



A-602-810
Investigation
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DATE: February 27, 2017

MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination in the Less-Than-Fair-Value Investigation of
Silicon Metal from Australia

I. Summary

The Department of Commerce (Commerce) finds that silicon metal from Australia is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is January 1, 2016 through December 31, 2016.

After analyzing the comments submitted by interested parties, we have made changes to the *Preliminary Determination*.¹ We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this LTFV investigation for which we received comments from interested parties:

- Comment 1: Application of Adverse Facts Available for Simcoa Operations Pty Ltd.
(Simcoa)
- Comment 2: Appropriate Rate for Application of Adverse Facts Available

¹ See *Silicon Metal from Australia: Preliminary Affirmative Determination of Sales at Less Than Fair Value Preliminary Affirmative Determination of Critical Circumstances, Postponement of Final Determination and Extension of Provisional Measures*, 82 FR 47471 (October 12, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.



II. Background

On October 12, 2017, Commerce published the *Preliminary Determination* of sales of silicon metal from Australia at LTFV. We invited parties to comment on the *Preliminary Determination*.

On November 30, 2017, the petitioner, Globe Specialty Metals, Inc., filed its case brief.² No party submitted rebuttal briefs. Based on our analysis of the comments received, we have made changes from our *Preliminary Determination*.

Commerce exercised its discretion to toll deadlines affected by the closure of the Federal Government from January 20 through 22, 2018. If the new deadline falls on a non-business day, in accordance with Commerce's practice, the deadline will become the next business day. The revised deadline for the final determination in this investigation is now February 27, 2018.³

For a summary of the product coverage comments and rebuttal responses submitted to the records of all concurrent silicon metal investigations, and accompanying discussion and analysis of all comments timely received, *see* the Final Scope Decision Memorandum, which is incorporated by and hereby adopted by this final determination.⁴

III. Discussion of the Issues

Comment 1: Application of Facts Available for Simcoa

The Petitioner's Case Brief:

- Shortly after Commerce announced its preliminary determination, Simcoa notified Commerce that it was withdrawing from the investigation and would not participate in verification.⁵ By refusing to participate further in this investigation, Simcoa significantly impeded the proceeding. In addition, by refusing to participate in verification, Simcoa prevented Commerce from verifying the accuracy and completeness of its questionnaire responses.⁶
- Under these circumstances, Commerce is required to base Simcoa's margin on the facts otherwise available, pursuant to section 776(a) of the Act. Further, because Simcoa has

² See Letter from Globe Specialty Metals, Inc., "Silicon Metal from Australia; Antidumping Investigation; Case Brief of Globe Specialty Metals, Inc." (Petitioner Case Brief), dated November 30, 2017.

³ See Memorandum for The Record from Christian Marsh, Deputy Assistant Secretary for Enforcement and Compliance, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Shutdown of the Federal Government" (Tolling Memorandum) dated January 23, 2018. All deadlines in this segment of the proceeding have been extended by 3 days.

⁴ See Memorandum, "Silicon Metal from Australia, Brazil, Kazakhstan, and Norway: Final Scope Comments Decision Memorandum," dated February 27, 2018 (Final Scope Decision Memorandum).

⁵ See Petitioner Case Brief at 1, citing Letter from Simcoa, dated October 12, 2017.

⁶ *Id.* at 1-2.

failed to cooperate by not acting to the best of its ability, Commerce should resort to adverse facts available (AFA) under section 776(b) of the Act.⁷

No other party commented on this issue.

Commerce's Position:

We agree with the petitioner. On the same day Commerce published its *Preliminary Determination*, Simcoa filed a letter stating that “we hereby withdraw from participation as a respondent in the {silicon metal} investigation and state Simcoa’s intention to not participate in the corresponding verification.”⁸

Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that, if necessary information is not available on the record, or if an interested party: (A) withholds information requested by Commerce; (B) fails to provide such information by the deadlines for submission of the information, or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, Commerce shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(c)(1) of the Act states that Commerce shall consider the ability of an interested party to provide information upon a prompt notification by that party that it is unable to submit the information in the form and manner required, and that party also provides a full explanation for the difficulty and suggests an alternative form in which the party is able to provide the information. Section 782(e) of the Act states further that Commerce shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Simcoa’s decision not to participate in this investigation after the issuance of the *Preliminary Determination* prevented Commerce from conducting verification of its data as required by section 782(i) of the Act and significantly impeded the investigation. By not allowing Commerce to conduct verification of its data, its data are unverifiable and therefore unreliable. As a result, Simcoa significantly impeded the proceeding and provided information that cannot be verified. Moreover, because Simcoa failed to provide any information that could be verified, section 782(e) of the Act is not applicable.⁹ Accordingly, pursuant to sections 776(a)(1) and 776(a)(2) (C) and (D) of the Act, we are relying upon facts otherwise available to determine Simcoa’s final dumping margin.

⁷ *Id.* at 2.

⁸ See Letter from Simcoa, dated October 12, 2017.

⁹ Cf. Section 782(e)(2) of the Act (Commerce “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by {Commerce} if . . . the information can be verified.”)

Comment 2: Appropriate Rate for Use as Adverse Facts Available

The Petitioner's Case Brief:

- In selecting an AFA rate, Commerce may rely upon information from (1) the petition; (2) a final determination in the investigation; (3) any previous review; and (4) any other information placed on the record.¹⁰
- The AFA rate applied in any given case should be “sufficiently adverse to induce respondents to provide complete and accurate information in a timely manner and to ensure that respondents do not obtain a more favorable result by failing to cooperate than if they had cooperated fully.”¹¹
- In an LTFV investigation, Commerce’s practice has been to assign the higher of the highest margin alleged in the petition or the highest calculated dumping margin of any respondent.¹²
- Here, with Simcoa as the sole respondent, there is no other calculated margin available to assign as AFA. Accordingly, Commerce should use the highest margin alleged in the Petition, or 52.81 percent.¹³
- In corroborating this rate, as required by the statute, Commerce relies on its analysis during the initiation phase of the investigation, as reflected in its initiation checklist.¹⁴
- Commerce examined the key elements of the U.S. price and normal value information included in the Petition, including the “accuracy and adequacy of the relevant information.”¹⁵
- The information in the Petition was mostly specific to Simcoa itself, including prices in both the U.S. and home markets, costs of production and constructed value, meaning the Petition margin is reliable and relevant and can be corroborated.¹⁶

No other party commented on this issue.

Commerce's Position:

Section 776(b) of the Act provides that, if Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may use an inference adverse to the interests of that party in selecting the facts

¹⁰ *Id.* at 2, citing section 776(b)(2) of the Act.

¹¹ *Id.* at 2-3, citing the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 at 869 (1994) (H.R. Rep 103-316), reprinted in 1994 U.S.C.A.A.N. at 4,198.

¹² *Id.* at 3.

¹³ *Id.*, citing Petitions for the Imposition of Antidumping and Countervailing Duties: Silicon Metal from Australia, Brazil, Kazakhstan, and Norway, dated March 8, 2017 (the Petition), Volume II at 7.

¹⁴ *Id.* at 4, citing *Silicon Metal from Brazil: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 82 FR 47466 (October 12, 2017), and Preliminary Decision Memorandum at 11-12; and Australia Initiation Checklist, dated March 28, 2017 (Australia Initiation Checklist).

¹⁵ *Id.*, citing Australia Initiation Checklist at 5-9.

¹⁶ *Id.*

otherwise available.¹⁷ In so doing, Commerce is not required to determine, or make any adjustments to, a weighted-average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.¹⁸ In addition, the SAA accompanying the Uruguay Round Agreements Act explains that Commerce may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”¹⁹ Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.²⁰ It is Commerce’s practice to consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.²¹

Because Simcoa withdrew from participating in the investigation and refused to permit verification of its responses, we find that Simcoa has not acted to the best of its ability to comply with Commerce’s requests for information. Consequently, in accordance with section 776(b) of the Act and 19 CFR 351.308(a), Commerce finds it appropriate to use an adverse inference when selecting from among the facts otherwise available.²²

As noted by the petitioner, section 776(b)(2) of the Act states that when employing an adverse inference, Commerce may rely upon information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record.²³ Commerce’s practice in such cases is to select, as an AFA rate, the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated rate of any respondent in the investigation.²⁴ The highest margin alleged in the Petition, as cited above, is 52.81 percent;²⁵ and because Simcoa is the sole respondent in this investigation, there is no calculated rate for any other respondent. Thus, consistent with our

¹⁷ See also 19 CFR 351.308(a); see also *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005); and *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002).

¹⁸ See section 776(b)(1)(B) of the Act.

¹⁹ See H.R. Rep. 103-316, Vol. 1 (1994) at 870; *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007).

²⁰ See, e.g., *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003); *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); and *Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27340 (May 19, 1997).

²¹ See, e.g., *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying Issues and Decision Memorandum at 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).

²² See, e.g., *Non-Oriented Electrical Steel from Germany, Japan, and Sweden: Preliminary Determinations of Sales at Less Than Fair Value, and Preliminary Affirmative Determinations of Critical Circumstances, in Part*, 79 FR 29423 (May 22, 2014), and accompanying Preliminary Decision Memorandum at 7-11, unchanged in *Non-Oriented Electrical Steel from Germany, Japan, the People’s Republic of China, and Sweden: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determinations of Critical Circumstances, in Part*, 79 FR 61609 (October 14, 2014); see also *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR at 42985, 42986 (July 12, 2000).

²³ See also 19 CFR 351.308(c).

²⁴ See *Welded Stainless Pressure Pipe from Thailand: Final Determination of Sales at Less Than Fair Value*, 79 FR 31093 (May 30, 2014), and accompanying Issues and Decision Memorandum.

²⁵ See the Petition, Volume II at 7.

practice, we have selected the highest dumping margin for subject merchandise from Australia alleged in the Petition, 52.81 percent, as the AFA rate applicable to Simcoa.²⁶

Corroboration of Secondary Information

When using facts otherwise available, section 776(c) of the Act provides that in general, where Commerce relies on secondary information (such as the petition) rather than information obtained in the course of an investigation, it must corroborate, to the extent practicable, information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.²⁷ The SAA clarifies that “corroborate” means that Commerce will satisfy itself that the secondary information to be used has probative value.²⁸ To corroborate secondary information, Commerce will, to the extent practicable, examine the reliability and relevance of the information to be used.²⁹

Because the rate based on AFA for Simcoa is derived from rates in the Petition and, consequently, based upon secondary information, Commerce must corroborate the rates to the extent practicable. We determined that the Petition margins are reliable because, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the Petition during our pre-initiation analysis.³⁰ As set forth below, for purposes of this final determination, we again find that the Petition margins are reliable.

We examined evidence supporting the calculations in the Petition to determine the probative value of the dumping margins alleged in the Petition for use as AFA for purposes in this final determination. During our pre-initiation analysis, we examined the key elements of the constructed export price and normal value calculations, and the alleged dumping margins.³¹ During our pre-initiation analysis, we also examined information from various independent sources provided in the Petition that corroborates key elements of the export price and normal value calculations used in the Petition to derive the alleged dumping margins.³² The margins alleged in the Petition are based on data specific to Simcoa. Because Simcoa failed to cooperate in the completion of this investigation, including its refusal to permit verification of its questionnaire responses, the information in the Petition, and its supporting documents, is the only reliable information on the record with respect to Simcoa.

²⁶ See *Certain Polyethylene Terephthalate Resin from India: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 13327 (March 14, 2016), and accompanying Issues and Decision Memorandum at Comment 14 (*PET Resin from India Final Determination*).

²⁷ See SAA at 870.

²⁸ *Id.*; see also 19 CFR 351.308(d).

²⁹ See, e.g., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 62 FR 11825 (March 13, 1997).

³⁰ See Australia Initiation Checklist.

³¹ *Id.*

³² *Id.*

Our examination of the Petition information is discussed in detail in the Australia Initiation Checklist, where we considered the petitioner's constructed export price and normal value calculations to be reliable.³³ We confirmed the accuracy and validity of the information underlying the derivation of the dumping margins alleged in the Petition by examining source documents and an affidavit, as well as publicly available information. We obtained no other information that calls into question the validity of the sources of information or the validity of the information supporting the constructed export price and normal value calculations provided in the Petition. Therefore, we preliminarily determine that the dumping margins alleged in the Petition are reliable for purposes of this investigation.

In making a determination as to the relevance aspect of corroboration, Commerce will consider information reasonably at its disposal to determine whether there are circumstances that would render a rate not relevant. In accordance with section 776(d)(3) of the Act, when selecting an AFA margin, Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an "alleged commercial reality" of the interested party. Thus, for Simcoa, we relied upon the highest dumping margin alleged in the Petition, which is the only acceptable information regarding silicon metal from Australia on the record.³⁴ In calculating normal value, the petitioner relied on both home market sales by Simcoa and constructed value, basing the cost of manufacture on data culled from Simcoa's 2015 audited financial statements, the most recent financial statements available at the time of the initiation.³⁵ In calculating constructed export price, the petitioner relied on actual sales prices for silicon metal produced in Australia by Simcoa and sold through its U.S. affiliate Shintech, Inc. to unaffiliated customers. The petitioner deducted foreign inland freight, international freight (including ocean freight and marine insurance), and U.S. inland freight.³⁶ The petitioner also adjusted U.S price for indirect selling expenses to derive an *ex-factory* price. Thus, the Petition information is relevant to Simcoa. Based on this information, we determine that we were able to corroborate the information in the Petition using information reasonably available and contained in the Petition.³⁷

Accordingly, Commerce determines that the dumping margins alleged in the Petition have probative value and has corroborated the AFA rate for Simcoa of 52.81 percent to the extent practicable within the meaning of section 776(c) of the Act. We have demonstrated that the AFA rate: (1) was determined to be reliable in the pre-initiation stage of this investigation (and we have no information indicating otherwise); and (2) is relevant.³⁸

³³ *Id.*

³⁴ See, e.g., *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar from France*, 66 FR 40201 (August 2, 2001) (*Stainless Steel Bar from France*).

³⁵ See the Petition, Volume II at 5.

³⁶ See Australia Initiation Checklist at 5-6.

³⁷ See *Stainless Steel Bar from France* at 40203.

³⁸ See section 776(c) of the Act and 19 CFR 351.308(c) and (d); *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 73 FR 35652, 35653 (June 24, 2008), and accompanying Issues and Decision Memorandum at Comment 1.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination of the investigation and the final dumping margins in the *Federal Register*.



Agree

Disagree

2/27/2018

X



Signed by: CHRISTIAN MARSH
Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance