismiss EuroChem’s contention that it will be denied an opportunity to have this sale reviewed if it prevails in its customs protest. According to the petitioners, EuroChem has the power to ensure a review of this entry by: 1) not submitting a customs protest; and 2) instead requesting that the Department review this sale during the next POR.

Finally, the petitioners disagree that the cases cited by EuroChem apply here, as there were POR entries in both SSPC from Belgium and CVP from India.

Analysis:

In determining whether there are reviewable entries of the subject merchandise, it is the Department’s general practice to rely on CBP information. See Certain Circular Welded-Non Alloy Pipe from Mexico: Final Results of Antidumping Duty Administrative Review, 76 FR 77770 (Dec. 14, 2011), and accompanying Issues and Decision Memorandum at Comment 1. The Department considers CBP data reliable because they are derived from actual entries of subject merchandise, based on information required by and provided to the U.S. government authority responsible for permitting goods to enter into the United States (*i.e.*, CBP).

The CBP data examined by the Department show that the entry date of EuroChem’s merchandise is April 2, 2012. This date is consistent with the ABI information provided by EuroChem itself in Exhibit 1 of its July 9 comments, which shows that CBP amended the date of release for this shipment to be the date that the merchandise actually arrived in port.

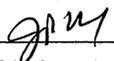
The issue here is whether it is appropriate to consider EuroChem's objection to CBP as a factor in determining whether to rescind this review. In an attempt to answer this question, we contacted CBP and inquired whether EuroChem had filed a challenge with CBP regarding this issue. See the August 24, 2012, memorandum from Elizabeth Eastwood, Senior Analyst, to the file entitled, "EuroChem's April 2012 Entry of Ammonium Nitrate."² CBP informed us that it had not and that the time for EuroChem to challenge its entry date was at the time merchandise was released; after release, CBP indicated that it cannot change the entry date. *Id.* Therefore, we disagree with EuroChem that we should continue with the review provisionally, given that CBP has stated that the date of entry of its sale can no longer be changed.

We also find to be unfounded EuroChem's concern that its CBP objection will lead to an unfair result because its entry will be liquidated at the current cash deposit rate. As noted above, CBP has not received a challenge from EuroChem regarding its entry date and, in any event, it is too late for EuroChem to file such a challenge. Thus, EuroChem's entry will be reviewable in the 2012-2013 administrative review and will be liquidated in accordance with that segment of the proceeding.

Finally, we disagree with EuroChem that either SSPC from Belgium or CVP from India stands for the proposition that the Department will continue a review in instances where there is a mere possibility that entries may be subject to antidumping duties. In both of those cases, there was at least one suspended POR entry on which the Department could assess duties at the completion of the review. Neither of these cases involved questions regarding entry dates,³ and thus they are factually distinct.

Recommendation:

We recommend relying on the date of entry set by CBP to determine whether EuroChem had a POR entry in this administrative review. Because the CBP entry date was April 2, 2012, we recommend finding that EuroChem had no entries of subject merchandise during the POR.



Agree

Disagree

² Additionally, on September 4, 2012, EuroChem placed information on the record showing that its request to CBP consisted of an e-mail from its counsel dated July 12, 2012 (*i.e.*, after EuroChem submitted its July 9, 2012, comments to the Department). This e-mail did not request that CBP take any particular action regarding EuroChem's entry.

³ The issue in SSPC from Belgium related to the adjustment of an assessment rate to account for misclassified merchandise, while the issue in CVP from India related to the inclusion of POR entries which had already been liquidated by CBP in the administrative review.

Issue 2: Reviewing Entries, Exports, or Sales of Subject Merchandise during the POR

A. Applicable Statutory and Regulatory Provisions

While section 751(a)(2) of the Act directs the Department to determine the normal value and EP/CEP of each entry of the subject merchandise, section 751(a)(2)(C) of the Act provides that the “determination under this paragraph {i.e., an administrative review} shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated antidumping duties.” (emphasis added) 19 CFR 351.213(e)(1) states that an administrative review normally will cover, as appropriate, entries, exports or sales of the subject merchandise during the 12 months immediately preceding the most recent anniversary month.

B. Arguments by Interested Parties

The respondents argue that the Department should not rescind this administrative review because 19 CFR 351.213(e)(1) does not require an entry of subject merchandise during the POR. Rather, the respondents maintain that this regulation permits the Department to conduct a review where there are exports or sales during the POR, even if there are no entries. Both respondents assert that, under this standard, they had reviewable transactions.

Acron asserts that the Department’s policy is to define the universe of CEP sales included in a review using the date of sale, rather than the date of entry. Acron contends that this policy is legally permissible because: 1) the Act does not specify the universe of sales to be used in calculating a weighted-average dumping margin; and 2) the Department’s regulations contain a disjunctive “or” (i.e., an administrative review covers entries, exports, or sales), which must be construed as setting out separate and distinct alternatives. See United States v. Cooper, 862 F.2d 339 (4th Cir. 1992); and Knutzen v. Eben Ezer Lutheran Housing Center, 815 F.2d 1343 (10th Cir. 1987). Moreover, Acron asserts that the Department’s practice reflects the preference set forth in the preamble to the Department’s regulations, which states that “{b}ecause of the inability to tie entries to sales, the Department normally must base its review on sales made during the period of review.” See Antidumping Duties; Countervailing Duties: final Rule, 62 FR 27296, 27314 (May 19, 1997) (Preamble).

Acron notes that the Department’s universe policy is reflected in the antidumping questionnaire, which requests that respondents report sales data based on the date of sale for CEP sales and the date of entry for EP sales. Acron maintains that the courts have consistently upheld the Department’s practice of reviewing CEP transactions with dates of sale during the POR, rather than POR entries. See Ad Hoc Committee of Southern California Producers of Gray Portland Cement v. United States, 914 F. Supp. 535 (CIT 1995) (Cement); NSK Ltd. v. United States, 825 F. Supp. 315, 320 (CIT 1993) (NSK); Hynix Semiconductor, Inc. v. United States, 424 F.3d 1363, 1368 (Fed. Cir. 2005) (Hynix); and Corus Staal B.V. v. United States, 387 F. Supp 2d 1291, 1302-03 (CIT 2005) (Corus). While Acron acknowledges that the Department’s regulations also permit the Department to review those sales which entered during the POR (as it does when it reviews EP transactions), it argues that the Department should not depart from its normal practice regarding CEP sales here.

Similarly, EuroChem claims that the CIT has held that the Department may review a company with POR sales and exports, but no entries. See East Sea Seafoods LLC v. United States, 714 F. Supp. 2d 1243, 1248 n. 3 (CIT 2010) (East Sea) (citing Allegheny Ludlum Corp., et. al. v. United States, 346 F. 3d. 1368, 1373 (Fed. Cir. 2003) (Allegheny)). Indeed, EuroChem asserts that the Department considers evidence of sales as a factor in determining whether to conduct a review, even in the absence of entries. See SSPC from Belgium and CVP from India. EuroChem asserts that this practice has been upheld by the Courts. See Hynix and Cement.

EuroChem argues that the cases cited in the Intent to Rescind Memo are not on point. According to EuroChem, these cases merely demonstrate that the Department's practice is to rescind a review only where a respondent has neither shipments nor entries. Specifically, EuroChem notes that in Certain Frozen Warmwater Shrimp From Brazil: Notice of Rescission of Antidumping Duty Administrative Review, 77 FR 32498 (June 1, 2012) (Shrimp from Brazil) the Department stated that it was rescinding the review based on a finding of no shipments or entries of subject merchandise; in Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Antidumping Duty Administrative Review, 76 FR 42679 (July 19, 2011) (Hot-Rolled from India), and accompanying Issues and Decision Memorandum at Comment 1, the Department stated that its practice is to rescind a review if the respondent certifies that it has no shipments and we can confirm this fact using CBP data; and in Certain Steel Concrete Reinforcing Bars From Turkey; Preliminary Results of Antidumping Duty Administrative Review, 67 FR 21634, 21635 (May 1, 2002) (Rebar from Turkey), unchanged in Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 66110 (Oct. 30, 2002), the Department stated that it rescinded the review with respect to certain exporters because they had no shipments and/or entries of subject merchandise during the POR. EuroChem contrasts the situation in those cases with the instant case, where EuroChem made both a sale and a shipment during the POR.

In contrast, EuroChem claims that the September 20, 2012, CIT decision in Hubbell compels the Department to continue this review. EuroChem maintains that in that case, the CIT required the Department to reinstate a review for a company having sales and shipments but no entries during the review period, finding that reinstatement was particularly appropriate because the exporter had an existing dumping deposit rate that was not based on its own data, but rather on "an over decade old prohibitive, trading-stopping country-wide NME rate" of 206 percent. EuroChem asserts that, like in Hubbell, here it has not been adequately explained how a decision to rescind the review would be consistent with: 1) the Department's own applicable regulation; and 2) the statutory goal to accurately and expeditiously calculate dumping cash deposit rates, such that the administration of the fair trade law is not itself made an unfair trade barrier/practice.

Finally, EuroChem argues that, if the Department refuses to review its entry until next year, it ironically will request that EuroChem report the same sales and cost data for the current POR. Thus, EuroChem requests that the Department review its sale now given that its antidumping duty margin, whenever calculated, will be based on identical data.

The petitioners argue that it is not appropriate to continue this administrative review, noting that neither respondent had suspended entries of subject merchandise during the POR. The petitioners maintain that it is the Department's longstanding practice when determining whether to conduct an administrative review first to make the threshold determination that there are

unliquidated POR entries on which to assess antidumping duties. See Industrial Phosphoric Acid From Israel; Preliminary Results and Termination in Part of Antidumping Duty Administrative Reviews, 59 FR 10787 (Mar. 8, 1994). According to the petitioners, this practice has been upheld by the Court of Appeals for the Federal Circuit (CAFC). See Allegheny, 346 F. 3d at 1373. The petitioners assert that the Department will examine whether it is appropriate to review sales or shipments with entry dates outside the POR only after determining that reviewable entries within the POR exist.

According to the petitioners, EuroChem is wrong when it claims that the cases cited in the Intent to Rescind Memo only involved situations where the exporter had neither POR entries nor shipments. Specifically, the petitioner contends that the basis of the Department's rescission in Shrimp from Brazil was that there were no entries of subject merchandise; the Department merely noted that there were also no shipments from exporters. Similarly, the petitioners point out that in Rebar from Turkey the Department rescinded the administrative review with respect to two exporters, one of which made a POR sale that entered the United States after the POR. Finally, the petitioners assert that the language quoted by EuroChem in Hot-Rolled from India is not contained in either the decision memorandum or notice cited. Thus, the petitioners argue it is clear that the absence of a POR entry renders a review inappropriate, and the Department has indeed rescinded reviews where the exporter had a POR sale or shipment but not a POR entry. See Rebar from Turkey, 67 FR at 66111, and Fresh Garlic from the People's Republic of China; Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 37520, 37521 (July 13, 1998) (Garlic from the PRC) (where the Department rescinded the review after noting that a POR shipment "did not result in a reviewable entry during the POR").

Moreover, while the petitioners agree that the courts have upheld the Department's calculation of weighted-average dumping margins based on POR sales data, rather than POR entry data,⁴ they disagree that either SSPC from Belgium or CVP from India supports conducting an administrative review in the absence of POR entries. In fact, the petitioners point out that there were POR entries on which the Department could assess duties in both of those cases. Similarly, in both Hynix and Cement, the petitioners note that, while the CIT upheld the Department's calculation of weighted-average dumping margins using POR sales, not entries, there were also POR entries of subject merchandise which warranted the conduct of the administrative reviews in the first place. Furthermore, the petitioners argue that EuroChem has misrepresented the facts of East Sea. According to the petitioners, in East Sea the CIT held that Allegheny validated the Department's "policy of limiting administrative reviews to companies with entries in the POR."

Analysis:

Section 751(a)(2) of the Act directs the Department to determine the normal value and EP (or CEP) of each entry of the subject merchandise. Section 751(a)(2)(C) of the Act provides that the "determination under this paragraph {i.e., an administrative review} shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated antidumping duties." (emphasis added) Consistent with the statutory directive that an administrative review "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination,"

⁴ See Cement, 914 F. Supp at 544.

the Department's policy is to conduct administrative reviews only where there exists at least one POR entry of subject merchandise. Simply put, while the Department has the discretion to calculate the weighted-average dumping margin on the basis of POR sales, there must be suspended POR entries on which duties may be assessed in order to meet the requirements of section 751(a)(2)(C) of the Act. As we stated in our Intent to Rescind Memo:

It is the Department's practice to rescind an administrative review when there are no reviewable entries of subject merchandise during the POR subject to the AD order and for which liquidation is suspended. At the end of the administrative review, the suspended entries are liquidated at the assessment rate computed for the review period. See 19 CFR 351.212(b)(1). Therefore, for an administrative review to be conducted, there must be a reviewable, suspended entry to be liquidated at the newly calculated assessment rate.

See the Intent to Rescind Memo at pages 2 and 3.

This practice has been upheld by the courts. In Allegheny, 346 F.3d 1373, for example, the CAFC stated:

we hold lawful Commerce's regulatory policy of rescinding annual administrative reviews where there are no entries during the period of review and where all in-period sales can be linked to pre-period-of-review entries.

See also Chia Far Indus. Factory Co. v. United States, 343 F. Supp. 2d 1344, 1369 (Ct. Int'l Trade) (stating "Commerce correctly decided to rescind Ta Chen's review based on the fact that there were no entries of the merchandise during the POR, regardless of whether there were sales"). In this case, similarly, there are no POR entries, despite the fact that each respondent had a single POR sale.

We disagree with the respondents that it is the Department's practice to continue a review in the absence of entries. See, e.g., Rebar from Turkey, 67 FR at 21635 (where the Department rescinded the administrative review for an exporter which had a POR sale of rebar but no POR entries). In the cases cited by the respondents (i.e., CVP from India, SSPC from Belgium, Hynix and Cement), there was at least one reviewable POR entry on which the Department could assess duties at the completion of the review.

Moreover, we disagree with Acron that the Department's normal practice of reviewing CEP sales, rather than CEP entries, is relevant here.⁵ It is true that the Department may calculate the amount of antidumping duty on the basis of CEP sales, because of a limitation applicable to most CEP sales – the "inability to tie entries to sales." See Preamble, 62 FR at 27314. However, there still must be POR entries on which the antidumping duty must be assessed. Before conducting an administrative review, the Department's practice is to first determine that a

⁵ Most CEP sales are made after importation from the inventory of a U.S. reseller affiliated with the respondent. Because this is the usual channel for CEP sales, we have characterized it as the Department's normal practice. However, as explained below, this practice is actually an exception to the Department's general rule of reviewing POR entries.

respondent has suspended POR entries, regardless of whether that respondent made EP or CEP sales. See, e.g., Rebar from Turkey, 67 FR at 21635.

Further, even in cases where a respondent made both CEP sales and entries during a given POR, we disagree that the Department always reviews CEP sales as a matter of practice. The Department's standard questionnaire, issued in all market-economy administrative reviews including this one, instructs respondents to report each U.S. sale of merchandise entered for consumption during the POR⁶, unless an identified exception applies. While one of the exceptions is for CEP sales made after importation (e.g., from a respondent's inventory), this is an exception to the rule, not the rule itself. Moreover, in this case, the CEP inventory exception would not apply as the ammonium nitrate in question was not made from either respondent's U.S. inventory, but rather was sold prior to importation and shipped directly from the Russian manufacturer to the customer. Thus, even though the sales at issue may qualify as CEP transactions, they are not reportable transactions in this POR because the merchandise was not entered for consumption.

While 19 CFR 351.213(e)(1) gives the Department the discretion to base a review on either entries, exports, or sales, as appropriate, we disagree that the existence of these alternatives requires the Department to conduct an administrative review in the absence of POR entries. See, e.g., Allegheny, 346 F.3d 1373. Further, we disagree with Acron that the Preamble to the Department's regulations sets out a preference for defining the universe of reviewed CEP transactions using sales made during the POR. Rather, the Preamble identifies a limitation applicable to most CEP sales – the “inability to tie entries to sales” – and it notes, because of this limitation, “the Department normally must base its review on sales made during the period of review.” See Preamble, 62 FR at 27314.⁷ The Preamble states that, where a respondent “*can* tie its entries to its sales, we potentially can trace each entry of subject merchandise made during a review period to the particular sale or sales of that same merchandise to unaffiliated customers, and we conduct the review on that basis.” Id. Thus, contrary to Acron's argument, the Preamble does not express a preference for reviewing sales during the POR.

With respect to EuroChem's arguments, we disagree that any of the cases cited to support its arguments are on point. EuroChem relies on dicta from East Sea, in which the Court, in a footnote, noted that nothing in Allegheny “forbids Commerce from reviewing a company with sales and exports but not entries.” See East Sea, 714 F. Supp. 2d 1243, 1248 n. 3. However, in the same footnote, the Court expressly recognized that Allegheny “validated Commerce's policy of limiting review to companies with entries in the POR.” Id. In response to the Department's

⁶ Specifically, the questionnaire at page C-2 contains the following instruction:

Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR; and (2) for CEP sales made after importation, report each transaction that has a **date of sale** within the POR. Do not report canceled sales. If you believe there is a reason to report your U.S. sales on a different basis, please contact the official in charge before doing so.

⁷ We agree with Acron that the courts upheld the Department's preference for reviewing CEP sales, rather than the associated entries, in Corus, NSK, Hynix, and Cement. However, unlike here, each of those cases involved CEP sales made from inventory (and thus they were of a type contemplated by the Preamble); moreover, unlike here, there were entries during the POR in each of those cases.

concern that it would be required to treat the plaintiff in that case as if it were subject to the administrative review under litigation (despite the fact that the plaintiff had no entries during the POR), the Court stated that “Commerce should be reassured that this is not so. . . Allegheny is not implicated in this case, as nothing in *East Sea I* required Commerce to conduct an administrative review of a company without POR entries.” *Id.* at 1247-1248.

We also disagree with EuroChem that the CIT’s opinion in Hubbell compels the Department to continue this review. In Hubbell, the Department rescinded the review for one company because its POR entries were liquidated. The CIT held that this rescission was not in accordance with law because the plaintiff did, in fact, have entries during the POR. The CIT found that Department failed to explain why the liquidation of entries was germane, stating:

The statute requires Commerce to conduct a review of “each entry” of subject merchandise that occurred during the period of review. 19 U.S.C. § 1675(a). Here, Commerce has not disputed that Gem Year’s subject merchandise entered the United States during the period of review. Commerce has not explained how it reconciles its obligation to review entries with its refusal to review Gem Year’s merchandise, which clearly entered the United States during the POR.

In contrast, here there are no POR entries to be reviewed. For this reason, the Department is following its normal practice of not conducting a review when there are no POR entries, a practice affirmed by the Federal Circuit in Allegheny. Indeed, the CIT found that the facts in Hubbell differed from those in Allegheny where “there were no entries of subject merchandise during the period of review, liquidated or otherwise.” The Court also pointed out that, pursuant to Allegheny, merchandise must enter the United States during the POR to be considered “subject merchandise” warranting a review. Thus, because neither Acron nor EuroChem made entries of subject merchandise during the POR, Hubbell is inapposite.⁸ Finally, the facts in this case also differ materially from those in Hubbell because there, the Department’s decision not to review the plaintiff’s POR entries deprived it of any future possibility of a review of those entries; here, unlike in Hubbell, the respondents do not lose their opportunity to obtain a review of the entries at issue. These entries are reviewable in the POR in which the entries were made, and the respondents may request an administrative review of them in April 2013.

Further, we disagree with EuroChem that the cases cited in the Intent to Rescind Memo are inapposite. In each of those cases, the Department rescinded the administrative review based on a finding of no entries during the POR. While the cited passages may have included an additional basis (e.g., no shipments in Shrimp from Brazil and Rebar from Turkey) or imprecise language (e.g., no explicit reference to entries in Hot-Rolled from India⁹), this does not change the central fact that there were no entries of subject merchandise during the POR in question.

⁸ Hubbell is also inapposite because it involved a non-market economy analysis (including a determination of whether the respondent qualified for separate rate status), facts which the CIT deemed relevant. Here, no such analysis is necessary for Acron or EuroChem. In addition, we note that the Hubbell decision is not a final decision at this time.

⁹ We agree with the petitioners that the language cited by EuroChem does not appear in either the Federal Register notice or accompanying decision memorandum for this case. However, even assuming that the language is drawn from a different source, it is still not dispositive. The reference to CBP data indicates that the relevant measure was entries, and not shipments, in that case because CBP data tracks entries, but not shipments.

Moreover, in Rebar from Turkey the respondent in question (a company known as “ICDAS”) made a sale during the POR which entered after the POR,¹⁰ a situation virtually identical to this case. In that case, we rescinded the review for ICDAS even though there was a POR sale associated with the post-POR entry.

Finally, we disagree that in the next POR, the Department will request the same sales and cost data for the current POR. Specifically, although EuroChem asserts that it will not make additional shipments of ammonium nitrate to the United States until its cash deposit rate is revised, we will not be able to determine whether this assertion proves accurate until after the end of the next POR. Therefore, we disagree that the data requested for the 2012-2013 POR will necessarily be the same.

Recommendation:

Neither respondent had an entry of subject merchandise during the POR. Therefore, we recommend finding that there were no reviewable transactions in this segment of the proceeding.



Agree

Disagree

Issue 3: Setting a Revised Cash Deposit Rate for Future Entries

A. Applicable Statutory Provision

Section 751(a)(1) of the Act directs the Department to determine the amount of any antidumping duty to be assessed, estimated duty to be deposited, or investigation to be resumed. Section 751(a)(2)(C) of the Act provides that the “determination under this paragraph {i.e., an administrative review} shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated antidumping duties.” (emphasis added)

B. Arguments by Interested Parties

The respondents argue that this administrative review should continue even if the Department determines that neither company made entries of subject merchandise during the POR. EuroChem argues that the language of section 751(a)(1) of the Act clearly sets out two points: 1) the Department must conduct an administrative review for any respondent who has properly requested one; and 2) the final results of review have future legal consequences beyond the entries at issue in any given review. Regarding this latter point, EuroChem argues the courts have held that the establishment of a cash deposit rate gives an interested party an ongoing interest in the review regardless of whether there are duties assessed on POR imports. See Gerdau Ameristeel Corp. v. United States, 519 F.3d 1336, 1342 (Fed. Cir. 2008) (Gerdau); and KYD Inc. v. United States, 779 F. Supp. 2d 1361, 1370 (CIT 2011) (KYD). Thus, the respondents argue that, because they made POR sales of subject merchandise, the Department should use this data to revise the cash deposit rate now.

¹⁰ See Rebar from Turkey, 67 FR at 21635.

According to the respondents, the current cash deposit rate for all companies subject to this order (i.e., 253.98 percent) was calculated many years ago using an NME methodology no longer applicable to Russia. The respondents note that this rate has not been subject to review since its imposition in 1999, solely due to the fact that the United States and Russia entered into a suspension agreement in 2000 which was in force until March 3, 2011. The respondents assert that this rate is no longer current because it was based on a calculation made for a different company (using adverse facts available (AFA)) more than 13 years ago, pursuant to a statutory and regulatory structure that no longer applies. Acron points out that, when Russia attained market-economy status, the Department stated that antidumping duty rates established under an NME methodology would be changed as a result of a review of a “sufficient period of time” after April 1, 2002. According to Acron, ten years is more than a “sufficient period of time” and, consequently, the Department should establish new cash deposit rates in this segment of the proceeding.

Both respondents imply that they are not dumping, and thus the cash deposit rate is not reflective of their selling practices. Acron notes that, while the suspension agreement was in force, it made a significant number of U.S. sales above normal value. EuroChem points out that, when the Department employed a market-economy methodology to determine a weighted-average dumping margin for its imports of urea, it calculated a rate of zero in the first administrative review; EuroChem contrasts this rate with a cash deposit rate of over 60 percent determined using an NME methodology. EuroChem implies that, similar to urea, the Department will also find that it is not dumping ammonium nitrate.

Finally, EuroChem states that it made one U.S. sale to achieve a weighted-average dumping margin based on current realities;¹¹ however, because the cash flow requirements associated with this rate are so large, it cannot make additional shipments to the United States until after this rate is revised. According to EuroChem, the Department’s continued use of this cash deposit rate distorts legitimate, fair trade and as a result, it is contrary to the purpose of the antidumping law.

The petitioners disagree with the respondents, pointing out that the Department does not calculate cash deposit rates where there are no reviewable POR entries of subject merchandise. See Certain Welded Carbon Steel Standard Pipe and Tube From Turkey: Notice of Final Rescission of Countervailing Duty Administrative Review, In Part, 77 FR 6542, 6543 (Feb. 8, 2012). The petitioners disagree with EuroChem that Gerdau is applicable here, noting that it involved a unique set of facts related to a respondent’s eligibility for revocation.¹² Furthermore, the petitioners point out that the CAFC has upheld the Department’s practice of not calculating a new cash deposit rate in situations where no duties are to be assessed.¹³

¹¹ EuroChem claims that the Department may use this sale to calculate both a revised cash deposit rate and an actual assessment rate, consistent with its treatment of similar sales in other proceedings. Specifically, EuroChem contends that, in the past, the Department has conducted a review of a POR sale which entered the United States after the POR, and instead of reviewing the entry twice, the Department applied its prior antidumping rate to that entry. As an example, EuroChem mentions the respondent Viraj in “prior stainless steel reviews.” However, EuroChem provides no citation to any specific proceeding.

¹² See Gerdau, 519 F.3d at 1342.

¹³ See Allegheny, 346 F.3d 1368.

According to the petitioners, Acron raised, and the Department dismissed, the same arguments contained in its July 9 comments when Acron requested a changed circumstances review of this order last year. While Acron claims that the current cash deposit rate is not representative of its own behavior, the petitioners note that Acron itself declined to participate in the underlying investigation. Thus, if Acron believed it was entitled to a lower cash deposit rate, the petitioners assert that it could have participated in that proceeding and received its own rate.¹⁴ Moreover, the petitioners contend that the mere fact that the cash deposit rate was calculated using an NME methodology does not invalidate the rate. According to the petitioners, the Department has repeatedly dismissed arguments that weighted-average dumping margins calculated before market-economy graduation are outdated.¹⁵ Given that Russia obtained market-economy status nearly ten years ago, the petitioners point out that the respondents could have at any time requested that their government terminate the suspension agreement to receive weighted-average dumping margins calculated using a market-economy methodology. Instead, the petitioners note that Russian producers chose to continue to benefit from the suspension agreement. Therefore, the petitioners maintain that there is no basis for the Department to continue this administrative review in the absence of entries in order to calculate revised cash deposit rates.

Analysis:

As noted in our analysis of Issues 1 and 2, above, the Department has determined that neither Acron nor EuroChem had reviewable entries during the POR. Under these circumstances, it is the Department's practice to rescind the administrative review, instead of continuing the review solely to calculate a revised cash deposit rate. See, e.g., Rebar from Turkey, 67 FR at 21635; and Garlic from the PRC, 63 FR at 37521. The respondents will have an opportunity to request that the Department review their entries that were made after this POR in the next POR.

The Department's practice was upheld by the CAFC in Allegheny. In that case, the CAFC stated:

{T}he statutory commands that an annual review "shall" take place where requested, *19 U.S.C. section 1675(a)(1)*, and that the review "shall be the basis for . . . deposits of estimated duties," *id. section 1675(a)(2)(C)*, do not preclude Commerce's policy here. The statutes indicate that where requested, Commerce must initiate a review. However, the statutes say nothing about how Commerce is to conduct that review – which is all that is at issue here. In conducting annual

¹⁴ The petitioners also point out that the cash deposit rate calculated in the investigation was based on a respondent's own data without the application of AFA.

¹⁵ See, e.g., Preliminary Results of Five-year Sunset Review of Suspended Antidumping Duty Investigation on Ammonium Nitrate from the Russian Federation, 70 FR 61431 (Oct .24, 2005), and accompanying Issues and Decision Memorandum at Comment 2 (unchanged in Final Results of Five-year Sunset Review of Suspended Antidumping Duty Investigation on Ammonium Nitrate from the Russian Federation, 71 FR 11177 (Mar. 6, 2006) (Ammonium Nitrate Sunset); Final Results of Five-Year Sunset Review of Suspended Antidumping Duty Investigation on Uranium From the Russian Federation, 71 FR 32517 (June 6, 2006) (Uranium Sunset), and accompanying Issues and Decision Memorandum at Comment 3; and Solid Urea from the Russian Federation; Final Results of the Expedited Sunset Review of the Antidumping Duty Order, 70 FR 24528 (May 10, 2005), and accompanying Issues and Decision Memorandum at Comment 3.

reviews of the cash deposit rates Commerce ignores sales that occur during the period of review where they can be linked to pre-period entries; where the sales cannot be linked, it may look to sales or exports “as appropriate” in any individual case. *19 C.F.R. section 351.213(e)(1)(ii)*. It follows that where there are no entries or unlinked sales during a period of review there is no subject merchandise and thus nothing to review and no basis for revising cash deposit rates – so Commerce need not (indeed, cannot) conduct a review.

See *Allegheny*, 346 F.3d at 1373 (emphasis added). In this case, likewise, there are no POR entries or unlinked sales, and, therefore, “nothing to review and no basis for revising cash deposit rates.” *Id.* EuroChem’s argument that the Act requires that the Department conduct an administrative review solely for the purpose of revising a cash deposit rate for any interested party who requests one, irrespective of whether there were POR entries, is contrary to the CAFC’s precedent in *Allegheny*.

With respect to the respondents’ claim that the current cash deposit rate on Russian ammonium nitrate is dated and was derived using a methodology which is no longer applicable to Russia, we note that, when the Department terminated the suspension agreement at the request of the Russian government, it reinstated the 253.98 percent cash deposit rate from the original investigation in accordance with Article X.C of the suspension agreement.¹⁶ This article specifies that upon termination of the suspension agreement the provisions of the U.S. antidumping law and regulations will apply. See Termination of the Suspension Agreement on Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation and Notice of Antidumping Duty Order, 76 FR 23569, 23570 (Apr. 27, 2011). Moreover, Russia’s graduation to market-economy status in 2002 did not automatically nullify the cash deposit rate calculated during the original investigation on ammonium nitrate from Russia. As indicated in the Department’s memorandum granting Russia market-economy status, Russia’s graduation had no effect on the Department’s use of investigation rates calculated before Russia achieved market-economy status, and such rates would remain in effect until they are changed as a result of a review. See Memorandum Regarding “Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law” (June 6, 2002) at 2. Since the issuance of that memorandum, the Department has repeatedly held that a country’s accession to market-economy status does not invalidate rates calculated using an NME methodology. See e.g., Ammonium Nitrate Sunset and Uranium Sunset.

The Department agrees that cash deposit rates should be accurate and current. This does not mean, however, that the Department is required to revise cash deposits annually. Section 751 of the Act establishes a process for keeping cash deposit requirements accurate and current, and we are required by the Act to follow this process. Specifically, section 751 of the Act requires the Department to conduct an administrative review when a respondent has entries during a POR and requests a review, and we intend to follow this requirement at the earliest possible moment (i.e.,

¹⁶ In its comments, Acron implies that this rate is not valid because it was based on AFA. However, we note that this rate was calculated for the sole participating respondent in the less-than-fair-value investigation and was based on the respondent’s reported data; the Department did not apply AFA (either in whole or in part) in its calculations. See Notice of Final Determination of Sales at Less Than Fair Value; Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation, 65 FR 42669, 42672 (Jul. 11, 2000).

in the next review period, if a review is requested by a company that has reviewable entries in that POR).

Regarding Acron's argument that the Department has failed to calculate a market-economy cash deposit rate within a "reasonable period of time" after Russia's attainment of market-economy status, we disagree. Because there was a suspension agreement in place, there were no cash deposit requirements in place until the antidumping duty order was imposed in 2011. Indeed, we are required by the Act to conduct an administrative review when a respondent has entries during a POR and requests a review. If the respondents had made entries of subject merchandise during the POR, we would have reviewed those entries and revised their cash deposit rates in this POR. However, this is not the case here. The record shows that both respondents made entries in the 2012-2013 POR and, thus, may have their cash deposit rates revised by requesting an administrative review for that period in April 2013.

Regarding EuroChem's contention that the Department could calculate a weighted-average dumping margin using its data in this review and then prospectively apply the same rate to the entry in the next POR,¹⁷ we disagree that such an approach is appropriate. While EuroChem asserts that it will not make additional entries during the next administrative review period, it is uncertain whether this would be the case. Because the Department's administrative resources are limited, it is not feasible to conduct a review applicable to the first few days of the next review period and then also conduct a review for the remaining 11 plus months, particularly when the entire POR may be captured in a single review that may be initiated in only a few months from now.

We also disagree with the respondents that the Department should presume that they are not dumping now based either on their behavior when the suspension agreement was in force (Acron) or the calculation of zero rates of dumping in other cases involving the former Soviet Union (EuroChem). As a general matter, suspension agreements are designed to eliminate dumping, but the sales under the suspension agreement are not an accurate indicator of commercial behavior that would occur without the discipline of the agreement. The sales Acron made when the suspension agreement was still in effect were governed by the reference prices and export limits established by the agreement; therefore, they are not indicative of Acron's current or future commercial behavior absent the discipline of the suspension agreement. With respect to EuroChem's argument, the dumping rate found for urea has no relationship to EuroChem's sales of ammonium nitrate.

Finally, we disagree with Acron that Gerdau is applicable here. The issue before the Court in that proceeding was whether liquidation of a respondent's POR entries prevented the petitioners from challenging the cash deposit rate determined in the administrative review.¹⁸ In that case, the Court held that the cash deposit rate had legal consequences beyond the assessment of

¹⁷ Although EuroChem makes an unspecified reference to "prior stainless steel reviews" of the respondent Viraj as support for its position, it cites no specific segment or proceeding. Accordingly, without a more specific reference, we have been unable to consider the facts and conclusions in that unspecified proceeding, other than noting that EuroChem's allegation does not appear to be consistent with the Department's normal practice.

¹⁸ In Gerdau, there were POR entries which were liquidated after the administrative review was completed because the plaintiff did not seek an injunction.

antidumping duties in the same review because it impacted the respondent's eligibility for revocation. The Court's ruling in Gerdau does not direct the Department to conduct administrative reviews in the absence of POR entries in order to calculate revised cash deposit rates. Moreover, we also disagree that KYD is relevant, and Acron does not explain why it considers it to be so. In KYD, the Court stated that the calculation of the cash deposit rate was not at issue. See KYD, 779 F. Supp. 2d at 1371-72.¹⁹ In fact, the plaintiffs in that case expressly stated, "We don't care about the cash deposit rate." Id at 1371.

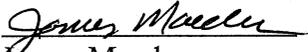
Recommendation:

It is not the Department's practice to conduct a review solely for the purpose of revising an existing cash deposit rate. Therefore, we recommend rescinding this review for the reasons noted above and continuing to apply the cash deposit rate calculated in the investigation.



Agree

Disagree


James Maeder
Director, Office 2
AD/CVD Operations
Import Administration

10/22/12
(Date)

¹⁹ In KYD, the Court stated that it "...need not review Commerce's selection . . . of the . . . rate for any future entries whatsoever."