

67 FR 77747, December 19, 2002

A-412-803  
Administrative Review  
POR: 7/1/2000 – 6/30/2001  
Public Document  
GIIO4: MMM

December 10, 2002

MEMORANDUM TO: Faryar Shirzad  
Assistant Secretary  
for Import Administration

FROM: Bernard T. Carreau  
Deputy Assistant Secretary  
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Administrative Review, Final Results, of Industrial Nitrocellulose (INC)  
from the United Kingdom – July 1, 2000 through June 30, 2001

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### **Summary**

We have analyzed the comments and rebuttal comments of the interested parties in the 2000 – 2001 administrative review of the antidumping duty order covering INC from the United Kingdom. As a result of our analysis of the comments received from interested parties, we have made changes in the margin calculation. We recommend that you approve the position we have developed in the “Discussion of the Issue” section of this memorandum.

### **Background**

On August 12, 2002, the Department of Commerce (the Department) published in the Federal Register the preliminary results of the administrative review of the antidumping duty order on INC from the United Kingdom. See Industrial Nitrocellulose from the United Kingdom: Notice of Preliminary Results of Antidumping Duty Administrative Review, 67 FR 52447 (August 12, 2002)(Preliminary Results). The period of review (POR) is July 1, 2000, through June 30, 2001.

We invited interested parties to comment on the Preliminary Results of review. In response to this invitation ICI and its subsidiary, NEC, as well as its U.S. affiliate, ICI Americas Inc. (ICIA) (collectively respondent) filed a case brief on November 13, 2002. No other interested parties filed case briefs. Petitioner in this review, Green Tree Chemical Technologies, Inc., filed a rebuttal brief on November 18, 2002.

## **Discussion of the Issue**

**Comment:** Whether the Department Should Calculate the Net Interest Expense Ratio Based on the Fiscal Year Financial Statements of the Subsidiary, Nobel's Explosives Company, Ltd. (NEC), rather than the fiscal year consolidated financial statements of the parent, Imperial Chemical Industries, PLC (ICI).

Respondent argues that the Department must use the interest expenses of the subsidiary, NEC, rather than those of the parent, ICI, in the final results to calculate the net interest expense ratio used to calculate the cost of production (COP) and constructed value (CV) of subject merchandise.<sup>1</sup>

Respondent contends that the antidumping statute requires the Department to base its calculations of COP and CV on the records of the exporter or producer of subject merchandise so as to calculate as accurately as possible the COP and CV. To support its position, respondent cites section 773(f)(1)(A) of the Tariff Act of 1930, as amended (the Act), which reads as follows:

Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. The administering authority shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other developmental costs.

Therefore, respondent asserts, the Department must calculate the net interest expense ratio using the financial statements of the actual producer or exporter rather than those of its parent. Respondent argues that by using the financial statements of the producer or exporter, the Department avoids using “an interest expense factor of a consolidated group {that} is more likely to include interest expenses associated with producing products other than those subject to the antidumping order.” See E.I. Dupont de Nemours & Company v. United States, No. 00-1100 (Fed. Cir. February 12, 2001)(unpublished, nonprecedential)(Dupont 2001). Respondent argues further that this is the only way to “determine as accurately as possible the true cost to the respondent of manufacturing the subject merchandise.” See American Silicon Technologies v. United States, Court No. 97-02-00267, Slip Op. 2001-109 (Court of International Trade (CIT) August 27, 2001)(American Silicon 2001) citing

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<sup>1</sup> NEC is the ICI subsidiary that manufactured and marketed subject merchandise during the POR.

Timken Co. v. United States, 852 F. Supp. 1040, 1049 (CIT 1994).

Respondent claims that, because the Department declined to follow the express language of the statute in the Preliminary Results and use NEC's records as the exporter and producer of subject merchandise, the end result is a net interest expense ratio that does not remotely correlate to the actual costs incurred to produce and sell INC during the POR. Respondent argues that this is evident due to the following facts: 1) NEC's sales represent a small portion of ICI's sales; 2) NEC incurred no interest expenses of its own because it had no borrowings during the POR; and, 3) ICI's interest expense was not related to the production and sale of subject merchandise by NEC.

Respondent concedes that the Department's practice to calculate net interest expense ratios based on the consolidated financial statements of group companies rather than the financial statements of subsidiaries could prevent "the controlling member from shifting interest expenses away from the calculated cost of production." See Dupont 2001. However, respondent argues that interest expenses were not shifted in the instant review. Although respondent also concedes that "the statute is silent on whether the interest expenses of the exporter or producer 'reasonably reflect' the actual costs of production where the exporter or producer is part of a consolidated group of companies under the control of a single member," (See Dupont 2001), respondent states that "the statutory language contains an ambiguity in the words 'specific exporter or producer' in that the statute does not specify at what corporate organizational level, *i.e.*, parent, subsidiary, etc. the specific exporter should be designated." See AIMCOR v. United States, 69 F. Supp. 2d. at 1345 (CIT 1999)(AIMCOR); see also, section 773(e)(2)(A) ("the constructed value . . . shall be . . . the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review. . .").

Notwithstanding the above, respondent alleges that the "policy reasons" the Department uses as its rationale for calculating the net interest expense ratio based on the parent's consolidated financial statements are not applicable in the instant review. Respondent summarizes the policy, which it claims is the basis of the Department's presumption that it is appropriate to calculate financial expenses using the consolidated financial statements of the parent, by citing Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Administrative Review, 67 FR 6490 (February 12, 2002), and accompanying Issues and Decision Memorandum, at Comment 10 (Sheet and Strip Decision Memo), wherein the Department states that its "established policy is to calculate the financial expenses for COP and CV purposes based on the borrowing costs incurred at the consolidated group level. This practice recognizes two facts: (1) the fungible nature of money within a consolidated group of companies; and, (2) that the controlling entity within a consolidated group has the power to determine the capital structure of each member company within its group." Respondent argues that this policy and the application of the Department's presumption have limits. Specifically, respondent, citing Gulf States Tube Division of Quanex Corp. v. United States, 981 F. Supp. 649 (CIT 1997)(Gulf States), asserts that the presumption that it is appropriate to use consolidated financial statements to calculate financial expenses is rebuttable ("Commerce's practice is to consider majority equity ownership to be prima

facie evidence of parent control over a subsidy. As a result, {defendant-intervenors} had the burden of submitting evidence to Commerce rebutting this presumption.”).

Moreover, respondent claims that because there is no evidence of “inter-company borrowing” in the instant review, the Department must use the financial statements of the producing subsidiary to calculate the net interest expense ratio. Respondent notes that, among the factors considered by the courts in determining whether the presumption has been rebutted, the most compelling factor is whether “inter-company borrowing” exists. Respondent cites AIMCOR, wherein the Court decided that when “there is evidence on the record from which to determine the actual ratio of financial expenses for COP and CV purposes, Commerce may not ignore that ratio in favor of a ratio found from consolidated statements. Commerce is statutorily mandated to utilize the ratio which will more accurately reflect actual costs incurred – especially in this case, where there is no evidence of inter-company borrowing or other indicia that the {parent of the producing subsidiary’s parent} determined {the subsidiary producer’s} cost of money.” AIMCOR, 69 F. Supp. 2d at 1353. Respondent claims that the Department has consistently given the factor of “inter-company borrowing” significant weight in its determinations. See Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review, 67 FR 6488 (February 12, 2002), and accompanying Issues and Decision Memorandum, at Comment 11; see also, Final Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil, 65 FR 7497, 7500 (February 15, 2000).

Further, respondent contends that the interaction, or lack thereof, between ICI and NEC is not limited to simply a lack of “shared borrowing.” Respondent asserts that the record evidence in this review demonstrates that equity has not been used as an alternative for debt, and that no new equity has been created in NEC for more than a decade. Respondent argues further that, not only are officers of NEC responsible for managing the finances and cash flow of NEC, in fact, if NEC were to borrow to finance operations relating to subject merchandise, it would do so independently in its own name and for its own account. According to respondent, in other cases where the Department has faced the issue at hand, it has placed greater weight on factors other than those weighed by the courts such as the degree of the parent company’s equity ownership in its subsidiary, the presence of officers shared by the parent and the subsidiary, and the consolidation of subsidiaries’ financial statements into the parent’s financial statements. See Notice of Final Results of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 65 FR 78472, 78474 (December 15, 2000) (Salmon from Chile), and accompanying Issues and Decision Memorandum, at Comment 7 (Salmon Decision Memo).

However, according to respondent, the court has rejected such evidence when the record demonstrates that actual control of the subsidiary’s capital structure by the parent was not present. See American Silicon 2001.

Respondent concludes that the Department’s presumption that it is appropriate to use the consolidated financial statements of the parent company to calculate interest expenses is fully rebutted because: 1) there is no evidence of inter-company or shared borrowing between ICI and NEC; 2) no new equity has been created in NEC in over a decade, and equity has not been used as an alternative for debt; 3) NEC manages its finances; 4) no other entity besides NEC financed the production of INC during the

POR; 5) the interest expenses of the parent company – ICI – during the POR do not relate to subject merchandise; and, 6) NEC did not incur interest expenses during POR.

Finally, respondent argues that, although record evidence and binding law require the Department to use only NEC's financial expenses, if the Department continues to use the financial expenses of ICI in the final results, it should change the denominator it used in the Preliminary Results. Specifically, respondent states that in calculating the net interest expense ratio, the Department used as the denominator the cost of sales from continuing operations. Respondent argues that the Department should have used the total cost of goods sold (COGS) as the denominator because the numerator includes ICI's actual interest payments without regard to whether, at year end, the involved operations were continuing or were discontinued. According to respondent, this correction will ensure that the denominator is consistent with the numerator.

Petitioner argues that the Department was correct in calculating the net interest expense ratio based on the parent company's consolidated financial statements. Petitioner asserts that the Department's long-standing, routine practice is to calculate financial expenses for COP and CV purposes based on the borrowing costs at the consolidated group level, and that this practice is in accordance with the Act. See, e.g., Salmon Decision Memo at Comment 7. Petitioner states that the Department's policy of using the parent company's interest expense to calculate the COP and CV is based on recognition of the parent company's control over its subsidiary. See Salmon Decision Memo at Comment 7 (it is the Department's position that majority equity ownership is prima facie evidence of corporate control); see also Sheet and Strip Decision Memo at Comment 10 (the Department's established policy is to calculate financial expenses for COP and CV purposes based on the borrowing costs incurred at the consolidated group level). Petitioner contends that the Department's position in Salmon from Chile applies to the instant review because ICI possesses more than a majority ownership in NEC – it has 100% ownership. Petitioner asserts it is also the Department's position that, although the specific nature of financial control is difficult to identify at times, the control may exist nonetheless:

Companies finance operations through various forms of debt transactions, stock transactions, and even corporate operating transactions. These financing activities are conducted both with internal and external parties. The controlling management of the group coordinates these activities in order to maximize the benefit to the group as a whole. . . . The important point here is that the corporate control on the financing operations of the individual group member companies may exist even in the apparent absence of specific inter-company financing transactions. The CIT has upheld the Department's practice of relying on consolidated financial statements when *corporate control, whether direct or indirect*, exists.

Salmon Decision Memo, at Comment 7, citing E.I. Dupont de Nemours & Company v. United States, Court No. 96-11-02509, Slip Op. 98-7 (CIT January 29, 1998)(Dupont 1998)(Emphasis added).

Petitioner argues that ICI exercises significant control over its INC operations in various ways. For instance, petitioner argues that ICI has exercised control by changing the corporate organizational structure of NEC and making changes over a period of time in the entities that manufacture and market subject merchandise. See pages A-5 and A-6 of respondent's questionnaire response dated November 13, 2001. Petitioner explains that this is significant because the Department's antidumping duty questionnaire states that "control exists where one person is legally or operationally in a position to exercise restraint or direction over another person." See page A-4 of the Department's antidumping duty questionnaire. Petitioner contends that respondent's attempt to distance ICI from NEC and the INC business is contradicted by statements in its own questionnaire response indicating a close relationship between ICI and NEC, as well as involvement by ICI in INC business operations. In making this argument, petitioner cites Business Proprietary Information (BPI). We discuss petitioner's argument in detail in a separate memorandum. See Memorandum to the File from Michele Mire Re: Business Proprietary Information (BPI) Contained in Petitioner's Rebuttal Comments and the Department's Position, dated December 10, 2002 (BPI Memo).

Petitioner contends that ICI appears to control certain NEC financial management decisions and operations. Petitioner asserts that respondent's original questionnaire response, coupled with documentation obtained by Department officials at verification, demonstrate that ICI has the ability to control at least certain aspects of NEC's financial management. See BPI Memo.

Petitioner argues that ICI does more than control NEC: it is directly involved in INC operations. Petitioner supports this argument by citing respondent's questionnaire response wherein respondent specifically identified those companies that were "related to the ICI group in the United Kingdom and the United States and which were directly involved in the manufacturing, sale, or purchase of INC." Respondent identified ICI as being the "parent company" whose role was "home market manufacturer, marketer, and exporter of INC through NEC during the POR." Respondent identified NEC as being the "wholly-owned subsidiary of ICI" whose role was "manufacturer and marketer of INC in domestic and export markets through the full POR." Respondent identified ICI's U.S. affiliate, ICIA, as a "wholly-owned U.S. subsidiary of ICI" whose role was U.S. "importer and related sales affiliate throughout the POR." See respondent's November 13, 2001, response at page A-8. Thus, petitioner concludes, by respondent's own admission, ICI exercises legal and operational control over NEC and the INC business.

Petitioner argues that the fact that ICI affiliates have provided services to respondent demonstrates further the existence of inter-company activities between the parent, ICI, and subsidiary, NEC. See BPI Memo for the names of the ICI affiliates and the exact services they provided.

Petitioner concludes that the record evidence in the instant review supports the Department's reliance on the fiscal year consolidated financial statements of the parent company, ICI, to calculate the net interest expense ratio used in the Preliminary Results.

## **Department's Position**

We agree with petitioner. We also agree with respondent, in part.

We point out that while the law does not specifically identify how to calculate the net interest expenses included in the COP and CV, the Department has developed a practice, which has been used consistently and upheld repeatedly by the courts, where we calculate the net interest expense ratio for COP and CV purposes based on the consolidated audited fiscal year financial statements of the highest consolidation level available – i.e., the ultimate parent. See, e.g., Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands; Final Results of Antidumping Administrative Review, 63 FR 37516, 37517 (July 13, 1998)(Aramid Fiber); see also 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, at Comment 7 (Steel Beams Decision Memo). ICI is the ultimate parent of NEC. Record evidence substantiates that NEC is wholly owned by ICI. See Cost Verification Report at 2; see also respondent's questionnaire response dated November 13, 2001 at A-12.

Moreover, respondent's reliance on Dupont 2001 for why the Department should recalculate the net interest expense ratio based on the financial statements of the subsidiary is misplaced. First, this decision was designated as nonprecedential by the Federal Circuit and may not be employed as precedent. Second, in decisions involving the same antidumping duty case – Aramid Fiber – the CIT twice sustained the Department's calculation of interest expenses using the consolidated financial statements of the parent, and the Federal Circuit affirmed the CIT's decisions. See Dupont 1998; see also E.I. Dupont de Nemours & Company v. United States, Court No. 97-08-01335, Slip Op. 99-47 (CIT June 2, 1999)(Dupont 1999). Furthermore, in Dupont 1998, because Dupont did not produce evidence which would overcome the presumption of corporate control, the CIT specifically did not accept Dupont's proposition that, "notwithstanding a respondent's membership in a broader corporate structure that affects its capital resources and management control, Commerce should depart from its general rule when company-specific data provides the most accurate picture of a respondent's true financial requirements and borrowing costs."

Additionally, the CIT has upheld the Department's practice to consider majority equity ownership to be prima facie evidence of a parent's control over its subsidiary, and it has explained that, as a result of this practice, the subsidiary has the burden of submitting evidence to rebut this presumption of control. See Gulf States; see also Dupont 1998. The CIT has also rejected the argument that while the parent controls a majority of the subsidiary's shares, the parent exercises no effective production, marketing or managerial control over the subsidiary's operations. See Gulf States. Record evidence in this instant review substantiates that not only does ICI own NEC, but it exerts control over NEC and the INC business. See, e.g., Cost Verification Report. Thus, respondent has not rebutted effectively the fact that ICI controls NEC.

Further, we note that respondent reported that "historically, the INC business has been operated by

ICI, although different ICI entities have operated the business during various points in time.” See respondent’s questionnaire response dated November 13, 2001 at A-5. The fact that ICI has operated its INC business through various entities over time exemplifies how ICI has determined the capital structure of its group companies involved in the production of subject merchandise.

The significance of the parent’s ability to determine capital structure of its subsidiaries has been recognized by the CIT. See Gulf States, citing Final Determination of Sales at Less Than Fair Value: New Minivans from Japan, 57 FR 21946 at Comment 18 (May 26, 1992)(the CIT stated that the Department has a well-established practice of deriving net financing costs based on the borrowing experience of the consolidated group of companies, and that this practice is based on the fact that the group’s parent has the power to determine the capital structure of each member company within the group). Further, as the Department stated in the Steel Beams Decision Memo, at Comment 7,

the controlling entity within a consolidated group has the ultimate power to determine the capital structure and financial costs of each member in the group. . . . Because the majority of the board of directors, and by extension management, of each group member is ultimately controlled by each successive board of directors, up to the highest level board of directors and management, it is reasonable to conclude that the overall strategic operations are guided from above. The Department recognizes that the very purpose of creating a corporate group is to leverage the strategic and competitive advantages of individual group companies for the betterment of the whole. We cannot ignore the fact that the company is operating as a member of a larger entity with the support (direct or indirect) to which it is entitled from the group.

Respondent argues that “the now verified record demonstrates conclusively that there is neither inter-company borrowing between NEC and the ICI group nor any other indicia of control of {ICI over} the financial operations of NEC.” Respondent argues further that record evidence shows that “NEC controls and is responsible for every aspect of its financial operations.” On the contrary, record evidence indicates that there is financial activity between ICI and NEC. Record evidence also demonstrates that ICI controls various aspects of the finances of NEC. While respondent can say that NEC exercises daily management of its finances, it cannot say that ICI does not control NEC. See Cost Verification Report at page 18; see also BPI memo.

Regarding respondent’s claim that there was no “inter-company borrowing” during the POR, at verification Department officials obtained documentation substantiating that “inter-company borrowing” had actually occurred in the instant review. See BPI Memo; see also Cost Verification Report at 17. Moreover, we note that respondent places too much weight on this factor as it is not a necessary criterion in determining whether the parent controls the finances of its subsidiary. See Salmon Decision Memo at Comment 7; see also, 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 at Comment 14 (Uranium Decision Memo)(corporate control of the financing operations of individual group member companies may exist even in the apparent absence of specific inter-company financing transactions). While we did not find evidence that NEC incurred interest expenses during the POR, record evidence substantiates the fact that ICI has the authority to control NEC's finances, and actually exerts that control over specific areas of NEC's finances, as discussed in this memorandum.

Although respondent cites AIMCOR as support for its argument, in AIMCOR the CIT stated that "Commerce is justified in utilizing consolidated financial statements when corporate control, whether direct or indirect, exists..." AIMCOR, 69 F. Supp. 2d. at 1354. While, in that case, the CIT stated that "Commerce is statutorily mandated to utilize the ratio which will more accurately reflect actual costs incurred – especially ... where there is no evidence of inter-company borrowing or other indicia" that the respondent's parent company determined the respondent's cost of money, we note, however, that the AIMCOR litigation (including the remand ordered on this issue) was stayed indefinitely by the CIT on March 2, 2000. As a result, the Department has had no opportunity to address the Court's ruling on remand. For these reasons, the AIMCOR decision does not compel adoption of respondent's argument.

Therefore, because respondent neither presented sufficient evidence rebutting the presumption of corporate control by ICI over NEC, nor refuted the specific examples of control found in record evidence and discussed in this memorandum, we have continued to use the consolidated financial statements of the parent to calculate interest expenses in these final results of review.<sup>2</sup>

However, we do agree with respondent that the denominator in the net interest expense ratio calculation should be changed so that it is consistent with the data represented by the numerator. For these final results, we changed the denominator from the cost of sales of continuing operations to the total COGS.

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<sup>2</sup> In the prior administrative review covering the period July 1, 1999, through June 30, 2000, the Department inadvertently used a net interest expense ratio based on the financial statements of NEC as reported by respondent. The issue of net interest expenses was not raised by interested parties in their case briefs in the 1999 – 2000 administrative review. Notwithstanding the above, the Department has a long-standing policy of deriving financial expenses from the consolidated audited fiscal year financial statements of the highest consolidation level available ( i.e., the ultimate parent). Consistent with this long-standing policy, in this review we are basing financial expenses on the consolidated financial statements of the parent company, ICI.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting the position described above. If our recommendation is accepted, we will publish the final results and the final weighted-average dumping margin in the Federal Register.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

Let's Discuss \_\_\_\_\_

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Faryar Shirzad  
Assistant Secretary  
for Import Administration

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(Date)