



A-552-818
POI: 10/01/2013 - 3/31/2014
PUBLIC DOCUMENT
AD/CVD, Office VI: EAA

May 13, 2015

MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

FROM: Abdelali Elouaradia 
Office Director, Office VI
for Antidumping and Countervailing Duty Operations

SUBJECT: Issue and Decision Memorandum for the Final Determination of
the Less-Than-Fair-Value Investigation of Certain Steel Nails from
the Socialist Republic of Vietnam

I. SUMMARY

We analyzed the case brief submitted by Mid-Continent Steel & Wire, Inc. (Petitioner) in the less-than-fair-value investigation of certain steel nails from the Socialist Republic of Vietnam (Vietnam). As a result of our analysis and as discussed below, we made changes to the weighted-average dumping margin assigned to the Vietnam-wide entity, which now includes the mandatory respondents Region Industries Co., Ltd. (Region Industries) and United Nail Products Co., Ltd. (United Nail). We recommend that you approve the positions of the Department of Commerce (the Department) set forth below in the "Discussion of Interested Party Comments" section of this memorandum.

II. BACKGROUND

On December 29, 2014, the Department published the notice of the preliminary determination of the less-than-fair-value investigation of certain steel nails from Vietnam in the *Federal Register*.¹ In the *Preliminary Determination*, we invited interested parties to comment on our findings and to request a hearing to discuss any issues raised in case and rebuttal briefs. On January 2, 2015, United Nail, one of the two mandatory respondents in the investigation, filed a letter stating that it had decided to withdraw from the proceeding and would not be participating in a verification

¹ See *Certain Steel Nails From the Socialist Republic of Vietnam: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures*, 79 FR 78058 (December 29, 2014) and the accompanying Decision Memorandum (collectively referred to as the *Preliminary Determination*).



of its questionnaire responses.² On January 7, 2015, Region Industries, the other mandatory respondent, filed a letter to the same effect. On February 18, 2015, we received a case brief from Petitioner. We did not receive any rebuttal comments or requests for a hearing from interested parties.

III. PERIOD OF INVESTIGATION

The period of investigation is October 1, 2013, through March 31, 2014.

IV. SCOPE OF THE INVESTIGATION

The final version of the scope, reflecting the changes referenced in the “Scope Comments” section below, appears in Appendix I of the *Final Determination*.

V. SCOPE COMMENTS³

On March 17, 2015, the Department invited interested parties to submit additional comments on certain scope issues that had been raised on the record of this and the concurrent antidumping and countervailing investigations of certain steel nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam (All Nails Investigations).

On March 23, 2015, two interested parties, The Home Depot (Home Depot) and Target Corporation (Target) requested in a joint submission that the Department exclude certain nails from the scope of All Nails Investigations. On that same day, another interested party, IKEA Supply AG (IKEA), made the very same request, using identical language to that in the Home Depot/Target submission. On March 26, 2015, Petitioner submitted a response that agreed with the exact scope exclusion language proposed by the aforementioned parties in their March 23, 2015 submissions. The exclusion language proposed by those parties and Petitioner is referenced below as “Interested Parties’ Proposed Exclusion.” That language reads as follows:

Also excluded from the scope are certain steel nails with a nominal shaft length of one inch or less that are (a) a component of an unassembled article, (b) the total number of nails is sixty (60) or less, and (c) the imported unassembled article is described in one of the following current HTSUS subheadings: 4418.10, 4418.20, 9401.30, 9401.40, 9401.51, 9401.59, 9401.61, 9401.69, 9403.30, 9403.40, 9403.50, 9403.60, 9403.81 or 9403.89.

On April 10, 2015, the Department provided interested parties in All Nails Investigations the opportunity to comment on a proposed revised version of the scope. That Department proposal

² The public record of the review, including all public or public versions of correspondence filed by parties or the Department, may be accessed electronically *via* Enforcement and Compliance’s Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to guest and registered users at <http://access.trade.gov> and is also available to the public in the Central Records Unit, room 7046 of the main Department of Commerce building.

³ In several of the investigations of certain steel nails, The Home Depot and Target Corporation submitted a case brief and IKEA Supply AG submitted a rebuttal brief that reiterate those parties’ requests for an additional scope exclusion, which those parties requested in scope comments they made in separate submissions, as discussed below.

modified the language proposed in the Interested Parties' Proposed Exclusion to include narrative from the Harmonized Tariff Schedule of the United States (HTSUS) describing the merchandise referenced in the HTSUS subheadings identified in Interested Parties' Proposed Exclusion, and which altered the reference to "described in one of the following current HTSUS subheadings" to "currently classified under the following HTSUS subheadings." The Department proposal also contained two other revisions.⁴ In addition, the Department indicated it was considering including language in the scope to address mixed media and non-subject merchandise kit ("mixed media and kits") analysis criteria.

On April 15, 2015, Home Depot, Target, IKEA, and Petitioner submitted comments objecting to the Department's proposed modification to Interested Parties' Proposed Exclusion. Those parties noted that it was unnecessary to attempt to incorporate language from the HTSUS into the scope itself because the HTSUS chapters in question are on the record and, therefore, can by reference be reflected in any interpretation of the desired scope exclusion.⁵ Those parties also commented that language related to "mixed media and kits" analysis would be unnecessary and inappropriate, and would introduce ambiguity that would be burdensome for the Department, importers, and Petitioner. None of those parties commented on the two other minor revisions the Department had proposed.

No parties provided rebuttal comments to those submitted by Home Depot, Target, IKEA, and Petitioner.

The Department has determined that inclusion of language from the HTSUS for the additional exclusion is appropriate, as modified in the Department's April 10, 2015 memorandum to incorporate narrative from the HTSUS. The Department notes it is important for such exclusions to include descriptions of the products in question, instead of relying only upon references to HTSUS subcategory numbers. The Department references HTSUS categories for convenience and customs purposes only, and such references are not intended to be dispositive of the scope. The Department's preference to rely on the physical description of the merchandise to determine the scope of an investigation provides greater clarity should there be future HTSUS number or categorization changes, and allows better enforcement of any order.

As noted, the April 10, 2015 version proposed by the Department incorporates two other modifications. No parties have raised objections to those other modifications, and the Department determines they are appropriate for clarification purposes.

The Department also determines that it would not be appropriate to introduce language into the scope to address "mixed media and kits." We note no interested parties have requested such language, and those that commented in fact opposed such language.

⁴ The other two other proposed revisions were: moving and altering a sentence that referred to an existing exclusion to account for the additional exclusion language, and an adding a reference noting subject merchandise may enter under HTSUS subheadings other than those listed with the scope.

⁵ Home Depot and Target also noted that use of "described in one of the following current HTSUS subheadings" ties the complete language of the HTSUS regarding those subheadings to the scope, while use of "currently classified under the following HTSUS subheadings" fails to achieve that goal.

VI. DISCUSSION OF COMMENTS

Comment 1: Application of Adverse Facts Available to Mandatory Respondents

Petitioner's Comments

- The Department should apply facts otherwise available in assigning final margins to both mandatory respondents because, by withdrawing their participation following the preliminary determination, they provided information in their questionnaire responses that could not be verified and they significantly impeded the investigation by preventing the Department from concluding its investigation.
- Furthermore, the Department should apply adverse facts available in assigning the final margins to the mandatory respondents because they failed to cooperate by not acting to the best of their ability to comply with a request for information from the Department. The petitioner cites decisions of the U.S. Court of Appeals of the Federal Circuit (CAFC) in support of its request.⁶
- The Department should follow its practice of treating non-cooperative respondents in non-market-economy proceedings as part of the non-market-economy entity and applying adverse facts available to the assignment of a rate for the entity. The Department took this approach in the first administrative review of the antidumping duty order on certain steel nails from the People's Republic of China, when a mandatory respondent withdrew from participation in the review just before verification, and the approach has been upheld by reviewing courts, including the CAFC.⁷ The Department should, accordingly, assign the Vietnam-wide rate of 323.99 percent, as corroborated by the Department in the *Preliminary Determination*, to both Region Industries and United Nail for the final determination.

Department's Position:

Section 776(a) of the Tariff Act of 1930, as amended (the Act), provides that the Department, subject to section 782(d) of the Act, shall apply "facts otherwise available" if (1) necessary information is not on the record or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Furthermore, section 776(b) of the Act provides that the Department may use an adverse inference in applying

⁶ Petitioner cites *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003), where the court found a party did not do the maximum it could do when it withdrew from an investigation on the eve of verification, and *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990), where the court authorized the Department to employ an adverse inference so that respondents do not benefit from their noncooperation.

⁷ Petitioner cites the following in support: *Ad Hoc Shrimp Trade Action Comm. v. United States*, 925 F. Supp. 2d 1315, 1324-27 (CIT 2013); *Jiangsu Changbao Steel Tube Co. v. United States*, 884 F. Supp. 2d 1295, 1308 (CIT 2012); *AMS Assocs., Inc. v. United States*, 719 F.3d 1376, 1380-1381 (Fed. Cir. 2013); and *Transcom, Inc. v. United States*, 294 F.3d 1371, 1381-1383 (Fed. Cir. 2013).

the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Adverse inferences are appropriate to “ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”⁸ Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.⁹

As noted in the “Background” section above, the two mandatory respondents withdrew their participation in this investigation shortly after the issuance of the *Preliminary Determination* and prior to a verification of their questionnaire responses. In the *Preliminary Determination*, we found that both Region Industries and United Nail were entitled to a separate rate based on information provided in their antidumping questionnaire responses.¹⁰ However, because both companies have withdrawn from the proceeding and have not participated in a verification of their company information, we cannot affirm the separate-rate status of either company for the final determination. In the case of Region Industries, which claimed to be a wholly foreign-owned limited entity, we have not been able to verify the corporate-structure information it placed on the record and thereby confirm that a separate-rate analysis was not required for the company.¹¹ With respect to United Nail, we have not been able to verify the information provided in its separate-rate application.¹² Thus, in keeping with our practice under such circumstances, we find the companies to be part of the Vietnam-wide entity for purposes of our final dumping analysis.

In the *Preliminary Determination*, we also found that four producers/exporters of Vietnam nails did not respond to our questionnaire requesting quantity-and-value information and that, consequently, they did not qualify for a separate rate but were part of the Vietnam-wide entity.¹³ Furthermore, we found that, because these parties did not respond to our request for information, it was appropriate to apply adverse facts available to the margin assigned to the Vietnam-wide entity, pursuant to sections 776(a)(2)(A) and 776(b) of the Act.¹⁴

For the final determination, we continue to find that it is appropriate to rely on adverse facts available to determine the dumping margin for the Vietnam-wide entity. Four parties failed to respond to our quantity-and-value questionnaire and, in addition, the Vietnam-wide entity now also includes Region Industries and United Nail, companies that withdrew their participation from the investigation and for which we were unable to verify their information. Thus, we find that, pursuant to sections 776(a)(2)(A), (C) and (D) of the Act, the application of facts otherwise available is warranted for the Vietnam-wide entity. The entity withheld information that was requested of it (*i.e.*, quantity-and-value information) and, with respect to Region Industries and

⁸ See *Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H.R. Rep. No., 103-316 at 870 (1994) (*SAA*).

⁹ See section 776(b) of the Act.

¹⁰ See the Preliminary Decision Memorandum of the *Preliminary Determination* at 6 and 7.

¹¹ See Region Industries’ Section A questionnaire response, dated August 24, 2014, at 7-8 and Exhibits 3 and 4; Region Industries’ supplemental questionnaire response, dated October 29, 2014, at 1.

¹² See United Nail’s Section A questionnaire response, dated August 29, 2014, at 1-12; Region Industries’ supplemental questionnaire response, dated October 3, 2014, at 1-4.

¹³ See the Preliminary Decision Memorandum of the *Preliminary Determination* at 8.

¹⁴ *Id.* at 9 and 10.

United Nail, took actions to significantly impede the investigation and provided information that could not be verified as provided by section 782(i) of the Act. Furthermore, the use of an adverse inference in applying the facts otherwise available is warranted since the entity failed to cooperate by not acting to the best of its ability to comply with requests for information and by withdrawing its participation in the investigation.

In deciding which facts to use as adverse facts available, section 776(b) of the Act and 19 CFR 351.308(c)(1) provide that the Department may rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. In selecting a rate for adverse facts available, the Department selects a rate that is sufficiently adverse “as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.”¹⁵ It is also the Department’s practice to select a rate that ensures “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”¹⁶ Generally, the Department finds selecting the highest rate in any segment of the proceeding as adverse facts available to be appropriate.¹⁷ It is the Department’s practice to select the higher of the (a) highest margin alleged in the petition or (b) the highest calculated rate of any respondent in the investigation, as adverse facts available.¹⁸

In the *Preliminary Determination*, we selected the margin provided in the petition, as it was higher than the rates calculated for Region Industries and United Nail, as the adverse-facts-available rate to be applied to the Vietnam-wide entity. We continue to select the petition rate for the final determination, as there is no other substantiated rate available on the record.

In the *Preliminary Determination*, we corroborated the adverse-facts-available rate, which was derived from the petition, by comparing it to transaction-specific dumping margins for Region Industries.¹⁹ Because we found the petition rate of 323.99 percent to be within the range of some of the transaction-specific margins, we found the rate to be reliable and relevant.²⁰ However, because Region Industries did not permit us to verify its sales and factors-of-production data, we cannot continue to rely on its data to corroborate this rate as the adverse-facts-available rate.

As we stated in the *Preliminary Determination*, section 776(c) of the Act provides that, when the Department relies upon secondary information, rather than information obtained in the course of

¹⁵ See *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998).

¹⁶ See *Brake Rotors From the People’s Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937, 69939 (November 18, 2005); see also SAA at 870.

¹⁷ See *Certain Cased Pencils from the People’s Republic of China; Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part*, 70 FR 76755, 76761 (December 28, 2005), unchanged in final, *Certain Cased Pencils from the People’s Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 38366 (July 6, 2006), and accompanying Issues and Decision Memorandum at Comment 10.

¹⁸ See *Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Quality Steel Products from the People’s Republic of China*, 65 FR 34660 (May 21, 2000), and accompanying Issues and Decision Memorandum at “Facts Available”.

¹⁹ See the Preliminary Decision Memorandum of the *Preliminary Determination* at 9 and 10.

²⁰ *Id.*

the investigation, as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is described as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the merchandise subject to the investigation, or any previous review under section 751 {of the Act} concerning the merchandise subject to this investigation.”²¹ To “corroborate” means the Department will satisfy itself that the secondary information to be used has probative value by examining the reliability and the relevance of the information. Independent sources used to corroborate may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.

In our review of the adequacy and accuracy of the information contained in the petition, we examined the evidence supporting the calculations in the petition to determine the probative value of the dumping margin provided there, including the key elements of the export price and normal value calculations used to derive the margin.²² We also examined information provided in the Petition or supplements to the Petition from independent sources that corroborates the key elements of the export price and normal value.²³

Based on this review, we consider Petitioner’s calculations to be reliable. Furthermore, we have obtained no other information that would make us question the validity of the sources of information or the validity of information supporting the U.S. price or normal value calculations provided in the Petition, and based on our examination of the information, we consider the calculations from the Petition to be reliable. Because we confirmed the accuracy and validity of the information underlying the derivation of the dumping margin by examining source documents as well as publicly available information, we determine that, for the final determination, the margin in the Petition is reliable for the purposes of this investigation.

In making a determination as to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin not relevant. The courts acknowledge that the consideration of the commercial behavior inherent in the industry is important in determining the relevance of the selected adverse-facts-available rate to the uncooperative respondent by virtue of it belonging to the same industry.²⁴ No information has been placed on the record to indicate that the rate in the petition was not reflective of the commercial practices of the steel nail industry. As such, we find this rate to be relevant to the Vietnam-wide entity. Furthermore, because we are unable to rely on any reported sales or factors-of-production data in this case to calculate the estimated weighted-average dumping margin for the Vietnam-wide entity, we are relying on the rate found in the

²¹ See *Final Determination of Sales at Less Than Fair Value: Sodium Hexametaphosphate From the People’s Republic of China*, 73 FR 6479, 6481 (February 4, 2008), quoting SAA at 870.

²² See Petition for the Imposition of Antidumping Duties on Imports of Certain Steel Nails from Vietnam, dated May 29, 2014 (Petition), Volume VIII; Submission of Foreign Market Researcher Declaration, dated June 3, 2014; Petitioner’s Response to the Department’s June 3, 2014 Supplemental Question on Volume VIII of the Petition, dated June 6, 2014; Petitioner’s Revised Declaration in Response to the Department’s June 3, 2014 Supplemental Questions on Volume VIII of the Petition, dated June 10, 2014; Petitioner’s Revised Calculations in Response to Department Instruction for Volume VIII of the Petition, dated June 11, 2014.

²³ *Id.*

²⁴ See, e.g., *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310, 1334 (CIT 1999).

