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Investigation
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March 4, 2014

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh *CM*
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for Preliminary Determination of the
Antidumping Duty Investigation of Ferrosilicon from Venezuela

SUMMARY

The Department of Commerce (“Department”) preliminarily determines that ferrosilicon from Venezuela is being, or is likely to be, sold in the United States at less than fair value (“LTFV”), as provided in section 733 of the Tariff Act of 1930, as amended (“the Act”). The period of investigation (“POI”) is July 1, 2012, through June 30, 2013. The estimated margins of sales at LTFV are shown in the “Preliminary Determination” section of this notice.

Background

Initiation

On July 19, 2013, the Department received antidumping duty (“AD”) petitions concerning imports of ferrosilicon from Venezuela filed in proper form on behalf of Globe Specialty Metals, Inc.; CC Metals and Alloys, LLC; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union; and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (collectively, “Petitioners”).¹ On August 8, 2013, the Department initiated an AD investigation on ferrosilicon from Venezuela.²

¹ See Letter to the Secretary of Commerce from Petitioners “Petitions for the Imposition of Antidumping Duties on Ferrosilicon from Russia and Venezuela” (July 19, 2013) (“Petitions”).

² See Ferrosilicon From the Russian Federation and Venezuela: Initiation of Antidumping Duty Investigations, 78 FR 49471 (August 14, 2013) (“Initiation Notice”).



On September 9, 2013, the International Trade Commission determined that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of ferrosilicon from Venezuela.³

Initiation of Cost Investigation

On December 13, 2013, Petitioners timely alleged that FerroAtlantica de Venezuela (“FerroVen”) made sales of ferrosilicon in its home market at prices below cost of production (“COP”) during the POI, pursuant to 19 CFR 351.301(c)(2)(ii)(A). On December 20, 2013, the Department initiated an investigation to determine whether FerroVen’s sales of ferrosilicon in the home market were made at prices below the COP during the POI and requested that FerroVen submit a response to section D of the AD questionnaire.⁴ On January 23, 2014, FerroVen submitted its section D response.

Period of Investigation

The POI is July 1, 2012, through June 30, 2013. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the Petitions, which was July 2013.⁵

Tolling of Deadlines and Postponement of Preliminary Determination

As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, through October 16, 2013.⁶ Therefore, all deadlines in this investigation have been extended by 16 days. If the new deadline falls on a non-business day, in accordance with the Department’s practice, the deadline will become the next business day.⁷ The tolled deadline for the preliminary determination of this investigation was January 13, 2014. Based on a timely request from Petitioners, on December 23, 2013, the Department postponed the deadline for the preliminary determination by 50 days to March 4, 2014, pursuant to section 733(c)(1)(A) of the Act, and 19 CFR 351.205(e).⁸

³ See Investigation Nos. 731-TA-1224-1225 (Preliminary) Ferrosilicon from Russia and Venezuela, 78 FR 55096 (September 9, 2013).

⁴ See Memorandum to James Doyle, Director, AD/CVD Operations, Office V, from The Team “Petitioners’ Allegation of Home Market Sales at Prices Below the Cost of Production for FerroAtlantica de Venezuela” (December 20, 2013) (“FerroVen Cost Initiation Memo”).

⁵ See 19 CFR 351.204(b)(1).

⁶ See Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, “Deadlines Affected by the Shutdown of the Federal Government” (October 18, 2013).

⁷ See Notice of Clarification: Application of “Next Business Day” Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended, 70 FR 24533 (May 10, 2005).

⁸ See Ferrosilicon From the Russian Federation and Venezuela: Postponement of Preliminary Determinations of Antidumping Duty Investigations, 78 FR 77423 (December 23, 2013).

Pre-Preliminary Determination Comments

On February 19, 2014, Petitioners filed pre-preliminary determination comments on the record.⁹

Scope of the Investigation

The merchandise covered by this investigation is all forms and sizes of ferrosilicon, regardless of grade, including ferrosilicon briquettes. Ferrosilicon is a ferroalloy containing by weight four percent or more iron, more than eight percent but not more than 96 percent silicon, three percent or less phosphorus, 30 percent or less manganese, less than three percent magnesium, and 10 percent or less any other element. The merchandise covered also includes product described as slag, if the product meets these specifications.

Ferrosilicon is currently classified under U.S. Harmonized Tariff Schedule (“HTSUS”) subheadings 7202.21.1000, 7202.21.5000, 7202.21.7500, 7202.21.9000, 7202.29.0010, and 7202.29.0050. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Scope Comments

In accordance with the preamble to the Department’s regulations,¹⁰ the Department set aside a period of time for parties to raise issues regarding product coverage, and encouraged all parties to submit comments within 20 calendar days of publication of the Initiation Notice.¹¹

On August 28, 2013, we received scope comments from FerroVen, the mandatory respondent in this investigation, and its parent company in Spain, FerroAtlantica, S.A. (“FASA”).¹² On September 6, 2013, we received rebuttal comments on the scope of the investigation from Petitioners.¹³

FerroVen argues that the Department should exclude ferrosilicon fines from the scope of the investigation. FerroVen argues that ferrosilicon fines are a byproduct of the production of lump ferrosilicon and that no producer intentionally produces fines, which it claims are “particles of ferrosilicon that are too small to be sold as lump ferrosilicon and will not be accepted by steel producers for use as an alloying agent or a deoxidizing agent.”¹⁴ As a result, FerroVen argues that the Department should exclude ferrosilicon fines from the scope of the investigation. FerroVen notes that the scope currently defines “all forms and sizes” of ferrosilicon, without limitation, and which, currently captures not only lump ferrosilicon, the target of the AD petition,

⁹ See Letter to the Secretary of Commerce from Petitioners “Pre-Preliminary Determination Comments” (February 19, 2014). Given the close proximity to the deadline for the preliminary determination and the current time constraints, we were unable to consider all of Petitioners’ comments for this preliminary determination.

¹⁰ See Antidumping Duties; Countervailing Duties, 62 FR 27323 (May 19, 1997).

¹¹ See Initiation Notice, 78 FR at 49472.

¹² See Letter to the Secretary of Commerce from FerroVen “Comments on the Scope of the Investigation” (August 28, 2013) (“FerroVen Scope Comments”).

¹³ See Letter to the Secretary of Commerce from Petitioners “Rebuttal to FerroAtlantica Comments on Scope of Investigation” (September 6, 2013) (“Petitioners Rebuttal Scope Comments”).

¹⁴ See FerroVen Scope Comments at 3.

but also ferrosilicon “fines.” FerroVen also notes that, for purposes of its scope exclusion request, ferrosilicon fines are defined as ferrosilicon sized as 0 x 3 millimeter (“mm”), meaning that no more than 10 percent of the material would be retained in a three mm sieve.¹⁵ FerroVen states that most of the fines generated in FerroVen’s ferrosilicon production process are recovered and reintroduced into the production process during subsequent furnace charges. However, FerroVen also exports a small quantity of its ferrosilicon fines to the United States where they are used in distinct applications from lump ferrosilicon. Therefore, FerroVen argues that, because these ferrosilicon fines cannot be substituted for lump ferrosilicon and do not compete with domestic lump ferrosilicon, the Department should exclude ferrosilicon fines from the scope of the investigation and/or order because there is no risk that the exclusion of ferrosilicon fines would undermine the effectiveness of any order that may result from this investigation.

In rebuttal, Petitioners argue that FerroVen misinterpreted the scope of the investigation, as initiated by the Department. Petitioners note that they clearly intended to include ferrosilicon fines within the scope of this investigation, whereas FerroVen presented no valid basis for excluding fines from the scope. Petitioners note that the scope description in the Petitions expressly state that “{t}his petition covers all forms and sizes of ferrosilicon. . .”¹⁶ Similarly, the scope definition submitted to the Department prior to the initiation of this investigation states that “the merchandise covered by these investigations is all forms and sizes of ferrosilicon. . .,”¹⁷ which also appears in the scope description in the Initiation Notice.¹⁸ Thus, Petitioners argue, there was a clear intent to cover all forms and sizes of ferrosilicon, including fines. Petitioners claim that the fact that fines may not meet the silicon-content specification for a particular grade of ferrosilicon does not mean that they should be excluded from the scope of this investigation, given that the scope of the investigation covers ferrosilicon with a silicon content of more than eight percent but not more than 96 percent.¹⁹ Finally, Petitioners argue that “Commerce owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition.”²⁰ For these reasons, Petitioners contend that the Department should reject FerroVen’s request and continue to include all ferrosilicon, including fines, within the scope of this investigation.

We preliminarily determine that the exclusion requested by FerroVen is not warranted. The scope of the investigation, as adopted from the Petitions, as noted above in the “Scope of the Investigation” section, and as written in the Initiation Notice, expressly states that “the merchandise covered by these investigations is all forms and sizes of ferrosilicon, regardless of grade, including ferrosilicon briquettes and slag. . .”²¹ The Department preliminarily finds that, ferrosilicon fines, as described within FerroVen’s comments, meet the plain language of the

¹⁵ See id., at 2.

¹⁶ See Petitioners Rebuttal Scope Comments at 2, citing to Petitions at 4.

¹⁷ See id., at 2, citing to Petitioners’ Letter to the Department “Responses to General Supplemental Questions to Petitions” (July 26, 2013) at 4.

¹⁸ See id., at 2, citing to Initiation Notice, 78 FR at 49472.

¹⁹ See id., at 3.

²⁰ See id., at 2, citing to Downhole Pipe & Equipment LP v. United States, 887 F. Supp. 2d 1311, 1319 (CIT 2012) (quoting Ad Hoc Shrimp Trade Action Comm. v. United States, 637 F. Supp. 2d 1166, 1174-75 (CIT 2009)).

²¹ See Initiation Notice, 78 FR at 49472; see also Petitions at 4; Letter to the Secretary of Commerce from Petitioners “Responses to General Supplemental Questions to Petitions” (July 26, 2013) at 4.

scope of the investigation and are necessarily a product for which Petitioners are seeking relief. Furthermore, the Department has a general preference for scope definitions which are not dependent on the end-use of the product, to ensure ease of administrability for U.S. Customs and Border Protection (“CBP”) to apply the scope upon importation.²² Products which meet the description of the language of scope of the investigations are necessarily covered by the scope, regardless of their intended use. Accordingly, FerroVen’s argument that ferrosilicon fines cannot be substituted for lump ferrosilicon is not sufficient for the Department to exclude merchandise which otherwise meets the description of the scope from these investigations.²³ Moreover, FerroVen does not dispute that fines are within the class or kind of merchandise, nor does it raise any question as to whether petitioners produce fines. Indeed, FerroVen stated that as a result of the crushing process, “a certain amount of ferrosilicon” will pass through the sieve and that “{f}ines are simply particles of ferrosilicon.”²⁴ Therefore, we preliminarily find that ferrosilicon fines are subject to the scope of this investigation as it is a product for which Petitioners are seeking relief.²⁵

Respondent Selection

In the Initiation Notice, the Department notified the public that the Department intended to select respondents based on CBP data for U.S. imports of ferrosilicon from Venezuela during the POI under the HTSUS subheadings listed in the scope of the investigation.²⁶ On August 9, 2013, the Department released CBP import data to interested parties.²⁷ No parties submitted comments regarding the data for respondent selection. On September 6, 2013, in accordance with section 777A(c)(1) of the Act, the Department selected FerroVen for individual examination in this investigation because it accounted for virtually all exports of Venezuelan ferrosilicon to the United States.²⁸ The Department issued its AD questionnaire to FerroVen on September 9, 2013. Between November 2013 and February 2014, FerroVen timely responded to the Department’s original and supplemental questionnaires. During the same time frame, Petitioners submitted comments regarding those responses.

Affiliation/Single Entity Determinations

Based on the information presented in FerroVen’s questionnaire responses, we preliminarily find that FerroVen is affiliated with its Spanish parent company, FASA, pursuant to sections 771(33)(E) and (G) of the Act, based on ownership and control. However, we do not find that the circumstances warrant consideration of FerroVen and FASA as a single entity for purposes of

²² See Initiation Notice, 78 FR at 49472.

²³ See Hardwood and Decorative Plywood From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 58273 (September 23, 2013) and accompanying Issues and Decision Memorandum at Comment 6D.

²⁴ See FerroVen Scope Comments, at 3.

²⁵ See, e.g., Walgreen Co. v. United States, 620 F.3d 1350, 1357 (Fed. Cir. 2010)

²⁶ See Initiation Notice, 78 FR at 49475.

²⁷ See Memorandum to the File from Irene Gorelik, Senior International Trade Compliance Analyst, Office 9 “Customs Data of U.S. Imports of Ferrosilicon” (August 9, 2013).

²⁸ See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through James C. Doyle, Director, Office 9, Antidumping and Countervailing Duty Operations, from Irene Gorelik, Senior International Trade Compliance Analyst, Office 9 “Antidumping Duty Investigation of Ferrosilicon from Venezuela: Respondent Selection” (September 6, 2013).

this preliminary determination.²⁹ Further, we preliminarily find that FASA is affiliated with FerroAtlantica, North America (“FANA”), FASA’s U.S. sales representative, pursuant to section 771(33)(G) of the Act, because it appears that the two companies operate under a principal-agent arrangement. For a full discussion of the proprietary details of this discussion, see Memorandum to the File through Catherine Bertrand, Program Manager, Office V, from Kabir Archuleta, Senior International Trade Analyst, Office V, “Antidumping Duty Investigation of Ferrosilicon from Venezuela: Preliminary Determination of Affiliation for FerroAtlantica de Venezuela” dated concurrently with, and hereby adopted by, this memorandum.

Determination of the Comparison Method

A. Differential Pricing Analysis

Pursuant to 19 CFR 351.414(c) (2013), the Department calculates dumping margins by comparing weighted-average normal values (“NVs”) to weighted-average export prices (“EPs”) (or constructed export prices (“CEPs”)) (the average-to-average method) unless the Secretary determines another method is appropriate in a particular situation. The Department’s regulations also provide that dumping margins may be calculated by comparing NVs, based on individual transactions, to the EPs (or CEPs) of individual transactions (transaction-to-transaction method) or, when certain conditions are satisfied, by comparing weighted-average NVs to the EPs (or CEPs) of individual transactions (average-to-transaction method).³⁰ In recent investigations, the Department applied a “differential pricing” analysis for determining whether application of the average-to-average method is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1).³¹ The Department may determine that in particular circumstances, consistent with section 777A(d)(1)(B) of the Act, it is appropriate to use the average-to-transaction method. The Department will continue to develop its approach in this area based on comments received in this investigation and on the Department’s additional experience with addressing the potential masking of dumping that can occur when the Department uses the average-to-average method in calculating weighted-average dumping margins.

The differential pricing analysis used in this preliminary determination requires a finding of a pattern of EPs (or CEPs) for comparable merchandise that differ significantly among purchasers, regions, or time periods. If such a pattern is found, then the differential pricing analysis evaluates whether such differences can be taken into account when using the average to average method to calculate the weighted-average dumping margin. The differential pricing analysis used in this preliminary determination evaluates all purchasers, regions, and time periods to determine whether a pattern of significant price differences exists. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. Purchasers are based on the customer codes reported by FerroVen. Regions are defined using the reported destination code (*i.e.*, zip code) and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the POI being examined based upon the reported date of sale. For purposes of analyzing sales

²⁹ See 19 CFR 351.401(f).

³⁰ See 19 CFR 351.414(b)(1) and (2).

³¹ See, e.g., Xanthan Gum From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33350 (June 4, 2013), and accompanying Issues and Decision Memorandum at Comment 3.

transactions by customer, region and time period, comparable merchandise is considered using the product control number and any characteristics of the sales, other than purchaser, region, and time period, that the Department uses in making comparisons between EP (or CEP) and NV for the individual dumping margins.

In the first stage of the differential pricing analysis used here, the “Cohen’s *d* test” is applied. The Cohen’s *d* test is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group. First, for comparable merchandise, the Cohen’s *d* test is applied when the test and comparison groups of data each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen’s *d* coefficient is calculated to evaluate the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen’s *d* test: small, medium or large. Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. For this analysis, the difference was considered significant if the calculated Cohen’s *d* coefficient is equal to or exceeds the large (i.e., 0.8) threshold.

Next, the “ratio test” assesses the extent of the significant price differences for all sales as measured by the Cohen’s *d* test. If the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test accounts for 66 percent or more of the value of total sales, then the identified pattern of EPs that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen’s *d* test as an alternative to the average-to-average method and application of the average-to-average method to those sales identified as not passing the Cohen’s *d* test. If 33 percent or less of the value of total sales passes the Cohen’s *d* test, then the results of the Cohen’s *d* test do not support consideration of an alternative to the average-to-average method.

If both tests in the first stage (i.e., the Cohen’s *d* test and the ratio test) demonstrate the existence of a pattern of EPs that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, we examine whether using only the average-to-average method can appropriately account for such differences. In considering this question, the Department tests whether using an alternative method, based on the results of the Cohen’s *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the average to average method only. If the difference between the two calculations is meaningful, this demonstrates that the average-to-average method cannot account for differences such as those observed in this analysis and, therefore, an alternative method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if 1) there is a 25

percent relative change in the weighted-average dumping margin between the average-to-average method and the appropriate alternative method where both rates are above the de minimis threshold, or 2) the resulting weighted-average dumping margin moves across the de minimis threshold.

Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in this preliminary determination, including arguments for modifying the group definitions used in this proceeding.

B. Results of the Differential Pricing Analysis

Based on the results of the differential pricing analysis, the Department finds that more than 33 percent but less than 66 percent of FerroVen's export sales confirm the existence of a pattern of CEPs for comparable merchandise that differ significantly among time periods. Further, the Department determines that the average-to-average method can appropriately account for such differences because there is not a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method. Accordingly, the Department preliminarily determines that it is appropriate to use the average-to-average method for all U.S. sales in making comparisons of CEP and NV for FerroVen.

DISCUSSION OF METHODOLOGY

A. Fair Value Comparisons

To determine whether sales of Ferrosilicon from Venezuela to the United States were made at LTFV, we compared the CEP to the NV, as described in the "Constructed Export Price" and "Normal Value" sections of this notice below. In accordance with section 777A(d)(1)A)(i) of the Act, we compared POI weighted-average CEPs to POI weighted-average NVs.

B. Product Comparisons

In the Initiation Notice, the Department notified interested parties of the opportunity to comment on the appropriate physical characteristics of ferrosilicon to be reported in response to the Department's AD questionnaire.³² Between August 29, 2013, and September 9, 2013, interested parties submitted comments on physical characteristics for use in this investigation and, on September 13, 2013, the Department issued to interested parties the physical characteristics to be used in this investigation.³³ Between September 13, 2013, and September 24, 2013, interested parties submitted additional comments on the product characteristics issued by the Department and, on September 24, 2013, counsel for Petitioners met with Department officials to discuss the various arguments placed on the record regarding the proper characterization of the product

³² See Initiation Notice, 78 FR at 49472.

³³ See Letter to All Interested Parties from Catherine Bertrand, Program Manager, AD/CVD Operations Office 9 "Product Characteristics for the Antidumping Investigation of Ferrosilicon from Venezuela" (September 13, 2013).

characteristics to be used for reporting purposes.³⁴ On September 24, 2013, the Department issued revised product characteristics to interested parties.³⁵ On December 19, 2013, the Department issued to interested parties a second revision to the physical characteristics to be used in this investigation.³⁶

In accordance with section 771(16) of the Act, all products produced by FerroVen, covered by the description in the “Scope of the Investigation” section above, and sold in Venezuela during the POI, are considered to be foreign like product for purposes of determining appropriate product comparisons to U.S. sales. We relied on the physical characteristics issued by the Department in this investigation to match U.S. sales of merchandise under consideration to comparison-market sales of the foreign like product. Where there were no sales of identical merchandise in the home market to compare to merchandise under consideration sold in the United States, we compared these U.S. sales to home-market sales of the most-similar, foreign like product on the basis of the reported physical characteristics and instructions provided in the AD questionnaire, which were made in the ordinary course of trade. Where we were unable to find a home market match of such or similar merchandise, in accordance with section 773(a)(4) of the Act, we based NV on constructed value (“CV”). Where appropriate, we made adjustments to CV in accordance with section 773(a)(8) of the Act.

C. Date of Sale

19 CFR 351.401(i) states that, in identifying the date of sale of the merchandise under consideration or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer’s records kept in the ordinary course of business. Additionally, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.³⁷ The Court of International Trade (“CIT”) stated that a “party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to ‘satisfy’ the Department that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.”³⁸ Alternatively, the Department may exercise its discretion to rely on a date other than invoice date if the Department “provides a rational explanation as to why the alternative date ‘better reflects’ the date when ‘material terms’ are established.”³⁹ The date of sale is generally the date on which the parties establish the

³⁴ See Memorandum to the File from Kabir Archuletta, Senior International Trade Analyst, Office 9 “Meeting with Counsel for CC Metals and Alloys, LLC, and Globe Specialty Metals, Inc. (‘Petitioners’)” (September 24, 2013).

³⁵ See Letter to All Interested Parties from Catherine Bertrand, Program Manager, AD/CVD Operations Office 9 “Revised Product Characteristics for the Antidumping Investigation of Ferrosilicon from Venezuela” (September 24, 2013).

³⁶ See Memo to the File from Irene Gorelik, Senior International Trade Analyst, Office V “Second Revised Product Characteristics for the Antidumping Investigations of Ferrosilicon from the Russian Federation and Venezuela” (September 13, 2013).

³⁷ See 19 CFR 351.401(i); see also *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001) (quoting 19 CFR 351.401(i)).

³⁸ See *id.*, 132 F. Supp. 2d at 1090 (brackets and citation omitted).

³⁹ See *SeAH Steel Corp. v. United States*, 25 CIT 133, 135 (CIT 2001).

material terms of the sale,⁴⁰ which normally includes the price, quantity, delivery terms and payment terms.⁴¹

In this case, FerroVen reported as its date of sale in the home market, the “earliest of the shipment date or invoice date as that is the date upon which the prices and quantity are finalized.”⁴² However, FerroVen also stated with respect to its home market sales that the “final price and quantity is not set until the date of invoice”⁴³ and that the “final terms of the sale are set by the invoice.”⁴⁴ For its U.S. sales, FerroVen stated that it reported the invoice date as the date of sale, except for sales made on a consignment basis, for which it reported the date the merchandise was withdrawn from consignment as the date of sale.⁴⁵ However, FerroVen is not notified of the final quantity withdrawn from warehouse until the customer issues the monthly usage reports, upon receipt of which FANA issues the invoice to the customer.⁴⁶ Further, FerroVen reported that, in the U.S. market, when the merchandise leaves the warehouse, “FANA will send the customer invoice, which sets out the final quantity and price to the customer.”⁴⁷

In light of the Department’s preference for using a uniform date of sale under section 19 CFR 351.401(i), we preliminarily select the invoice date as the date of sale for all of FerroVen’s sales of merchandise under consideration made during the POI in the home market and the U.S. market. Although “Congress expressed its intent, that for antidumping purposes, the date of sale be flexible so as to accurately reflect the true date on which the material elements of sale were established,”⁴⁸ the Department has a clear preference for “using a single date of sale for each respondent, rather than a different date of sale for each sale” because, *inter alia*, “by simplifying the reporting and verification of information, the use of a uniform date of sale makes more efficient use of the Department’s resources and enhances the predictability of outcomes.”⁴⁹ Accordingly, we select the invoice date as the date of sale for FerroVen’s sales of merchandise under consideration made during the POI based on the Department’s preference for using the invoice date and a uniform date of sale.⁵⁰ Further, the record does not demonstrate that another uniform date better represents the date that the material terms of sale are established for all sales.

⁴⁰ See 19 CFR 351.401(i).

⁴¹ See *USEC Inc. v. United States*, 31 CIT 1049, 1055 (CIT 2007).

⁴² See Letter to the Secretary of Commerce from FerroVen “Response to Section A of Initial Questionnaire” (November 1, 2013) (“FerroVen SAQR”), at 18.

⁴³ See *id.*

⁴⁴ See *id.*, at 19.

⁴⁵ See Letter to the Secretary of Commerce from FerroVen “Response to Sections B and C of Initial Antidumping Questionnaire” (November 25, 2013), at Section C (“FerroVen SCQR”), page 16.

⁴⁶ See, e.g., Letter to the Secretary of Commerce from FerroVen “Supplemental Section A Questionnaire Response” (December 11, 2013), at 10-11; FerroVen SCQR, at 16.

⁴⁷ See FerroVen SAQR, at 20.

⁴⁸ See *Allied Tube and Conduit Corp., v. United States*, 127 F. Supp. 2d 207, 218 (CIT 2000).

⁴⁹ See *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27348-50 (May 19, 1997).

⁵⁰ See, e.g., *Hardwood and Decorative Plywood From the People’s Republic of China: Antidumping Duty Investigation*, 78 FR 25946 (May 3, 2013), unchanged in *Hardwood and Decorative Plywood From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013); *Large Power Transformers From the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 77 FR 40857 (July 11, 2012), and accompanying Issues and Decision Memorandum at Comment 1; see also *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791 (October 17, 2012), and accompanying Issues and Decision Memorandum at Comment 3.

Rather, as FerroVen stated that the final quantity and price in both markets is established by the invoice, invoice date is the most appropriate, uniform date of sale for use in this investigation.⁵¹

D. Constructed Export Price (“CEP”)

In accordance with section 772(b) of the Act, CEP is the price at which the merchandise under consideration is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. For purposes of this investigation, FerroVen classified all of its sales of ferrosilicon to the United States as CEP sales. FerroVen reported that it sold merchandise under consideration to its parent company, FASA, which then sold the merchandise under consideration to the unaffiliated U.S. customer through FANA, after importation to the United States. As noted above, we find that FANA and FASA operate under a principal-agent relationship and, thus, affiliated within the meaning of section 771(33)(G) of the Act. Further, we concluded that EP, as defined by section 772(a) of the Act, was not otherwise warranted. We calculated CEP based on the packed, delivered prices to unaffiliated purchasers in the United States. We adjusted these prices for movement expenses, including foreign inland freight, international freight, marine insurance, U.S. brokerage and handling, and U.S. customs duties, in accordance with section 772(c)(2)(A) of the Act. In accordance with section 772(d)(1) of the Act, we calculated the CEP by deducting selling expenses associated with economic activities occurring in the United States, which includes direct selling expenses and indirect selling expenses. Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP.⁵²

E. Sales to Canada

FerroVen reported that FASA had sales of merchandise under consideration that were entered into the U.S. for consumption but re-exported to certain customers in Canada.⁵³ FANA provided documentation in support of its claim that the merchandise was transported to Canada.⁵⁴

Section 731 of the Act directs the Department to impose upon imports of the subject merchandise an AD in the amount by which the NV exceeds the EP or CEP. Section 772 of the Act defines EP and CEP as a price to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for export to the United States. Thus, the Department’s ability to conduct AD proceedings depends upon the existence of entries and sales to unaffiliated U.S. purchasers or unaffiliated purchasers for export to the United States. Merchandise that is entered for consumption but is not sold in any form (either in the form as entered or as further manufactured) to an unaffiliated customer in the United States is not subject to ADs because

⁵¹ For further discussion of this issue, *see* “Memorandum to Catherine Bertrand, Program Manager, Office V, from Kabir Archuleta, Senior International Trade Compliance Analyst, Office V; Antidumping Duty Investigation of Ferrosilicon from Venezuela: Preliminary Analysis Memorandum,” issued concurrently with this notice (“FerroVen Prelim Analysis Memo”).

⁵² For further discussion, *see id.*

⁵³ *See* Letter to the Secretary of Commerce from FerroVen “Sections B and C Supplemental Questionnaire Response” (January 30, 2014) (“FerroVen SuppBC”), at 37-39.

⁵⁴ *See id.*, at Exhibit C-42.

there is no U.S. sale and, therefore, no margin can be calculated.⁵⁵ Therefore, when the exporter enters merchandise under consideration for consumption, but re-exports the merchandise (in the form as entered or as further manufactured), *i.e.*, the merchandise is never sold in any form to an unaffiliated U.S. customer, the Department does not include those entries in its dumping analysis.⁵⁶ The Department's practice in this context was affirmed by the U.S. Court of Appeals for the Federal Circuit.⁵⁷ For further discussion regarding the proprietary details of this issue, see FerroVen Prelim Analysis Memo.

Normal Value

A. Home Market Viability

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales⁵⁸) we compared FerroVen's volume of home market sales of the foreign like product to the volume of U.S. sales of the merchandise under consideration, in accordance with sections 773(a)(1)(A) and (B) of the Act. Based on this comparison, we determined that FerroVen's aggregate volume of home market sales of the foreign like product was greater than five percent of the aggregate volume of U.S. sales of the merchandise under consideration.⁵⁹ Therefore, we used home market sales as the basis for NV, in accordance with section 773(a)(1)(B) of the Act.

B. Affiliated Party Transactions and Arm's-Length Test

Pursuant to the Act and the Department's regulations, the Department will examine whether inputs purchased from or sales made to an affiliate were made at arm's-length before relying on reported costs and sales prices in its margin calculation. We exclude home market sales to affiliated customers that are not made at arm's-length prices from our margin analysis because we consider them to be outside the ordinary course of trade. Consistent with 19 CFR 351.403(c) and (d) and our practice, "the Department may calculate normal value based on sales to affiliates if satisfied that the transactions were made at arm's length."⁶⁰ Because FerroVen had no sales to

⁵⁵ See Oil Country Tubular Goods From Japan: Preliminary Results and Rescission {sic} in Part of Antidumping Duty Administrative Review, 64 FR 48589 (September 7, 1999); Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic; Final Results of 1998-1999 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part, 66 FR 1953, 1954 (January 10, 2001); and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.: Final Results of Antidumping Duty Administrative Reviews, 62 FR 54043, 54049 (October 17, 1997).

⁵⁶ See Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 4 1/2 Inches) From Japan: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 41366 (July 10, 2013) and accompanying Decision Memorandum at "Entries by CNRL", unchanged in Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 4 1/2 Inches) From Japan: Final Results of Antidumping Duty Administrative Review; 2011-2012.

⁵⁷ See Torrington Co. v. United States, 82 F.3d 1039, 1046-47 (CAFC 1996).

⁵⁸ See 19 CFR 351.404(b)(2).

⁵⁹ See FerroVen SAQR, at 2 and Exhibit A-1.

⁶⁰ See China Steel Corp. v. United States, 264 F. Supp. 2d 1339, 1365 (CIT 2003), citing Light-Walled Rectangular Pipe and Tube From Mexico: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 55352, 55355 (September 7, 2011).

affiliated parties in the home market,⁶¹ the Department has not excluded any transactions from the home market based on an arm's-length test.

C. Level of Trade

In accordance with section 773(a)(1)(B)(i) of the Act and the Statement of Administrative Action accompanying the Uruguay Round Agreements Act,⁶² to the extent practicable, the Department determines NV based on sales in the comparison market at the same level of trade ("LOT") as the EP or CEP. Pursuant to 19 CFR 351.412(c)(1), in identifying LOTs for EP and comparison market sales (*i.e.*, NV based on either home market or third-country prices), we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and CEP profit under section 772(d) of the Act.⁶³ Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling, general, and administrative expenses, and profit for CV, where possible.

To determine whether comparison market sales are at a different LOT than EP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer.⁶⁴ If the comparison market sales are at a different LOT and the difference affects price comparability, as described in 19 CFR 351.412(d) and as manifested in a pattern of consistent price differences between the sales on which NV is based and the comparison market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act.

FerroVen reported that its home market sales were all made directly to its customers, who were end-users and distributors.⁶⁵ Therefore, we consider FerroVen's home market sales to constitute one LOT. In the U.S. market, FerroVen sold the merchandise to FASA before it was shipped and the goods were then sold to the unaffiliated U.S. customers, who were end-users and, to a limited extent, distributors,⁶⁶ by FASA's U.S. sales representative;⁶⁷ therefore, we considered these CEP sales to constitute only one LOT. We compared the selling activities reported by FerroVen at the CEP LOT with its selling activities at the comparison market LOT. We found that sales at the CEP level involved no sales forecasting, market research, procurement/sourcing services, sales promotion, order input/processing, market research, strategic planning, and price negotiations, and inventory maintenance, and less personnel management compared to the sales in the comparison market.⁶⁸ Therefore, we considered the comparison market sales to be at a different LOT and at a more advanced stage of distribution than the CEP LOT.

⁶¹ See Letter to the Secretary of Commerce from FerroVen "Response to Sections B and C of Initial Antidumping Questionnaire" (November 25, 2013) at Section B ("FerroVen SBQR"), page 6.

⁶² See H.R. Doc. No. 316, 103d Cong., 2d Sess. 829-831 (1994).

⁶³ See *Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1314 (Fed. Cir. 2001).

⁶⁴ See 19 CFR 351.412(c)(2).

⁶⁵ See FerroVen SAQR, at 12.

⁶⁶ See FerroVen SCQR, at 15.

⁶⁷ See FerroVen SAQR, 12-13.

⁶⁸ See *id.*, at 14-16.

Because the comparison market LOT was different from the CEP LOT, we could not match to sales at the same LOT in the comparison market. Moreover, because the CEP LOT did not exist in the comparison market, there is no basis for an LOT adjustment. Therefore, for FerroVen's CEP sales, we made a CEP offset adjustment in accordance with section 773(a)(7)(B) of the Act. The CEP offset adjustment to NV is subject to a cap, which is calculated as the sum of comparison market indirect selling expenses up to the amount of U.S. indirect selling expenses deducted from CEP.

D. Cost of Production

As noted in the "Background" section above, we received an allegation from Petitioners that FerroVen made home market sales at prices below the COP. Based on our analysis of these allegations, we initiated a company-specific investigation to determine whether sales of ferrosilicon in the home market were made at prices below their COPs.⁶⁹

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product, plus an amount for general and administrative ("G&A") expenses, interest expenses, and comparison market packing costs.⁷⁰ We examined the cost data and preliminarily determined that our quarterly cost methodology is not warranted. Therefore, we are applying our standard methodology of using annual costs based on the reported data, as adjusted below.⁷¹

We relied on FerroVen's aggregated COP data except as follows. First, we applied the transactions disregarded rule in accordance with section 773(f)(2) of the Act in calculating the cost of direct materials purchased by FASA on behalf of FerroVen. In doing so, we added FASA's selling, G&A expenses and financial expenses to the direct material costs of those inputs. Secondly, FerroVen allocated depreciation expense, which was recorded in U.S. dollars during the POI, between G&A expense and cost of goods sold ("COGS"). FerroVen's G&A expense ratio was calculated based on the expenses recorded in Venezuelan bolivares by FerroVen during the fiscal year ended December 31, 2012. However, the depreciation expenses added to the numerator and denominator of the G&A expense ratio were still based on the POI U.S. dollar amounts. We recalculated the depreciation expenses to be added to the numerator and denominator of the G&A expense ratio calculation based on the Venezuelan bolivar amount recorded for the fiscal year ended December 31, 2012. We used the company's experience during the POI to allocate the fiscal year depreciation expenses to G&A expense and COGS. Finally, we recalculated FerroVen's scrap offset to correct for a mathematical error in the scrap calculation.

⁶⁹ See FerroVen Cost Initiation Memo.

⁷⁰ See "Test of Comparison Market Sales Prices" section, below, for treatment of comparison market selling expenses.

⁷¹ See Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products From Japan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 78 FR 69371 (November 19, 2013) and accompanying Preliminary Decision Memorandum.

For additional details, see Memorandum to Neal M. Halper, Director, Office of Accounting, “Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination-FerroAtlantica de Venezuela,” dated March 4, 2014.

2. Test of Comparison Market Sales Prices

As required under section 773(b)(2) of the Act, we compared the weighted average of the COP for the POI to the per-unit price of the comparison market sales of the foreign like product to determine whether these sales had been made at prices below the COP within an extended period of time in substantial quantities, and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time. We determined the net comparison market prices for the below cost test by subtracting from the gross unit price any applicable movement charges, discounts, rebates, billing adjustments, direct and indirect selling expenses, and packing expenses.⁷²

3. Results of the COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of sales of a given product were at prices less than the COP, we disregarded no below-cost sales of that product because we determined that the below-cost sales were not made in substantial quantities. Where 20 percent or more of a respondent’s home market sales of a given model were at prices less than the COP, we disregarded the below-cost sales because (1) they were made within an extended period of time in substantial quantities in accordance with sections 773(b)(2)(B) and (C) of the Act and (2) based on our comparison of prices to the weighted average of the COPs, they were at prices which would not permit the recovery of all costs within a reasonable period of time in accordance with section 773(b)(2)(D) of the Act.

Our cost test for FerroVen indicated that for comparison market sales of certain products, more than 20 percent were sold at prices below the COP within an extended period of time and were at prices which would not permit the recovery of all costs within a reasonable period of time. Thus, in accordance with section 773(b)(1) of the Act, we disregarded these below-cost sales from our analysis and used the remaining above-cost sales to determine NV.

E. Calculation of Normal Value Based on Comparison Market Prices

For those comparison products for which there were an appropriate number of sales at prices above the COP for FerroVen, we based NV on comparison market prices. We calculated NV based on packed prices of sales to unaffiliated customers in Venezuela. We adjusted the starting price for billing adjustments and foreign inland freight, pursuant to section 773(a)(6)(B)(ii) of the Act. We made adjustments for differences in packing, in accordance with sections 773(a)(6)(A) and 773(a)(6)(B)(i) of the Act, and in circumstances of sale (imputed credit expenses and other direct selling expenses), in accordance with section 773(a)(6)(c)(iii) of the Act and 19 CFR 351.410. Where FerroVen had home market sales for which it had not yet received payment,⁷³ we used the date of FerroVen’s most recent supplemental questionnaire response as a proxy for

⁷² See FerroVen Prelim Analysis Memo.

⁷³ See FerroVen SuppBC, at 12-13.

payment date in the calculation of FerroVen's imputed credit expense, in accordance with Department practice.⁷⁴ We also made adjustments to FerroVen's reported credit expenses and inventory carrying costs, in accordance with Department practice. Because home market inventory carrying costs are a component of U.S. sales, we also made adjustments to FerroVen's reported inventory carrying costs incurred in the country of exportation in its U.S. sales database.⁷⁵

When comparing U.S. sales with comparison market sales of similar, but not identical, merchandise, we also made adjustments for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacturing for the foreign like products and the merchandise under consideration.⁷⁶

Currency Conversion

Because FerroVen's functional operating currency is U.S. dollars, we did not execute any currency conversions in the calculation of FerroVen's AD margin.

Verification

As provided in section 782(i) of the Act, we intend to verify information relied upon in making our final determination.

⁷⁴ See, e.g., Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2011-2012, 78 FR 56211 (September 12, 2013) and accompanying Issues and Decision Memorandum at Comment 13; Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea, 64 FR 15444,15455 (March 31, 1999) and accompanying Issues and Decision Memorandum at Comment 1; Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel from Germany, 67 FR 55802 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 4.

⁷⁵ For further discussion, see FerroVen Prelim Analysis Memo.

⁷⁶ See 19 CFR 351.411(b)

RECOMMENDATION

We recommend applying the above methodology for this preliminary determination.

✓
Agree

Disagree

Paul Piquado
Paul Piquado
Assistant Secretary
for Enforcement and Compliance

7 MARCH 2014
(Date)