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March 5, 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 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from India

Summary

We have analyzed the case and rebuttal briefs submitted by the petitioner[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: U.S. Date of Sale

Comment 2: U.S. Sales Type Designation

Comment 3: Level of Trade

Comment 4: U.S. Credit Expenses and Inventory Carrying Costs

Comment 5: Verification Corrections

[1] The petitioner in this investigation is Compass Chemical International LLC.

[2] The sole respondent in this investigation is Aquapharm Chemicals Private Limited (Aquapharm).

Background

On October 21, 2008, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value investigation of 1-Hydroxyethylidene-1, 1-Diphosphonic Acid (HEDP) from India. See 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from India: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 62465 (October 21, 2008) ("Preliminary Determination"). The products covered by this investigation are HEDP of a kind used for industrial water treatment or detergents and cleaners. The period of investigation (POI) is January 1, 2007, through December 31, 2007. 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 petitioner and the respondent with an opportunity to comment on our Preliminary Determination and verification findings.

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

Margin Calculations

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

1. For CEP sales made to one of Aquapharm's customers, we did not adjust the gross unit prices reported in the field GRSUPRU2 in the U.S. sales database for the billing adjustment amounts reported in the field BILLADJU1, as we confirmed at verification that those billing adjustment amounts do not apply to the CEP starting prices. See January 13, 2009, Memorandum to The File from Case Analysts entitled "Verification of the Questionnaire Response of Aquapharm Chemicals Pvt. Ltd. (Aquapharm) in the Antidumping Duty Investigation of 1-Hydroxyethylidene-1, 1-Diphosphonic Acid (HEDP) from India" (Sales Verification Report) at 20.

2. We corrected a clerical error by subtracting from the CEP starting prices the credit expense amounts reported in the data field CREDITU2 instead of the credit expense amounts reported in the data field CREDITU. See Comment 4 for further discussion.

3. We corrected a clerical error by subtracting from the CEP starting prices the inventory carrying costs reported in the data field DINVCARU2 only, instead of the inventory carrying costs reported in both data fields DINVCARU and DINVCARU2. See Comment 4 for further discussion.

4. We incorporated, where applicable, all other revisions to Aquapharm's data as noted in the sales verification report. See Sales Verification Report at 16-19. See also Comment 5 for further discussion.

See March 5, 2009, Memorandum to The File from Case Analysts, entitled "Calculations Performed for Aquapharm Chemicals Private Limited (Aquapharm) for the Final Determination in the Antidumping Duty Investigation of 1-Hydroxyethylidene-1, 1-Diphosphonic Acid (HEDP) from India" (Calculation Memo), for further details.

Discussion of the Issues

Comment 1: *U.S. Date of Sale*

With respect to Aquapharm's sales of subject merchandise made to one U.S. customer (hereafter referred to as Customer A) through its unaffiliated U.S. warehouse, the Department preliminarily determined that the appropriate date of sale was the date of the sales invoice to the U.S. customer, rather than the date of the purported "long-term contract"[3] as proposed by Aquapharm. We stated in the preliminary determination that the terms of the "long-term contract" did not appear to be binding on the parties, nor did they appear to establish the essential terms of sale. We also stated that Aquapharm had not sufficiently demonstrated its claim that, in the normal course of business, no changes to the material terms of sale were possible between the date of the "long-term contract" and the date of the invoice to the customer. Accordingly, the Department used the date of invoice to the customer as the date of sale and treated these sales as CEP sales transactions under section 772(b) of the Tariff Act of 1930, as amended (the Act), in the preliminary determination because Aquapharm (via its unaffiliated U.S. warehouse) issued the sales invoice to Customer A after the merchandise was imported into the United States. See Preliminary Determination, 73 FR at 62467.

Aquapharm does not contest the Department's preliminary determination that its sales to Customer A are CEP sales transactions; however, it argues that the Department should rely on the date of the "long-term contract" (otherwise referred to as annual contract or RFP by Aquapharm in its case brief), rather than the date of the sales invoice issued to Customer A as the date of sale, because it claims that the material terms of sale (i.e., price and quantity) were established on the contract date.[4] Aquapharm contends that although the Department's verification report mentions that in certain instances one of the two essential terms of sale (i.e., quantity) changed from the contract date to the sales invoice date, the changes in quantity noted in the verification report were insignificant. Aquapharm maintains that in similar cases the Department has relied on the contract date as the date of sale despite subsequent changes in the quantities purchased, because those changes were within tolerances specified in the contract and, as such, not material. In support of its argument, Aquapharm cites Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review, 71 FR 17810 (April 7, 2006) (Pipe and Tubes from Thailand); and Certain Steel

[3] The "long-term contract" referred to by Aquapharm in its questionnaire responses is actually an exchange of emails with its customer conveying the request for proposal (RFP), RFP offer and acceptance of the RFP offer. Aquapharm reported in its U.S. sales database the date of email or verbal acceptance of its price/quantity offer from the U.S. customer as the date of sale.

[4] We note that Aquapharm's date-of-sale claim is inconsistent with its agreement on the Department's preliminary CEP sales classification determination with respect to the sales at issue, in that the contract date precedes the date of entry into the United States.

Concrete Reinforcing Bars from Turkey: Notice of Court Decision Not in Harmony with Final Results of Administrative Review, 71 FR 14835 (March 24, 2006).

The petitioner agrees with the Department's preliminary date-of-sale determination with respect to the sales made by Aquapharm to Customer A. The petitioner maintains that the Department's verification findings support its preliminary determination that the invoice date, rather than the contract date, is the proper basis for the U.S. date of sale for the sales at issue. The petitioner asserts, based upon review of the verification exhibits, that the changes in quantity occurring after the RFP email exchange, which it argues, cannot be construed either in form or function as a contract, that were observed by the Department and noted in the sales verification report, are not limited instances. The petitioner asserts further that the cases cited by the respondent in support of its date-of-sale claim are not applicable to the facts of this case. Specifically, the petitioner contends that the changes in quantities evidenced in this case are not within any specified contract tolerances because the RFP emails exchanged between Aquapharm and Customer A do not establish any such tolerances. Finally, the petitioner agrees with the Department's characterization of these sales as CEP sales, as explained in the Preliminary Determination.

Department's Position:

We disagree with Aquapharm, and have continued to rely on the date of issuance of the commercial invoice to the U.S. customer as the basis for the U.S. date of sale for the sales to Customer A.

As discussed in the Preliminary Determination, 73 FR at 62467, 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, 27348 (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.

At verification, we confirmed the sales process with respect to Customer A. Specifically, we stated in the Sales Verification Report at 6-7 that:

> For sales to {Customer A}, Aquapham also provided a document flow diagram … which shows that it emails the customer a request for proposal (RFP) and negotiates with the customer via email until eventually the customer agrees to the price and quantity terms initially established in the RFP. Company officials explained that the RFP is based on the contents of a three-month forecast which it receives from {Customer A} every month. The forecast received from {Customer A} indicates the expected quantity of HEDP which it will need in the next three

> months. The RFP agreed upon with {Customer A}] contains prices for specific HEDP products on both a drum and bulk basis. The RFP also notes an effective period within which the price and delivery terms of the merchandise are applicable, and specifies that the merchandise must be on hand at an unaffiliated warehouse in the United States upon request. Company officials explained that all communication with {Customer A} and the unaffiliated U.S. warehouse is done through its unaffiliated U.S. commissionaire (who is located in the United States).
>
> After the RFP is finalized, Aquapharm will generate an order confirmation for internal purposes. When the merchandise is ready to be shipped from India to the U.S. warehouse, Aquapharm will issue a sales invoice (i.e., 1st commercial invoice) which accompanies the shipment documentation for entry of the merchandise into the United States but which {Customer A} never receives. Once the U.S. warehouse receives the merchandise, it unloads the merchandise from drums and places it in a storage tank until it receives shipment instructions from the U.S. commissionaire to dispatch portions of the merchandise held in the storage tank to {Customer A}. Once Aquapharm receives the details of {Customer A's} purchase order (or actual purchase order) from its U.S. commissionaire, Aquapharm will issue the final commercial invoice (i.e., 2nd commercial invoice) to {Customer A} through its U.S. commissionaire, and on the same day the merchandise is released from the warehouse. {Customer A} will pay Aquapharm directly and the U.S. commissionaire will receive payment from Aquapharm after Aquapharm has received payment from the customer. Although company officials maintained that the prices in the RFP do not change up to the issuance of the final commercial invoice, company officials clarified that the quantities can and do change up to the issuance of the final commercial invoice. Specifically, company officials explained that there is a quantity conversion difference as a result of the merchandise being shipped in drums from India and then later sold to the customer in bulk form.

During our examination of source documentation at verification, we found that for nearly all the sales we reviewed, the quantity observed on Aquapharm's order confirmation form which was generated after the customer's acceptance of its RFP offer (as well as the quantity observed on the invoice Aquapharm issued for U.S. importation purposes at the time of shipment of the merchandise from India) differed from the quantity observed on the invoice Aquapharm issued to the U.S. customer at the time the merchandise left the unaffiliated U.S. warehouse for delivery to the U.S. customer. In certain instances, the quantity changes were significant. See Sales Verification Report at 8 and Exhibits 8L, 8N, 8O, and 8Q. Although Aquapharm characterized these quantity differences as general material handling losses incurred at the U.S. warehouse in its questionnaire response, we find no evidence to suggest that these quantity differences are solely the result of material being lost when transferring the HEDP to different containers; nor do these differences appear to be solely the result of changing the size of the containers in which the HEDP was placed (i.e., from drums to bulk containers) at the unaffiliated U.S. warehouse and the unit conversion associated with those container sizes (i.e., kilograms to pounds) prior to

shipment to the U.S. customer from the U.S. warehouse. Moreover, even if, assuming arguendo, these quantity differences are attributable to material handling losses, there is no mention in the sales documentation (RFP email exchange or otherwise) that they are acceptable from Customer A's standpoint. Specifically, the RFP emails contain no allowable quantity tolerances which would take into account handling losses. In addition, we found no instances in our examination of this issue at verification that Aquapharm through its unaffiliated U.S. warehouse shipped more HEDP to the U.S. customer to account for any handling losses in fulfillment of the total quantity specified in the RFP email exchange and the commercial invoice, which Aquapharm issued for purposes of shipping the HEDP to the U.S. unaffiliated warehouse. See Sales Verification Report at 8, and Exhibits 8B, 8L, 8N, 8O, 8Q, and 8S.

Upon further review of Aquapharm's questionnaire response and the source documentation provided at verification, we find that the quantities stated in the exchange of emails or so-called "long-term contract," which Aquapharm claims establishes the total quantity of HEDP it sold to Customer A during the POI, do not correlate with the total of the individual quantities stated on each sales invoice issued to Customer A during the POI and reported in the U.S. sales database. In other words, the Department cannot determine whether the total quantity specified in the exchange of emails between Aquapharm and Customer A was in fact reached vis a vis the total quantity actually purchased by/sold to that customer and reported in the U.S. sales database.

Furthermore, we find that the date upon which Aquapharm relies for reporting purposes does not always appear in the exchange of emails or so-called "long-term contract." For example, the date Aquapharm relies on in making its date-of-sale claim for its sales of bulk HEDP to the U.S. customer at issue is in fact the date of a verbal confirmation from its customer which Aquapharm attempts to document in a post-POI letter from that U.S. customer. See Exhibit AS-4(b) of the September 9, 2008, supplemental questionnaire response. There is no substantiation for this date based on the correspondence between Aquapharm and the U.S. customer during the POI, in the ordinary course of business, as examined at verification or placed on the record.

In addition, the cases cited by Aquapharm in support of its date-of-sale claim are inapposite. The cases cited relate to Department date-of-sale determinations where the observed differences in quantity between contract date, or purchase order date, and invoice date are based on quantity tolerances established in the contractual or other relevant sales documentation (see, e.g., Pipe and Tube from Thailand, 71 FR at 17810). In Aquapharm's case, no quantity tolerances were specified in the RFP emails or any other documentation relevant to the sales process involving Customer A.

Based on the foregoing, the Department finds an insufficient basis on the record to accept Aquapharm's date-of-sale claim with respect to its sales to Customer A, as we observed at verification that one of the material terms of sale, i.e., quantity, changes up until issuance of the commercial invoice to the U.S. customer, which occurs after importation of the subject merchandise into the United States. Accordingly, we have no basis upon which to deviate from our preliminary date-of-sale determination. Therefore, we have continued to rely on the date of the commercial invoice Aquapharm issues to Customer A as the appropriate date of sale because that date can be clearly established from the sales documentation generated between Aquapharm

and Customer A during the POI, and the material terms of sale do not change after the issuance of this commercial invoice to Aquapharm's customer.

Consistent with this date-of-sale determination, our findings at verification, and section 772(b) of the Act, we have continued to treat the sales to Customer A as CEP sales in the final determination because the commercial invoices are issued to the customer, and thus the sales are made after the merchandise is imported into the United States. See Sales Verification Report at 6-8.

Comment 2: *U.S. Sales Type Designation*

In the Preliminary Determination, the Department accepted Aquapharm's EP sales type designation for certain sales made to another U.S. customer (hereafter referred to as Customer B) which did not go through its unaffiliated U.S. warehouse and were made by Aquapharm before the date of importation of the subject merchandise into the United States. See Preliminary Determination, 73 FR at 62467.

The petitioner argues that the Department should reclassify these sales as CEP sales because it found at verification that the essential terms of sale (i.e., quantity) can change from the date of the customer's purchase order to the date of Aquapharm's commercial invoice to the customer. The petitioner reasons that this treatment is consistent with the logic and law that directed the Department to reclassify Aquapharm's sales to Customer A as CEP sales in the Preliminary Determination. The petitioner concludes that should the Department reclassify the sales at issue, and to the extent the U.S. sales database on the record of the proceeding does not include the relevant sales information for treatment of such sales as CEP sales, the Department should apply facts otherwise available, as appropriate.

Aquapharm disagrees, arguing that the petitioner's reasoning is flawed. Aquapharm asserts that the fact that the quantity might change between the date of purchase order and the date of sales invoice is completely irrelevant to the issue of whether a sale is properly designated as EP or CEP. According to the respondent, the fluctuation in the price or quantity of subject merchandise is relevant to determining the appropriate date of sale for purposes of compiling the universe of sales within the POI,[5] and has no bearing on the analysis of whether a sale is EP or CEP, except if the date of sale falls after the importation of the subject merchandise into the United States. Accordingly, the respondent maintains that this exception is irrelevant in this case as the sales at issue were made to Customer B prior to the date of the respondent's importation of the merchandise into the United States. Aquapharm explains further that the Department's reclassification of its sales to Customer A from EP sales to CEP sales was linked to the date of sale only because the Department concluded that the appropriate date of sale was the invoice date and not the contract date, and the invoice date came after the date of importation of the merchandise into the United States.

Department's Position:

[5] Aquapharm notes for the record that it correctly reported all sales to Customer B with sales invoice dates within the POI.

We agree with Aquapharm and have continued to treat the sales at issue as EP sales in the final determination in accordance with section 772(a) of the Act.

Section 772(a) of the Act defines EP as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States…." (Emphasis added.) Section 772(b) of the Act defines CEP as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter…." (Emphasis added.)

As stated in the Preliminary Determination, 73 FR at 62467, we did not accept Aquapharm's claim that the appropriate date of sale for the sales at issue is the date of the customer's purchase order. Rather, we determined the appropriate date of sale to be the date Aquapharm issued its commercial invoice to Customer B. Unlike the sales made to Customer A, as discussed in Comment 1 above, the invoice is issued to Customer B, and thus the sale is made outside the United States, prior to the importation of the merchandise into the United States. Therefore, consistent with section 772(a) of the Act, we accepted Aquapharm's designation of the sales as EP sales in its questionnaire responses. Our preliminary determination with respect to the classification of these sales is consistent with our findings at verification. See Sales Verification Report at 7-8. Therefore, we have no basis upon which to reclassify these sales as CEP sales, as requested by the petitioner.

Comment 3: *Level of Trade*

In the preliminary determination, we determined that no level-of-trade (LOT) adjustment (or CEP offset) was warranted because we found the single NV LOT and the single U.S. LOT to be the same. Specifically, in comparing the U.S. LOT to the NV LOT, we stated that the selling functions performed for home market sales were either performed at the same degree of intensity as, or varied only slightly from, the selling functions performed for U.S. sales. Accordingly, we matched U.S. and home market sales at the same LOT in the preliminary determination.

The petitioner argues that the Department should continue not to grant Aquapharm an LOT adjustment, as there is no information in the Department's verification report to suggest that a change in the Department's preliminary determination on this issue is warranted or supported for purposes of the final determination. The petitioner also notes that Aquapharm has not contested the Department's preliminary LOT determination.

Aquapharm did not comment on this issue.

Department's Position:

We agree with the petitioner. Consistent with our preliminary determination analysis on this issue and based on the verified information on the record of this investigation, we have not made a LOT adjustment (or CEP offset) in the final determination.

Comment 4: *U.S. Credit Expenses and Inventory Carrying Costs*

For one U.S. customer (Customer A), Aquapharm reported in its U.S. sales database two credit expense data fields (i.e., CREDITU and CREDITU2) and two inventory carry cost fields (i.e., DINVCARU an DINVCARU2) for sales transactions which the Department treated as CEP sales transactions in the preliminary determination. The calculation formula Aquapharm used to report the per-unit amounts in the CREDITU and DINVCARU data fields relies on the date that Aquapharm shipped the HEDP from its facility in India to its unaffiliated U.S. warehouse, and assumes the Department treats the sales made to the U.S. customer as EP sales transactions. The calculation formula Aquapharm used to report the per-unit amounts in the CREDITU2 and DINVCARU2 data fields relies on the date the HEDP is shipped from Aquapharm's unaffiliated U.S. warehouse to its unaffiliated U.S. customer, and assumes the Department treats the sales made to the U.S. customer as CEP sales transactions. In the preliminary determination, we deducted CREDITU, and both DINVCARU and DINVCARU2, from the gross prices reported for sales which were treated as CEP sales to this customer.

Aquapharm contends that because the Department treated its sales to the U.S. customer at issue as CEP sales transactions in the preliminary determination, it made a ministerial error when it deducted from the reported U.S. gross unit prices the expense amounts reported in the CREDITU data field and both the DINVCARU and DINVCARU2 data fields, instead of the expense amounts reported in the CREDITU2 data field and only the DINVCARU2 data field to arrive at the net U.S. prices. To correct this ministerial error, Aquapharm asserts that when deriving net U.S. prices, the Department must deduct CREDITU2 and DINVCARU2 only from the gross unit prices if it continues to treat the affected sales as CEP sales transactions in the final determination.

The petitioner did not comment on Aquapharm's credit expense ministerial error allegation. However, with respect to Aquapharm's inventory carrying cost ministerial error allegation, the petitioner states that Aquapharm's characterization of the alleged ministerial error with respect to inventory carrying costs in terms of the SAS programming language revisions it proposes in its case brief is unclear. Specifically, the petitioner asserts that to the extent the Department made a ministerial error in deducting both inventory carrying expense fields from the gross unit price, it should only deduct the DINVCARU2 expense amounts from the gross unit prices of the CEP sales made to the affected U.S. customer.

Department's Position:

We agree with Aquapharm that we should have deducted the expenses reported in the CREDITU2 and DINVCARU2 fields (and not the CREDITU and DINVCARU fields) in the U.S. sales database from the gross unit prices reported for the sales made to the U.S. customer at issue. This determination is consistent with our treatment of these sales as CEP sales

transactions. Therefore, we have corrected this error in the final determination. See Calculation Memo.

Comment 5: *Verification Corrections*

The petitioner asserts that the Department should make all necessary corrections to Aquapharm's reported U.S. and home market sales data, pursuant to its verification findings as noted at pages 16-19 of its Sales Verification Report. These data corrections affect the following expense data fields in the home market and U.S. sales databases, where applicable: CREDITH, INLFTCH, DINLFTPU, USDUTYU, CREDITU2, USBROKU, and DIRSELU.

Department's Position:

We agree with the petitioner and have made all necessary corrections to Aquapharm's reported U.S. and home market sales data pursuant to verification findings. See Sales Verification Report at 16-19, and Calculation Memo.

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, Aquapharm, in the Federal Register.

Agree ___ Disagree ____

_____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

_____

(Date)