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Investigation
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MEMORANDUM TO: Bernard T. Carreau
Acting Assistant Secretary
for Import Administration

FROM: Holly A. Kuga
Acting Deputy Assistant Secretary
for Import Administration, Group II

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Investigation of Ferrovandium from the Republic of South Africa

Summary

We have analyzed the comment submitted by the petitioners¹ in the antidumping duty investigation of ferrovandium from the Republic of South Africa (South Africa). For this final determination, we recommend assigning a margin to the respondents based upon total adverse facts available.

Background

On June 25, 2002, the Department of Commerce (the Department) preliminarily determined that imports of ferrovandium from South Africa are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733 of the Act. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Ferrovandium from the Republic of South Africa, 67 FR 45083 (July 8, 2002) (Preliminary Determination). In the preliminary determination, the Department calculated antidumping duty margins for the two respondents, Xstrata South Africa (Proprietary) Limited (Xstrata) and Highveld Steel and Vanadium Corporation Ltd., (Highveld). Since the preliminary determination, the following events have occurred.

¹ The petitioners in this case are The Ferroalloys Association Vanadium Committee (TFA Vanadium Committee) and its members: Bear Metallurgical Company, Shieldalloy Metallurgical Corporation, Gulf Chemical & Metallurgical Corporation, U.S. Vanadium Corporation, and CS Metals of Louisiana LLC.

On July 9, 2002, Xstrata, timely filed an allegation that the Department made several ministerial errors in its preliminary determination. In addition, during July 2002, Xstrata and Highveld separately notified the Department in writing that they would not participate in the Department's verification because they believed that any further participation and use of resources would not likely yield them much success in the investigation. See the letters from Highveld and Xstrata to the Secretary of Commerce dated July 15, 2002, and July 12, 2002, respectively. On September 12, 2002, the Department found that the preliminary determination contained certain ministerial errors. See Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Ferrovandium from the Republic of South Africa, 67 FR 59050 (September 19, 2002). The petitioners filed their case brief on September 26, 2002. The respondents did not file case or rebuttal briefs.

Issue

The Department only received comments on one issue from the petitioner and no comments from the respondents. This single issue for analysis is whether to apply total adverse facts available.

Discussion of Issue

Issue: Application of Total Adverse Facts Available

The petitioners argue that the Department should assign Highveld and Xstrata a margin based upon total adverse facts available for two reasons, both relating to respondents refusal to allow the Department to verify their responses. See petitioner's case brief dated September 26, 2002.

First, the petitioners claim that the use of facts available is warranted because section 776(a) of the Tariff Act of 1930, as amended (the Act), states that if an interested party provides information in the course of an investigation, but the information cannot be verified, the Department shall use the facts otherwise available in reaching the applicable determination. Furthermore, the petitioners note that section 351.307(b)(4) of the Department's regulations states that if a person objects to verification, the Secretary will not conduct verification, and may disregard any and all information submitted by the person in favor of using facts available under section 776 of the Act. According to the petitioners, the fact that the data provided by Highveld and Xstrata cannot be verified requires the Department, pursuant to section 776(a) of the Act, to apply facts available to both respondents. See petitioner's case brief dated September 26, 2002.

Second, the petitioners also assert that the Department should determine that an adverse inference be used in its selection of facts available. The petitioners note that the Department can make an adverse inference if it makes the additional finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." See section 776(b) of the Act. In making a determination that a respondent has been uncooperative, the petitioners contend that the Statement of Administrative Action (SAA) requires the Department to consider the extent to which a party may benefit from its own lack of cooperation.

See the SAA, H. Doc. No. 316, Vol. 1, 103rd Cong., 2d Sess. at 870 (1994). According to the petitioners, by refusing to allow the Department to verify their responses, the respondents have failed to cooperate by not acting to the best of their ability. Moreover, should the Department not apply adverse facts available, the petitioners assert that the respondents will benefit from their lack of cooperation because the estimated margins calculated in the preliminary determination are less than the initiation rate which was based on information in the petition. Furthermore, the petitioners note that the Department would establish an unfortunate precedent if it did not apply adverse facts available in this situation. Namely, the petitioners claim that future respondents who are satisfied with their preliminary estimated margins would simply choose to forego verification if administrative precedent gave them a basis to believe that the final determination would not be detrimental to their interests.

Additionally, to support their allegation for the use of adverse facts available, the petitioners point out that section 776(b) of the Act permits an adverse facts available rate to be based on information derived from: (1) the petition, (2) a final determination in the investigation, (3) any previous review, or (4) any other information placed on the record. The petitioners argue that the Department must base its adverse inference on information from the petition because the sources of information listed as items two and three above are not available, and the source listed as item four can only refer to unverified information placed on the record by Highveld or Xstrata. Since using any information placed on the record by Highveld or Xstrata would benefit the respondents, the petitioners assert that item four is clearly not a valid basis for an adverse inference. Therefore, the petitioners argue that the Department should use as adverse facts available the 116 percent margin which was used in the initiation of this investigation. See Notice of Initiation of Antidumping Duty Investigations: Ferrovandium From the People's Republic of China and the Republic of South Africa, 66 FR 66398 (December 26, 2001)

Department's Position

We agree with the petitioners. Section 776(a)(2) of the Act provides that, if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination. Section 782(d) of the Act directs the Department to provide parties with an opportunity to correct their deficient submissions, noting that the Department may disregard interested parties' submissions if they do not meet the criteria found in section 782(e) of the Act. One of the criteria found in section 782(e) of the Act is that the information can be verified. Although Highveld and Xstrata responded to the Department's original and supplemental questionnaires, they refused to allow the Department to verify their questionnaire responses. See the letters from Highveld and Xstrata to the Secretary of Commerce dated July 15, 2002, and July 12, 2002, respectively. Because section 782(i) of the Act requires the Department to rely upon verified information in making its final determination in an investigation, and the Department was not permitted to verify the information submitted by the respondents in this investigation,

pursuant to sections 776(a)(2)(D) and 782(e)(2) of the Act, we believe it is appropriate to use the facts otherwise available in reaching our final determination.

In reaching a determination using facts available, section 776(b) of the Act provides that the Department may use an inference that is adverse to the interests of a party if that party has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. To examine whether the respondent "cooperated" by "acting to the best of its ability" under section 776(b) of the Act, the Department considers, *inter alia*, the accuracy and completeness of submitted information and whether the respondent has hindered the calculation of accurate dumping margins. See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil, 65 FR 5554, 5567 (February 4, 2000). In the instant investigation, the accuracy and completeness of the submitted information has not been established because the respondents did not agree to verification. Without verified data on the record, the Department cannot calculate accurate margins. Therefore, the respondents' refusal to allow verification has hindered the calculation of accurate dumping margins. Moreover, by refusing to allow the Department to verify their responses, the respondents did not act at all to comply with the Department's request for verification, let alone act to the best of their ability. Consequently, we have determined that it is appropriate to base the antidumping duty margins for Highveld and Xstrata on adverse facts available.

Section 776(b) of the Act authorizes the Department to use, as adverse facts available, information derived from the petition, the final determination in the investigation, any previous administrative review, or any other information placed on the record. Given that we are in the investigative stage of this proceeding, and the only information on the record with which to calculate an adverse facts available rate is information from the petition (the margins calculated from the information submitted by the respondents are not adverse to the interests of the respondents when compared to the initiation margin which was based on information in the petition), we are using, as adverse facts available, the margin which was used by the Department to initiate this investigation (116 percent). See Notice of Initiation of Antidumping Duty Investigations: Ferrovandium From the People's Republic of China and the Republic of South Africa, 66 FR 66398 (December 26, 2001) (Ferrovandium Initiation Notice). Section 776(c) of the Act requires that, when the Department relies on secondary information (such as the petition) as facts available, it must, to the extent practicable, corroborate that information from independent sources that are reasonable at its disposal. The SAA clarifies that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA, at 870. We have corroborated the initiation margin as required by section 776 (c) of the Act. For details regarding corroboration of the information used to derive the initiation margin, see the Memorandum from Mark Manning to Holly A. Kuga regarding corroboration of secondary information used as adverse facts available, dated concurrently with this memorandum.

Recommendation

Based on our analysis of the comment received, we recommend adopting the position described above, that the application of adverse facts available is warranted with respect to Highveld and Xstrata. If this recommendation is accepted, we will publish a final determination and the final dumping margin for Highveld and Xstrata of 116 percent in the Federal Register.

Agree _____

Disagree _____

Let's Discuss _____

Bernard T. Carreau
Acting Assistant Secretary
for Import Administration

Date