A-122-853
POI: 04/1/07-03/31/08
Public Document
AD/CVD O2: TKS/RT

April 6, 2009

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Citric Acid and Certain Citrate Salts from Canada

**Summary**

We have analyzed the case and rebuttal briefs submitted by the petitioners[1] and the respondent[2] in this investigation. As a result of our analysis, we have made changes in the margin calculation for the final determination. 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 investigation for which we received comments from the interested parties.

Comment 1: Date of Sale and Whether to Exclude U.S. Sales Made Pursuant to Multiyear Contracts
Comment 2: Indirect Selling Expenses
Comment 3: Home Market Billing Adjustments
Comment 4: Currency Conversions Reported for Certain Home Market Sales Prices and U.S. Freight Expenses
Comment 5: Electricity Purchased from an Affiliate
Comment 6: General and Administrative (G&A) Expense Ratio

[1] The petitioners in this investigation are Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas, Inc.

[2] The respondent in this investigation is Jungbunzlauer Technology GMBH & Co. KG (JBLT).

**Background**

On November 20, 2008, the Department of Commerce (the Department) published in the Federal Register the preliminary determination of sales at less-than-fair-value (LTFV) in the antidumping duty investigation of citric acid and certain citrate sales from Canada. See Citric Acid and Certain Citrate Salts from Canada: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 70324 (November 20, 2008) (Preliminary Determination). The period of investigation (POI) is April 1, 2007, through March 31, 2008. For a detailed discussion of the events which have occurred in this investigation since the Preliminary Determination, see the "Background" section of the Federal Register notice which this memorandum accompanies. We provided the petitioners and the respondent with an opportunity to comment on our Preliminary Determination and verification findings.

Based on our analysis of the comments received and findings at verification, we have changed the weighted-average margin applicable to the respondent and all other producers or exporters.

**Margin Calculations**

We calculated constructed export price (CEP) and normal value (NV) for the respondent using the same methodology described in the Preliminary Determination, except as follows:

1. We applied adverse facts available (AFA) to certain home market gross unit prices and all U.S. inland freight expenses. See infra Comment 4 and the April 6, 2009, Memorandum to The File from Case Analyst, "Calculations Performed for Jungbunzlauer Technology GMBH & Co. KG for the Final Determination in the Antidumping Duty Investigation of Citric Acid and Certain Citrate Salts from Canada" (Final Sales Calculation Memo).

2. Based on verification findings, we revised our preliminary determination adjustment to energy costs to apply only to electricity instead of to both electricity and steam. See Memorandum from James Balog to Neal M. Halper, Director, Office of Accounting, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Jungbunzlauer Technology GMBH & Co. KG" (Final Cost Calculation Memorandum) at adjustment 1.

3. We revised our preliminary determination adjustment to the G&A expenses by using JBLT's financial statements instead of JBL Canada Group combined financial

statements. We have continued to include the capital tax in the G&A expense ratio calculation (see infra Comment 6 and the Final Cost Calculation Memorandum at adjustment 2).

**Discussion of the Issues**

Comment 1: *Date of Sale and Whether to Exclude U.S. Sales Made Pursuant to Multiyear Contracts*

JBLT reported that during the POI, it made sales of the subject merchandise pursuant to long-term contracts and spot sales (i.e., noncontract sales). In the Preliminary Determination, we found that the material terms of sale (e.g., price and quantity) were subject to change after the date the sales contracts were signed. See Preliminary Determination at 73 FR 70325. Therefore, we preliminary determined that the invoice date better reflected the date on which the material terms of sale were set. In accordance with 19 CFR 351.401(i) and our normal practice, we used the invoice date as the date of sale for all U.S. and home market sales.

The respondent argues that the Department should use contract date as the date of sale for its sales made pursuant to contracts. Despite the Department's stated preference to use invoice date as the date of sale, the respondent argues that there are numerous cases where the Department determined that circumstances warranted the use of an alternative date of sale.[3] In particular, the respondent points out that in Sodium Metal from France: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination 73 FR 30605 (May 28, 2008), unchanged in the final determination, Sodium Metal from France: Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances, 73 FR 62252 (October 20, 2008) (Sodium Metal from France), the Department accepted the contract date for some sales, and the invoice date for others as the appropriate date of sale. JBLT adds that, in that case, the Department also decided to exclude from its analysis certain sales for which the contract date was outside the POI. JBLT contends that the circumstances in this investigation warrant the same treatment, maintaining that the appropriate date of sale for its sales made pursuant to contracts is the contract date.

[3] See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey, 70 FR 73447 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 1 (where the date sale for U.S. sales was the date of an email confirmation) (Certain Welded Carbon Steel Pipe and Tube from Turkey); Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review 65 FR 37518 (June 15, 2000), and accompanying Issues and Decision Memorandum at Hylsa Comment 1 (where the date of sale for U.S. sales was the purchase order date).

JBLT contends that at verification it demonstrated to the Department that in many instances the material terms of sale in the contract did not differ from those reflected in the sales invoice. JBLT claims that the Department found no instance where the contract price was amended or revised during the contract period, as company officials were able to explain how the invoice price was derived from the language of the relevant agreement for the sales the Department examined. With respect to quantity, the respondent claims that it demonstrated to the Department's verifiers that in most cases the delivered quantities were within +/- 10 percent of the contracted quantities. JBLT explains that the instances where the difference was greater than 10 percent were due to market circumstances (e.g., changes to the customer's seasonal harvest schedule or the customer's vendor approval process). The respondent maintains that +/- 10 percent is the generally accepted tolerance for contracted volumes in the citric acid business, and claims that the Department is familiar with such industry standards.[4] Because the Department was able to confirm at verification that there were no amendments or revisions to the material terms of its contract sales, and given the long-term nature of its contracts, the respondent argues that the Department should use the contract date as the date of sale for the sales made pursuant to contracts for the final determination.

However, if the Department continues to use invoice date as the date of sale in the final determination, the respondent argues that the Department should exclude the U.S. sales that were made pursuant to multiyear contracts which were negotiated and signed before the beginning of the POI. JBLT states that the multiyear contract prices are not representative of JBLT's pricing during the POI, and that they provide no basis for determining whether sales during the POI were made at less than fair value. In support of its argument, the respondent cites to Final Determination of No Sales at Less Than Fair Value: Ferrosilicon from Argentina, 58 FR 27534 (May 10, 1993) (Ferrosilicon from Argentina). The respondent also notes that in Notice of Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from Portugal, 67 FR 60219 (September 25, 2002) (Sulfanilic Acid from Portugal), the Department excluded sales made pursuant to multiyear contracts because evidence on the record showed that the prices were set according to contracts made prior to the POI.

The petitioners argue that for the final determination the Department should continue to use invoice date as the date of sale for the so-called contract sales because the evidence on the record demonstrates that the material terms of these sales were not fixed prior to invoicing.
The petitioners assert that, contrary to the respondent's claims, the Department's verification findings show that sales quantities were not fixed on the date of the contracts. They add that the

[4] See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bars from Latvia, 71 FR 74900 (December 13, 2006), and accompanying Issues and Decision Memorandum at Comment 2.

respondent continually changed the contract dates in its databases over the course of the investigation, which calls into question the reliability of the contract date as an alternative date of sale.

Because there is no evidence on the record demonstrating that any of the reported contract dates are reliable enough to use as an alternate date of sale, the petitioners believe the Department has no factual basis on which to make a date-of-sale distinction for multiyear contract sales. Therefore, they argue, for the final determination the Department should not exclude the multiyear contract sales, and should continue to use invoice date as the date of sale for all sales.

Department's Position:

As discussed in the Preliminary Determination, 73 FR at 70325, it is the Department's normal practice to use the date of invoice, as recorded in the respondent's records kept in the ordinary course of business, as the date of sale. The Department's regulations provide that the Department may use a date other than the date of invoice (e.g., the date of contract in the case of a long-term contract) if it is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale (e.g., price and quantity). See 19 CFR 351.401(i) and Antidumping Duties; Countervailing Duties, 62 FR 27295, 27349 (May 19, 1997); see also Allied Tube and Conduit Corp. v. United States, 132 F. Supp. 2d 1087, 1090-92 (CIT 2001). As explained below, the facts in this case do not warrant departure from the Department's normal date-of-sale methodology.

For the contract sales we examined at verification, we found that sales volumes were not fixed by JBLT's contracts.[5] Moreover, JBLT acknowledged in its case brief that none of the actual quantities matched the quantities in the contracts. Although JBLT claims that there is a +/- 10 percent industry-wide tolerance for delivered sales quantity, this tolerance was not always specified in the sales agreements. Furthermore, we found that there were several instances where the differential between contracted and invoiced quantities was significantly greater than the alleged +/- 10 percent tolerance.[6] Consistent with JBLT's statement in its supplemental questionnaire response that its contracts are not "take or pay" contracts,[7] we also noted at

[5] See Memorandum "Verification of the Sales Response of Jungbunzlauer Technology GMBH& Co KG (JBLT) in the Antidumping Duty Investigation of Citric Acid and Certain Citrate Salts from Canada," dated February 5, 2009 (Sales Verification Report) at 7-8.

[6] See Sales Verification Report at 8.

[7] See JBLT's October 14, 2008, First Supplemental Questionnaire Response at 7.

verification that there is no penalty to the customer if the contracted volumes are not actually purchased by the end of the contract period. Therefore, we find that a material term of sale (i.e., quantity) was not established on the contract date. These facts are distinct from those in cases such as Certain Welded Carbon Steel Pipe and Tube from Turkey, in which the Department determined that an alternative date (e.g., date of email correspondence) reflected the date upon which the material terms of sale were established.

Moreover, we find that the reported contract dates are unreliable. The record shows that JBLT made revisions to its reported contract dates shortly before verification,[8] and twice during verification.[9] The record also shows that JBLT encountered difficulties in associating particular sales with their corresponding contracts, and identifying the correct contract prices negotiated by those agreements.[10] Therefore, we are unconvinced that the contract date represents an appropriate alternative to the invoice date in this case. Consequently, we have no basis to distinguish multiyear contract sales from other contract sales, as the respondent suggests. Contrary to the facts in this case, in Sulfanilic Acid from Portugal, the Department found that contract date was the appropriate date of sale based on the facts of that case, and appropriately excluded shipments made pursuant to contracts that were dated prior to POI. Ferrosilicon from Argentina is equally inapposite, because at issue in that case was not what date constituted the date of sale, but whether to expand the POI beyond one year to capture sales of a respondent that had no sales during the POI.

For the forgoing reasons, we continue to find that the invoice date better reflects the date on which the material terms of sale were set, and we have continued to use it as the date of sale for all U.S. and home market sales, in accordance with our normal practice. Accordingly, we have not excluded from our calculations sales made pursuant to multiyear contracts.

Comment 2: *Indirect Selling Expenses*

The respondent's reported domestic indirect selling expenses (DINDIRSU) consist of indirect selling expenses (ISEs) incurred in Canada on behalf of U.S. sales, plus ISEs incurred by JBLT's corporate parent, JBL International AG, on behalf of U.S sales. The respondent determined the amount of these expenses, beginning with the total amount of ISEs incurred by JBLT in Canada and the total ISEs incurred by JBL International AG, which is located in Switzerland. The respondent allocated a portion of ISEs incurred by the Swiss entity to U.S. sales on the basis of

[8] See JBLT's December 2, 2008, Submission of Factual Information.

[9] See Sales Verification Report at 2 and Verification Exhibits 4 and 26.

[10] See Sales Verification Exhibit 26, and JBLT's December 2, 2008, Submission of Factual Information.

an estimated percentage of time that its employees spent on activities associated with selling citric acid to the United Stated during the POI. The respondent similarly allocated the ISEs incurred by sales staff in the United States (U.S. ISEs or INDIRSU), on the same basis. For purposes of the preliminary determination, we accepted this allocation method, and made no adjustments to the reported ISEs.

The petitioners argue that the Department should reject the respondent's activity-based allocation of its ISEs, and reallocate these expenses on the basis of neutral facts available for the final determination. According to the petitioners, the Department normally requires respondents to allocate its U.S. ISEs based on sales value, unless the respondent can demonstrate the reasonableness of an alternative allocation methodology.[11]

In this investigation, the petitioners allege that the respondent failed to establish the reasonableness of its activity-based allocation methodology. The petitioners point out that the respondent's ISE allocation was based on estimates of time spent selling citric acid, rather than actual documentation supporting that amount of time, and that the record evidence suggests that these estimates significantly understate the activities involving the citric acid anhydrous (CAA) product group in the U.S. market. Therefore, the petitioners argue that the Department should use facts available to reallocate the respondent's U.S. ISEs. Because the record does not contain the sales value figures necessary to reallocate the respondent's ISEs to the U.S. market and the CAA product group based on sales value, the petitioners propose that, as neutral facts available, the Department should use an average rate calculated directly from the respondent's 2007 and 2008 U.S. financial statements.

In addition, with regard to certain domestic indirect selling expenses (DINDIRSU) reported by the respondent, the petitioners argue that the Department should deduct a portion of DINDIRSU (i.e., the amount incurred by JBL International AG) from the gross unit price (GRSUPRU) because the sales activities associated with these expenses are attributable to sales to unaffiliated customers in the United States. The petitioners maintain that evidence on the record shows that the U.S. affiliate pays for selling activities performed by JBL International AG based on the value of the sales to the unaffiliated customers in the United States. Therefore, the petitioners argue that in calculating the final determination margin, the Department should treat these selling activities in the same manner as the ISEs incurred by the U.S. affiliate. The petitioners assert that this treatment is consistent with the Department's regulation which expressly provides that, in establishing constructed export price (CEP), "the Secretary will make adjustments for

[11] See, e.g., Stainless Steel Sheet and Strip in Coils from the Republic of Korea; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 72 FR 4486 (January 31, 2007), and accompanying Issues and Decision Memorandum at 12 – 15.

expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid".[12] According to the petitioners, in applying this regulation the Department has repeatedly recognized the need to deduct ISEs incurred outside the United States when calculating CEP if the ISEs relate to sales to unaffiliated purchasers in the United States.[13] Moreover, the petitioners argue that the Court of International Trade has held that the Department "has the authority to deduct ISEs that are associated with the sales of exports in the United States from CEP, whether incurred in the United States or the home market" (see Mitsubishi Heavy Indus. Co., Ltd v. United States, 22 C.I.T. 541, 551-553 (Ct. Int'l Trade 1998)) (Mitsubishi v. United States).

Thus, consistent with the Department's past determinations and judicial precedent, the petitioners argue that Department should deduct from GRSUPRU the portion of DINDIRSU that is attributable to JBL International AG. The petitioners argue that because there is no evidence demonstrating that the respondent's activity-based allocation is reasonable and that it relates to the expenses actually incurred, the Department should apply facts available to reallocate the expenses at issue. Specifically, to account for the portion of DINDIRSU that should be deducted from GRSUPRU, the petitioners propose that the Department use, as neutral facts available, the amount the U.S. affiliate paid for selling activities performed by JBL International AG as an arm's-length commission rate, and treat it as a direct selling expense.

The respondent disagrees with the petitioners, and maintains that the Department confirmed at verification that the allocation of its ISEs was both reasonable and accurate. According to the respondent, it allocated its U.S. ISEs on the basis of the estimated percentages of time that each employee spent selling citric acid to the United States during the POI. The respondent contends that the Department's interviews with various employees (including market development and regional sales representatives, company President and Director of Sales) and examination of monthly sales reports shows that the respondent in fact overestimated these expenses. Furthermore, the respondent points out that the Department reconciled the ISE amounts reported in the questionnaire responses to the appropriate Jungbunzlauer Group (JBL Group) entity's financial statement and tied several individual expense categories to its accounting system (i.e., SAP system) without discrepancy.

With respect to the portion of DINDIRSU that the petitioners suggest should be deducted from GRSUPRU as a direct selling expense, the respondent argues that the Department should not

---

[12] See 19 CFR 351.402(b).

[13] See e.g., Stainless Steel Sheet and Strip in Coils From Italy: Final Results of Antidumping Duty Administrative Review, 67 FR 1715 (January 14, 2002) and accompanying Issues and Decision Memorandum at Comment 2.

make this deduction, stating that: 1) most of the services provided by JBL International AG to the respondent are general in nature and not related to specific sales made in the United States or any other market; and 2) with the exception of certain accounts which are handled by JBL International AG, the U.S. affiliate is responsible for the sales activities in Canada and the United States. In such circumstances, the respondent argues that the Department deducts from the CEP only expenses which are in support of the sale to the unaffiliated U.S. customer, that is, expenses associated with commercial activities in the United States that relate to the sale to the unaffiliated purchaser. Therefore, the respondent maintains that the Department should not make a deduction for general services and activities performed by JBL International AG from GRSUPRU.

Department's Position:

Based on verification findings, we are satisfied that the respondent's activity-based allocation is reasonable. Given that the respondent did not maintain records which tracked the amount of time its employees spent on citric acid sales (or sales of any other product), it estimated the amount of time each employee spent selling citric acid to the United States and used these estimates as the basis of its ISE allocations. In our discussions with sales staff and our review of their project reports at verification, we found that the estimates were conservative and did not understate the ISEs reported.[14] Contrary to the petitioners' assertion, it is not the Department's policy to require the allocation of ISEs based upon relative sales value in every instance. (See Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 61 FR 20216, 20217(May 6, 1996) at Comment 1, in which we stated that we would accept an allocation basis other than relative sales value, provided the methodology used was reasonable.)

With respect to the ISEs incurred by JBL International AG, we agree with the respondent. Pursuant to section 772(d)(1)(D) of the Tariff Act of 1930, as amended (the Act), and the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1, at 823 (1994), we deduct from CEP only those expenses associated with economic activities occurring in the United States, with respect to sales to unaffiliated U.S. customers. See Mitsubishi v. United States. In this case, however, the record shows that the activities performed by JBL International AG occurred outside of the United States. JBL International AG is located in Switzerland. Moreover, its activities were not specifically related to sales made to unaffiliated customers in the United States. The activities performed by JBL International AG were general in nature and performed on behalf of all JBL Group entities

[14] See Sales Verification Report at 14-16.

worldwide.[15] Therefore, for these reasons we find that these expenses were appropriately reported as DINDIRSU. Accordingly, for the final determination, we have not deducted them from GRSUPRU.

Comment 3: *Home Market Billing Adjustments*

The petitioners claim that JBLT's home market billing adjustments were allocated to home market sales using a flawed methodology that disproportionately allocated billing adjustments to the Canadian branches of certain JBLT customers with sales offices in both Canada and the United States. Citing to the Department's Antidumping Manual, Chapter 8 at 11, the petitioners also assert that, as a general matter, the Department does not accept price adjustments in investigations that occurred after the petition was filed, unless such price adjustments can be linked directly to pre-existing agreements. The petitioners contend that, although the timing of the billing adjustments at issue is unknown, they believe that some of the reported home market billing adjustments must have been granted shortly before the petition was filed, and were likely applied after the filing of the petition, thus disqualifying them from treatment as billing adjustments to home market sales prices.

The petitioners urge the Department not to grant JBLT the benefit of the doubt with respect to the timing of these billing adjustments. The petitioners argue that the data submitted in this case suggest that JBLT may have heard about the pending petition and changed its selling practices to certain key customers before the filing of the petition to reduce or eliminate its dumping margin. According to the petitioners, such possible pre-petition maneuvering, including JBLT's granting of substantial price adjustments to particular home market customers, as described above, suggests that the Department should not allow JBLT's claimed billing adjustments.

JBLT argues that its home market billing adjustments were proper, correct and verified, and that the petitioners' allegations regarding the timing of certain home market billing adjustments are unfounded and based on pure speculation. JBLT cites several statements in the Department's sales verification report in support of its argument.[16] In particular, JBLT points out that the Department's verifiers performed various exercises tying the reported billing adjustment amounts to the accounts for particular customers, and reconciled the total value reported for these adjustments to JBLT's general ledger and financial statement without discrepancy. Finally, JBLT argues that it entered into multiyear contracts with three customers some years before the filing of the petition; therefore, it is impossible that the petition's filing could have

[15] See Sales Verification Report at Exhibit 16.

[16] See Sales Verification Report at 12.

had any influence on the negotiation of those contracts.

Department's Position:

We agree with JBLT. At verification we found that JBLT had a defined program in place since before the filing of the petition through which it granted billing adjustments to particular customers in both Canada and the United States. The program was narrow in focus, and had well-established and consistent procedures for negotiating and applying the billing adjustments at issue.[17] With respect to the allocation of these adjustments, we found at verification that JBLT's allocation methodology, based on the ultimate destination of the merchandise, was supported by the sales documentation we examined.[18] Thus, we found no evidence to suggest that these adjustments were made in order to manipulate potential dumping margins. Furthermore, given that the billing adjustments were narrow in focus and made pursuant to procedures that were in place before the filing of the petition, the timing of the adjustments does not, in and of itself, give us any reason to think that the adjustments were made to manipulate the margin. For these reasons, we have made no changes with respect to home market billing adjustments in the final determination.

Comment 4: *Currency Conversions Reported for Certain Home Market Sales Prices and Certain U.S. Freight Expenses*

JBLT reported that Canadian sales prices and U.S. inland freight expenses had been incurred in both Canadian dollars (CAD) and U.S. dollars (USD) during the POI. Rather than reporting all values in the currency in which they were incurred, JBLT reported all Canadian sales data in CAD and all U.S. sales information in USD. JBLT made currency conversions using the monthly exchange rates employed in its electronic accounting system, stating that its system does not retain the original foreign currency amount in the sales database or in the general ledger.[19] In the Preliminary Determination, we accepted JBLT's sales prices and expense reporting, stating that we would test its reasonableness at verification.[20]

[17] See Sales Verification Report at 6. See also Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 11 (wherein the Department stated "we have accepted those post-petition adjustments claimed by the respondents in this proceeding where the respondent has demonstrated that the basis for the price adjustment was established prior to the filing of the petition, and that the adjustment does not appear to be a possible manipulation of potential dumping margins.")

[18] See Sales Verification Report at 12 and Verification Exhibit 35.

[19] See JBLT's October 15, 2008, supplemental questionnaire response at 4-6.

[20] See Preliminary Determination, 73 FR 70327.

The petitioners argue that the Department should apply AFA to all of JBLT's Canadian sales prices and to all U.S. inland freight expenses, because JBLT failed to report these values in the currency in which they were incurred, thereby preventing the Department from making currency conversions in accordance with the Act and the Department's regulations.[21] The petitioners also point out that the Department's questionnaire required JBLT to report its prices and expenses as incurred, to allow the Department to perform the appropriate conversion.[22] The petitioners add that, absent unusual circumstances,[23] the Department may not accept from a respondent values that have been converted in a different manner.

The petitioners assert that JBLT did not identify the specific home market sales and U.S. freight values for which it executed its own currency conversions; therefore, the Department was unable to reverse JBLT's initial conversion for the Preliminary Determination, and was forced to rely on the improperly-converted data. The petitioners assert that continuing to use these converted values for purposes of the final determination would not only be contrary to the statute and the Department's regulations, but could significantly distort JBLT's dumping margin because of the possible effects of double conversion (i.e., converting USD into CAD and then back into USD at a different rate than originally applied). The petitioners add that the Department's statutory obligation to determine dumping margins as accurately as possible[24] requires it to reject the distortive Canadian sales prices and U.S. freight expenses when calculating JBLT's final dumping margin.

The petitioners believe AFA is warranted in this case because JBLT failed to act to the best of its ability to provide the unconverted price and expense data requested by the Department. The petitioners point out that, contrary to JBLT's assertions in its questionnaire response, the Department found at verification that JBLT had the ability to report the prices and freight expenses in the currencies incurred. At a minimum, the petitioners argue, JBLT could have

---

[21] The petitioners cite to 19 U.S.C. § 1677b–1(a), stating that the Department must "convert foreign currencies into United States dollars using the exchange rate in effect on the date of sale of the subject merchandise . . . ." and 19 C.F.R. § 351.415(a) ("In an antidumping proceeding, the Secretary will convert foreign currencies into United States dollars using the rate of exchange on the date of sale of the subject merchandise.").

[22] See Antidumping Questionnaire at Question II-7 of the General Instructions ("Report all expenses and revenues in the currencies in which they were incurred or earned.")

[23] The petitioners acknowledge that the Department has the discretion to adjust its requirements so as to avoid imposing an undue burden on the respondent if a respondent promptly informs the Department that it is unable to submit requested information. See Section 782(c)(1) of the Act. However, the petitioners do not believe this authorization applies in this case because JBLT was capable of reporting the unconverted currency data in the manner requested by the Department.

[24] See, e.g., NTN Bearing Corp. v. United States, 74 F.3d 1204, 1208 (Fed. Cir. 1995).

identified the relevant home market invoices, as the Department's verification made clear.[25] With respect to U.S. freight expenses, the petitioners claim that JBLT neither identified the U.S. transactions for which it improperly reported self-converted freight values, nor provided the data needed to correct those improperly reported values.

The petitioners argue that it is appropriate for the Department to apply AFA to JBLT's Canadian sales price and U.S. freight expense data pursuant to 19 U.S.C. 1677e(a) and (b) and sections 776(a) and (b) of the Act. The petitioners add that, in order to determine whether a respondent has acted "to the best of its ability," the Department assesses whether the party has put forth "maximum efforts" towards providing the Department complete answers to its inquiries.[26] The petitioners assert that in this case, it is clear that JBLT was capable of providing the requested information without undue administrative burden, but refused to extract the requisite data from its records. The result of JBLT's actions, the petitioners argue, is distorted values that likely had the effect of deflating JBLT's dumping margin. The petitioners urge the Department to assume that all of JBLT's sales to its Canadian customers were incurred in USD and were improperly converted to CAD. As AFA, the petitioners advocate increasing all home market prices by an amount equal to the largest positive percentage difference between the Department's official USD/CAD exchange rates and JBLT's monthly rates. As AFA for U.S. freight expenses, the petitioners suggest increasing all of JBLT's reported inland freight amounts by the largest negative percentage difference between one of the Department's official daily rates and JBLT's USD/CAD monthly rates.

JBLT argues that there is no basis for the application of AFA. JBLT contends that the Department found at verification that its electronic accounting system is used company-wide, and that in the normal course of business, currency conversions are done automatically by the system at the time of posting, using standard monthly exchange rates. Furthermore, JBLT argues, the Department found no evidence at verification that JBLT manipulated the exchange rates in the SAP system, but in fact verified JBLT's reporting based on the SAP system. JBLT adds that the record demonstrates that its monthly exchange rates were set long before the petition was filed in this case,[27] and that the Department verified that the system does not retain the original amount in foreign currency in the sales database or in the general ledger.[28]

---

[25] See Sales Verification Report at 4-5 and Verification Exhibit 4.

[26] Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

[27] See JBLT's October 9, 2008, Response to Supplemental Questions Regarding Currency Conversions and Date of Sale at 1-2.

[28] See Sales Verification Report at 4.

In addition to reporting the monthly CAD/USD exchange rates that were in effect in its SAP system during the POI, JBLT asserts that it provided the Department with a list of the Canadian customers that were invoiced in USD during the POI, for which currency conversions were made using the monthly exchange rates in its SAP system. With respect to freight values, JBLT contends that the Department verified that JBLT incurred freight costs in both USD and CAD during the POI, and that the SAP system automatically converted USD-denominated entries to CAD. Furthermore, JBLT argues, it supplied the Department at verification with copies of its annual freight tenders for 2007 and 2008, covering deliveries in both Canada and the United States.[29] JBLT adds that, although its SAP system automatically converted USD-denominated freight values to CAD, in order to report these expenses to the Department, it converted them back to USD using the identical monthly exchange rates from the SAP system.

JBLT maintains that at verification, the Department performed various tests of the SAP exchange rates and reported no discrepancies. It adds that, in the verification report, the Department noted that "original unconverted invoice prices can be accessed through the SAP system, but only by drilling down to each individual invoice."[30] However, JBLT claims, a manual review of every invoice and expense in the SAP system to determine which were subject to automatic currency conversions would have been unreasonably and unnecessarily burdensome. It notes that the Department has the discretion to adjust its requirements so as to avoid imposing an undue burden on the respondent pursuant to section 782(c)(1) of the Act. Finally, JBLT notes that the Department confirmed at verification that JBL International AG controls the SAP system, and that access to it is limited to certain employees at the corporate level.[31] JBLT concludes that the petitioners' claim that JBLT was able to manipulate the exchange rates in the SAP system should be rejected as unfounded.

Department's Position:

The Department's antidumping questionnaire instructs respondents to report sales and expense data in the currency in which they were incurred in order to comply with the statute and regulations concerning currency conversions.[32] In our September 23, 2008, supplemental questionnaire, we noted that JBLT had converted some home market data into CAD and some U.S. data into USD, irrespective of the currency in which the data was originally denominated or

[29] JBLT cites copies of freight documents attached to the Sales Verification Report at Exhibits 19 and 20.

[30] See Sales Verification Report at 5.

[31] See Sales Verification Report at 4.

[32] See Antidumping Duty Questionnaire at C-17; See also section 773A of the Act and 19 CFR 351.415(a).

incurred. We emphasized the importance of reporting the prices and expenses in the currency in which they were incurred, and instructed JBLT on how to do so. JBLT responded that its SAP accounting system automatically converts all foreign currency into the currency of the respective JBLT entity at the moment of posting. JBLT also stated that the SAP system does not retain the original amount in foreign currency in the sales database or in the general ledger, requiring that JBLT report all values either in CAD in the case of the home market sales database or in USD in the case of the U.S. sales database.[33] We preliminarily accepted JBLT's data as reported, and stated in the Preliminary Determination that we would examine the reasonableness of JBLT's price and expense reporting based on its SAP system at verification.[34]

At verification we found that JBLT's SAP system does make automatic currency conversions at the point of data entry; however, we also found that it is possible to access in the SAP system source documents containing original unconverted values (i.e., invoices in the case of Canadian prices and credit notes for freight payments in the case of freight expenses),[35] as JBLT acknowledges in its comments above.

Despite the Department's request that JBLT report sales and expense information in the currency in which it was incurred, JBLT did not provide information pertaining to certain Canadian sales and U.S. freight expense in the manner requested. Additionally, JBLT's assertion that it could not report certain sales and expense data in the currency in which they were incurred, did not verify. Because it was possible for JBLT to have provided sales and expense data in the currency in which they were denominated or incurred, we find that JBLT withheld information requested by the Department. Therefore, we find it is appropriate to apply facts available under section 776(a)(2)(A),(B) and (D) of the Act in the final determination. In selecting from among the facts otherwise available, section 776(b) of the Act authorizes the Department to use an adverse inference if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information. Rather than complying with the Department's request for unconverted data, which was in JBLT's possession, or explaining the extent of the administrative burden compliance with that request entails, JBLT misrepresented its ability to report all values in the currency in which they were incurred. By so doing, JBLT did not act to the best of its ability in reporting this information to the Department. Therefore, we find it is appropriate to apply AFA in the final determination to certain of JBLT's home market prices and all of its U.S. freight expenses.

[33] See JBLT's October 14, 2008, Supplemental Questionnaire Response at 4-6.

[34] See Preliminary Determination, 73 FR at 70327.

[35] See the Sales Verification Report at 4-5.

At verification, JBLT provided a list of home market customers that were invoiced in USD during the POI. As AFA, we have increased the invoice prices to these customers by 1.16 percent, which is the percentage difference between the Department's weighted-average POI exchange rate (used to convert comparison-market values to USD in the margin calculation program), and the average of JBLT's monthly exchange rates for the POI (used by JBLT's SAP system for currency conversion purposes). Because it is not possible to isolate the improperly-converted U.S. freight charges, as AFA we have increased all U.S. inland freight charges by 1.16 percent. See the Final Calculation Memo.

Comment 5: *Electricity Purchased from an Affiliate*

JBLT argues that the Department erred in the preliminary determination by applying section 773(f)(3) of the Act (the major input rule) to electricity it purchased from its affiliate. JBLT argues that in calculating the cost of production (COP) the Department should use the transfer price for electricity that it paid to its affiliate JBL Canada Inc. (JBL Canada) (or JBL Canada's cost of producing electricity which is the same as the transfer price). JBLT contends that its and JBL Canada's operations are so intertwined that they should be viewed as one single entity and collapsed for the purpose of determining the value of electricity. JBLT points out that the companies are located at the same site and claims that JBL Canada's cogeneration plant is dedicated solely to supplying electricity and steam to JBLT. JBLT argues that JBL Canada could not provide its infrastructure to another party, and JBLT could not procure the services it receives from JBL Canada from another supplier. JBLT adds that the same employees manage both companies, and the same employees work for both companies. Further, JBLT points out that all of JBL Canada's costs were included in its books and records. JBLT contends that this is not a case where an affiliated vendor offers inputs to the general market while supplying the inputs to the company under investigation at a preferential price. JBLT also contends that this is not a case where an affiliated vendor is located in a different geographic region and is just one of several suppliers of the input in question. JBLT argues, therefore, that to apply the major input rule would elevate form over substance.

In the alternative, JBLT argues that if the Department determines it appropriate to use a market price to value electricity, the appropriate price to use is the price at which JBL Canada sold electricity back to an unaffiliated supplier. In support of its contention, JBLT cites Certain Hot-Rolled Carbon Steel Flat Products from India[36] where the Department stated "{W}e adjusted energy and pellet costs to reflect the per-unit prices that Essar's suppliers charged their

[36] See Preliminary Results of Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 2018, 2022 (January 12, 2006) (Certain Hot-Rolled Carbon Steel Flat Products from India).

unaffiliated customers during the POI (Essar is affiliated to its electricity and pellet suppliers)." JBLT argues that the price the unaffiliated supplier charged JBL Canada for electricity should not be used because it includes additional items not required for the generation and provision of electricity such as debt retirement charges, standby charges, and delivery charges.

The petitioners argue that the Department should continue to apply the major input rule and calculate the value of electricity using the price JBL Canada paid to the unaffiliated supplier for electricity. The petitioners contend that JBLT and JBL Canada are not eligible for collapsing under the Department's regulations. The petitioners claim that the Department's regulations at 19 CFR 351.401(f) require that the affiliated producers have production facilities for similar or identical products in order to be considered one entity (i.e., collapsed). The petitioners argue, however, that JBLT and JBL Canada produce dissimilar products (i.e., JBLT produces citric acid and JBL Canada produces steam and electricity). The petitioners cite Nihon Cement, Ltd. v. United States [37] in support of their contention that the Department collapses companies only in unusual circumstances that meet the Department's regulatory criteria. The petitioners claim that those criteria are not met in this case.

The petitioners contend that the Department acted in accordance with sections 773(f)(2) and (3) of the Act and the Department's regulations at 19 CFR 351.407(b) by valuing electricity at the price the unaffiliated supplier charged JBL Canada for electricity. The petitioners hold that the Department is not required to use the price at which JBL Canada sold electricity back to the unaffiliated supplier as the market price when applying the major input rule. The petitioners maintain that the Department's regulations direct it to use the highest of transfer price, market price, or the cost of producing the input, and therefore the Department must use the price of electricity purchased from the unaffiliated supplier because it is the highest value. Finally, the petitioners assert that there is no record evidence that the fees charged by the unaffiliated supplier for electricity are out of the ordinary for the Canadian electricity market.

Department's Position:

We disagree with JBLT that we should use the transfer price (or the affiliated supplier's cost which, in this case, is the same as the transfer price) to value electricity because we disagree that JBLT and its affiliated supplier should be collapsed and treated as a single entity. The Department would use the affiliate's cost of producing the input only if the entities were treated as a single, collapsed entity. Under the Department's regulations at 19 CFR 351.401(f), the Department will treat two or more affiliated producers as a single entity "where those producers have production facilities for similar or identical products that would not require substantial

[37] See Nihon Cement, Ltd v. United States, 17 CIT 400 (1993) (Nihon Cement, Ltd. v. United States).

retooling in order to restructure manufacturing priorities and the Secretary concludes that there is significant potential for the manipulation of price or production." In this case, JBL Canada and JBLT do not have production facilities for similar or identical products, and therefore the first criterion of the regulation for collapsing has not been met. JBLT owns the factory equipment that produces citric acid and purchases electricity from its affiliate JBL Canada. JBL Canada produces the electricity in its cogeneration plant but does not own equipment that would enable it to produce citric acid or a similar product without substantial retooling. Nor was JBL Canada involved in the sale of subject merchandise during the POI. Therefore, we have not collapsed JBLT and JBL Canada for the purpose of determining the value of electricity in the calculation of the COP.

Under section 773(f)(2) of the Act, the "transactions disregarded rule," a direct or indirect transaction between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of the merchandise under consideration in the market under consideration. Section 773(f)(3) of the Act authorizes the Department to evaluate transactions between affiliated parties involving the production of a major input to the subject merchandise (i.e., the major input rule). With respect to major inputs purchased from affiliated suppliers, the Department normally values the inputs at the higher of the affiliated party's transfer price, the market price of the inputs, or the actual costs incurred by the affiliated supplier in producing the input. This treatment is consistent with the Department's regulations at 19 CFR 351.407(b). Since implementation of the Uruguay Round Agreements Act, the Department has applied this calculation methodology consistently. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile, 63 FR 31411, 31426-27 (June 9, 1998), at Comment 22; and Chlorinated Isocyanuates From Spain: Final Results of Antidumping Duty Administrative Review, 72 FR 64194 (November 15, 2007), and accompanying Issues and Decision Memorandum at Comment 3.

To determine if an input is major and whether section 773(f)(3) of the Act applies, the Department examines the percentage of purchases of the input from the affiliated company relative to total purchases of the input and the percentage that input represents of the total cost of manufacturing (COM) of the subject merchandise. See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review,72 FR 27802 (May 17, 2007), and accompanying Issues and Decision Memorandum at Comment 3. In this investigation, we analyzed the quantities and values of electricity that JBLT purchased from JBL Canada and the percentage of COM that electricity represents, and determined that electricity constitutes a major input for purposes of section 773(f)(3) of the Act. See Final Cost Calculation Memorandum.

Accordingly, for these final results, we have analyzed JBLT's electricity transactions in accordance with the major input rule as described in section 773(f)(3) of the Act. As directed under the Department's regulations at 19 CFR 351.407(b), we compared the transfer price, the market price and the affiliate's cost of producing the input. In determining the market price when applying the major input rule, the Department is directed under 19 CFR 351.407(b)(2) to use the amount usually reflected in sales of the major input in the market under consideration. We agree with the petitioners that in this case JBL Canada's purchases of electricity from its unaffiliated supplier are the best reflection of a market price for electricity purchases in Canada. These transactions were made between two unaffiliated parties, in commercial quantities and in the market under consideration. We disagree with the respondent that the small quantity of electricity sales made by the affiliated supplier back to its original supplier, of excess quantities purchased, fairly reflects a market price for electricity. These transactions occurred in small quantities, and as a means to recover some of the cost for unused electricity purchases. Neither of these factors is reflective of normal market conditions. We also disagree with the respondent that charges such as debt retirement charges, standby charges, and delivery charges, are charges beyond the market price for electricity. There is no evidence on the record that these charges were not standard charges billed by the unaffiliated supplier to its customers in order to provide them with electricity in Canada. Therefore, for the final determination we have determined the market price for electricity using the price charged to JBL Canada by its unaffiliated supplier. We have valued the affiliated party electricity purchases at the market price, as it is the highest of transfer price, market price, or COP. See Final Cost Calculation Memorandum.

Comment 6: *G&A Expense Ratio*

JBLT argues that in the preliminary determination the Department included an incorrect amount for capital tax in the calculation of the G&A expense ratio. Therefore, JBLT asserts that for the final determination, when calculating the G&A expense ratio, the Department should use the amount for capital tax that is included on the audited financial statements of JBL Canada Group. Citing Stainless Steel Round Wire from Canada,[38] the petitioners contend that with the exception of income and value added taxes (VAT), the Department's normal practice is to include taxes, such as capital taxes, in the calculation of the G&A expense ratio. The petitioners claim that the cost verification exhibits show that the amount that the Department included in the G&A expense ratio as "capital tax" in the preliminary determination was comprised of both "capital tax" and "land tax" or "municipal tax." The petitioners maintain that in addition to capital tax the Department was correct to include the land tax or municipal tax in the calculation of the G&A expense ratio.

[38] See Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Canada, 64 FR 17324, 17335 (April 9, 1999) at Comment 19.

Department's Position:

We agree with the petitioners. In the preliminary determination, under the line item of capital tax, the Department included an amount in the G&A expense ratio calculation which actually consisted of capital tax and land tax.[39] Normally, with the exception of VAT and income taxes, the Department usually includes taxes, such as land or property taxes, in the calculation of COP. See, e.g., Certain Pasta from Italy: Preliminary Results of Eleventh Antidumping Duty Administrative Review, 73 FR 45716 (August 6, 2008) unchanged in final results.[40] Therefore, for the final determination we have continued to include both capital tax and land tax in the calculation of the G&A expense ratio.

[39] See Cost Verification Exhibit 6 at page 3.

[40] See Final Results of the Eleventh Administrative Review and Partial Rescission of Review: Certain Pasta from Italy, 73 FR 75400 (December 11, 2008).

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination of this investigation and the final weighted-average dumping margin for the investigated firm in the Federal Register.

Agree ____ Disagree ____

_____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

_____

(Date)