A-570-930
Investigation
7/01/07 - 12/31/07
Public Document
AD/CVD 4: MB

January 21, 2009

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

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China

SUMMARY

The Department of Commerce (the Department) has analyzed the case and rebuttal briefs submitted by interested parties in the above-referenced 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 position described in the "Discussion of the Issue" section of this memorandum.

**Background**

On September 5, 2008, the Department published its preliminary determination in the investigation of circular welded austenitic stainless pressure pipe (CWASPP) from the People's Republic of China (PRC). See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 51788 (September 5, 2008) (Preliminary Determination). We invited parties to comment on our Preliminary Determination. Petitioners[1] and Winner Machinery Enterprise Co., Ltd. (Winner), the mandatory respondent in this investigation, submitted case briefs on October 22, 2008, and rebuttal briefs on October 27, 2008.

**Discussion of the Issue**

**Comment 1: Whether, as Adverse Facts Available for the PRC-Wide Entity, the Department Should Use the Petition, Initiation, or Preliminary Determination Margins,**

1 Petitioners in this investigation are Bristol Metals, L.P., Felker Brothers Corp., Marcegaglia USA, Inc., Outokumpu Stainless Pipe Inc., and the United Steel Workers of America (collectively, Petitioners).

**and Whether Those Margins Should Be Adjusted Using Thai, Instead of Indian, Surrogate Values**

Petitioners note that the sole respondent in this investigation, Winner, refused to allow the verification of its questionnaire responses, and subsequently withdrew from participation in this investigation. As a result, note Petitioners, neither Winner's factor data nor its U.S. sales data were verified.

Petitioners contend that the Department's established practice is to apply an adverse inference in establishing the final determination margin under these circumstances. The courts,[2] continue Petitioners, have repeatedly endorsed this practice as a means to induce cooperation from the respondents in complying with the Department's informational requests, and to ensure that non-cooperative respondents do not benefit from their failure to cooperate. Petitioners claim that in situations involving non-cooperating respondents of this type, the Department often selects as adverse facts available (AFA) the highest margin from the current or any prior segment of the same proceeding. In this case, however, the use of the highest initiation margin (12.70%) or preliminary determination margin (22.03%) would not be appropriate because a rate greater than the preliminary determination rate is needed to prevent Winner from benefitting from its refusal to participate by obtaining a more favorable result by failing to cooperate than if it had fully cooperated. Moreover, the petition and Preliminary Determination rates are not high enough to encourage participation in future segments of this proceeding. Also, in the present case Winner's refusal to permit verification precludes the use of Winner's factor data or its U.S. sales data given the requirement, at section 782(i)(1) of the Tariff Act of 1930, as amended (Act), that the Department "shall verify all information relied upon in making a final determination in an investigation."

Consequently, in accordance with section 776(b)(4) of the Act, Petitioners ask that the Department use other information placed on the record of this investigation as AFA. Specifically, Petitioners propose that the Department calculate an AFA margin using the factor and U.S price data provided in the petition and the surrogate values, including the financial ratios, the Department used for the Preliminary Determination, with the exception of the surrogate value for stainless steel which cannot be used because it was based on Winner's purchases of inputs from market suppliers which were not verified. Petitioners also argue that the surrogate values for stainless steel from Indian World Trade Atlas (WTA) data used in the initiation and preliminary determination should not be used because the harmonized tariff schedule (HTS) category for stainless steel does not differentiate between those grades of steel not containing expensive alloys and those, subject merchandise, that do contain expensive alloys. Moreover, contend Petitioners, the surrogate values from the Indian WTA data do not even approach the cost of only the expensive alloys within the grades of stainless steel used to produce subject merchandise. Petitioners assert that the Court of International Trade has found[3] that the

2 F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (De Cecco).

3 Globe Metallurgical Inc. v. United States, Slip Op. 08-105 (October 1, 2008) at 14 (Globe Metal) and Hebei Metals & Mineral v. United States, 366 F. Supp. 2d 1264 (CIT 2005) (Hebei Metals).

Department's use of import data from a broad HTS category that does not relate, at least reasonably, to the specific input used in production was arbitrary and unsupported by the record.

To value stainless steel in calculating the AFA margin, Petitioners recommend that the Department use the period of investigation (POI) average daily U.S. prices for grades 304L stainless steel and 316L stainless steel reported in the American Metal Market (AMM) publication, which Petitioners placed on the record in their June 23, 2008 surrogate values submission. Petitioners argue that, in this case, although the AMM prices are not ideal, they are the most suitable and also supportable.[4] Petitioners add that the AMM data also corroborate the prices charged by the Indian stainless steel producers Jindal Stainless and the Steel Authority of India Limited (SAIL) which Petitioners placed on the record. According to Petitioners, the SAIL and Jindal Stainless prices are not only specific to the most common grade of steel used in producing the subject merchandise, but are specific to the surrogate country selected by the Department.

Lastly, Petitioners argue that the surrogate value information Winner submitted one day after the October 15, 2008 deadline should be rejected as untimely.

Winner argues that the Department has a statutory mandate to accurately calculate the dumping margin, and that mandate continues even if a respondent is uncooperative. While adverse inferences are then permitted, according to Winner, they cannot defy reality or be unreasonable as to the true extent of dumping. In that regard, Winner does not contest using the factors of production (FOP) and U.S. prices in the petition including Petitioners' objection to using surrogate values for stainless steel coil based on Winner's market economy purchases.

However, argues Winner, the adverse inference cannot extend to using the wrong surrogate country or surrogate values. In that regard, as a matter of law and to fulfill the Department's statutory mandate to accurately calculate dumping margins, Winner contends that Thailand should be selected as the surrogate country, not India. Winner argues that Thailand, not India, is the most appropriate surrogate country for the following reasons: (1) Thailand, rather than India, is at a comparable level of economic development to the PRC because (a) the PRC and Thailand are in the World Bank's middle income group while India is in the low income group, and (b) in countervailing duty (CVD) law, the Department distinguishes between the PRC and India as developed and developing, respectively; and (2) only Thai financial statements are useable because (a) the Thai financial statements on the record are from companies that produce subject merchandise, (b) most of the Indian financial statements are not contemporaneous with the POI or are not representative of stainless pipe producers, and those that are contemporaneous with the POI show countervailable subsidies.

4 See Smith Corona Corp. v. United States, 796 F. Supp. 1532, 1537 (CIT 1992) (the rate deemed best information available does not need to be a perfect rate, rather the most suitable considering the circumstance and also the most supportable. Additionally, respondents who refuse to participate in investigations are not entitled to special considerations).[4]

Also, Winner argues that the surrogate values for welding gases from Indian WTA data that were used in the Preliminary Determination (1) were derived from small quantities, (2) are aberrational compared to those found in (a) Thai WTA data, (b) one of the Indian financial statements, and (c) the website Wikipedia, (3) do not compare to the small relative cost for these gases as a percent of total cost of producing subject merchandise found in the petition, and (4) were not included in the petition because Petitioners claimed they were unable to obtain reliable Indian values for these gases and instead reported the U.S. price of these gases. Winner adds that in Chlorinated Isos,[5] the Department used a Philippine WTA surrogate value for hydrogen because it found the Indian WTA surrogate value to be aberrational. Winner adds that the Department should also use the surrogate value for electricity used in Chlorinated Isos for consistency.

In rebuttal, Petitioners concur with the Department's finding in its Preliminary Determination that it does not rank-order countries' comparability according to how close their per capita gross national income (GNI) is to that of the NME country in question, rather it creates a list of possible surrogate countries that it considers equivalent in terms of economic comparability. In addition, Petitioners contend that Winner has not provided a reasonable basis for the Department to depart from this practice, and therefore, India remains equivalent in terms of economic comparability with Thailand. Moreover, argue Petitioners, Indian surrogate value data is superior to Thai data. Petitioners contest Winner's claim that only Thailand has usable financial statements, and concur with the Department's findings in the Preliminary Determination that the financial statements of the Indian companies are more appropriate as the source of the financial ratios than the Thai financial statements.

Petitioners argue that contrary to Winner's claims, the financial statements of Ratnamani Metals & Tubes Ltd. (Ratnamani) do not indicate that it received subsidies. Specifically, Petitioners claim that (1) according to the financial statements, the company had "excise benefits available to the Company in respect of its unit in the Kutch District of Gujarat,"[6] (2) these statements are insufficient for determining whether or not these excise benefits concern programs found countervailable by the Department, (3) there is no indication in the financial statements of exemptions from excise duties on imports that are contingent upon export performance, such as the EPCG schemes found countervailable by the Department, and (4) the Department has found that the purchase of materials and other inputs in India free of the central excise duties that are ordinarily imposed is not countervailable, rather, it is the Department's normal practice to exclude excise taxes from the price of inputs sold in India to derive surrogate values.

Petitioners also disagree with Winner's contention that because the quantity of Ratnamani's production of carbon pipe exceeded the quantity of Winner's production of stainless steel pipe, the Ratnamani financial statements are not representative of subject merchandise production in India. Petitioners argue that although the quantity of carbon steel pipes produced by Ratnamani

5 Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 73 FR 24943 (May 6, 2008) and Surrogate Value Memorandum at 3, April 29, 2008 (Chlorinated Isos).

6 See Petitioners' July 28, 2008 submission at Exhibit 1.

exceeded the quantity of stainless steel pipes, the cost of the raw materials used to produce stainless steel pipe exceeded the cost of the raw materials used to produce carbon steel pipes, and because financial ratios are based on the costs of production rather than the quantity produced, the Ratnamani's financial ratios are representative of the production of subject merchandise production in India. Moreover, contend Petitioners, the Department has accepted the financial statements of producers of the subject merchandise even though the subject merchandise is not the primary product manufactured by the producer. Petitioners add that the financial ratios of Indian producer Jindal Stainless are further representative of subject merchandise production given the company's substantial production of seamless stainless steel pipe, a product that is similar to the subject welded stainless steel pipe.

Furthermore, Petitioners note that the Department found in its Preliminary Determination that the financial statements for two of the three Thai companies submitted by Winner, Thai–German Products Company Ltd. and Lokahit Metal Public Co. Ltd., cannot be used because they indicate that these companies received subsidies found countervailable by the Department. Petitioners add that it does not appear that the other Thai company for which Winner submitted financial statements produces the subject merchandise. Moreover, Petitioners argue that because the Department found that Thailand maintains broadly available, non-industry specific export subsidies, there is reason to believe that Thai companies receive those subsidies, and Thai financial statements should not be used as a surrogate value source. Therefore, contend Petitioners, the Department's use of the two Indian financial statements of producers of subject and like products, rather than the financial statements of the Thai companies, as the basis for its calculation of the financial ratios is eminently reasonable and supported by the record.

Petitioners disagree with Winner's claims that the Department's surrogate values for the welding gases are aberrational, and that the gases are not a significant component of the costs of producing subject merchandise. Petitioners contend that Winner's claims regarding the gases are not supported by the record. Specifically, assert Petitioners, Winner acknowledges that the cost for the gases in the petition is realistic, and the petition, according to Petitioners, indicates that these gases constitute a major input. Petitioners argue that because the Department was unable to verify Winner's factor data to get a proper measure of the quantities consumed in the production of subject merchandise, the Department should add a facts available amount to the gases in constructing the NV.

Finally, Petitioners maintain that that the Department should not reopen the record at this point to consider surrogate value data which Winner filed after the deadline for submitting this information.

In rebuttal, Winner claims that in Hebei Metals, cited by Petitioners to support its arguments for not using Indian WTA data to values stainless steel, the court emphasized the "paramount goal" under the antidumping statute to calculate surrogate values "as accurately as possible;" and that the best information rule (see 19 USC § 1677b(c)(1)(B)) obligates the Department to choose information that has a reasonable relationship to the factor it represents. Winner asserts that according to Globe Metal, also cited by Petitioners, in selecting reasonable surrogate values, accuracy is key, and that applying adverse facts to other FOP has no relevancy to selecting

appropriate surrogate values. Winner adds that according to De Cecco, also cited by Petitioners, an AFA rate should be a reasonably accurate estimate of the respondent's actual rate, with some built-in-increase as a deterrent to non-compliance. Winner argues that in comparing the information that it reported and the FOP and U.S. prices in the petition, the latter is adverse to Winner. However, Petitioners' argument that using a rate higher than the initiation or preliminary margin to achieve cooperation is contrary to Department's normal practice and court precedence and would require that the Department use higher than prior or normal adverse rates when those rates did not achieve cooperation, which ignores the case precedent that even in AFA situations, the dumping margin must still be reasonable.

With regard to Petitioners' arguments that the surrogate values from Indian WTA data for stainless steel coil should not be used, Winner asserts that Hebei Metals, is inapposite because in that case the Department chose a surrogate value from an "all others" Indian HTS category while there was no evidence on the record that the category included the factor input at issue. Winner adds that with regard to Petitioners citing of Globe Metal as support for not using a broad WTA category, in that case the petitioner submitted an affidavit and actual transaction prices in India, documented that the WTA data contained imports from countries that did not produce the input at issue, provided Info-drive data on the value of the input during the period at issue, provided actual sales invoices for sales of the input in India, and provided an Indian expert report. In this case, in comparison, Winner alleges that Petitioners did not provide reliable Indian prices for stainless steel coil, rather Petitioners provided price quotes which lack important information, such as the time period and whether the prices are for the export or domestic market, and certification that these prices are accurate. Therefore, these prices should be rejected by the Department as unreliable, as in Refined BAO.[7] With regard to using AMM prices to value stainless steel coil, Winner asserts that those prices do not originate in a country at a comparable level of economic development to the PRC and have already been rejected by the Department in the Preliminary Determination. Winner instead suggests using, as surrogate values for stainless steel coil, either benchmark prices used by the Department in the CVD investigation of CWASPP from the PRC or the prices paid by the respondent, which were verified in the CVD investigation and could be placed on the record of this proceeding. Winner clarifies two of its arguments from its case brief regarding the aberrational values of welding gases and countervailable subsidies in Indian financial statements by stating that it referred to the amounts of the welding gases as a percentage of the total cost of production in the petition, not the absolute amounts, and that because the subsidies were limited to a particular geographic area and specific, not general, it is therefore countervailable. Winner disagrees with Petitioners' argument that because the Department found that Thailand maintains broadly available, non-industry specific export subsidies, there is reason to believe that Thai companies receive those subsidies, because if countries are excluded from being a surrogate country based on the fact that the Department has found export subsidies that apply to all companies, then India should be excluded as well. Finally, Winner argues that the Department should not reject its untimely

7 See Notice of Final Determination of Sales at Less Than Fair Value: Refined Brown Aluminum Oxide (Otherwise known as Refined Brown Artificial Corundum or Brown Fused Alumina) from the People's Republic of China, 68 FR 55589 (September 26, 2003) (Refined BAO).

submission, as in other cases,[8] based on the reasons stated in its original request for an extension and because there is still sufficient time remaining in the investigation to consider the submission.

**Department's Position:**
We agree, in part, with Petitioners. Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act allows the Department, subject to section 782(e) of the Act, to disregard all, or part, of deficient or untimely responses from a respondent. Pursuant to 782(e) of the Act, the Department 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. Section 776(b) of the Act authorizes the Department to use an adverse inference with respect to an interested party if the Department finds that the party failed to cooperate by not acting to the best of its ability to comply with a request for information. See e.g., Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808, 53819-20 (October 16, 1997); see also Crawfish Processors Alliance v. United States, 343 F. Supp. 2d 1242 (CIT 2004) (approving use of AFA when the respondent refused to participate in verification).

Winner withdrew from verification. By withdrawing from verification, Winner prevented the Department from verifying the information that it had submitted and significantly impeded the proceeding. Thus, pursuant to sections 776 (a)(2)(C) and (D) of the Act, we have determined to base Winner's dumping margin on facts otherwise available.[9] Furthermore, by withdrawing from verification, we determine that Winner failed to act to the best of its ability to allow the Department to verify the accuracy of the information that it submitted to the Department. Therefore, pursuant to section 776(b) of the Act, we have determined to use an adverse inference when selecting from among the facts otherwise available. As AFA we are considering Winner to be part of the PRC-wide entity.

The PRC-wide entity includes companies that failed to respond to the Department's request for quantity and value information (See Preliminary Determination) and Winner, which prevented the Department from verifying its information, including information pertaining to its separate rate application. Thus, pursuant to sections 776 (a)(2)(A), (C), and (D) of the Act, and consistent with our Preliminary Determination, we find it appropriate to base the PRC-wide entity's

8 See Certain Preserved Mushrooms From the People's Republic of China: Final Results of Third New Shipper Review and Final Results and Partial Rescission of Second Antidumping Duty Administrative Review, 67 FR 46173, 46174 (July 12, 2002).

9 In this case, sections 782 (d) and (e) of the Act do not require the Department to consider the information that Winner submitted to the Department because the information could not be verified.

dumping margin on facts available. Moreover, because the PRC-wide entity did not respond to the Department's request for information and Winner decided not to allow the Department to verify its information, we have determined that the PRC-wide entity has failed to cooperate to the best of its ability to provide needed information. Therefore, pursuant to section 776(b) of the Act, we have determined to use an adverse inference when selecting from among the facts otherwise available (i.e., we have, decided, consistent with our Preliminary Determination, to base the PRC-wide entity's dumping margin on total AFA).

In selecting an AFA rate, we look to the information available on the record. Generally, the Department selects as AFA the higher of (1) the highest margin from the initiation or (2) the highest calculated rate for any respondent in the proceeding in order "to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998). In this case, the preliminary dumping margin calculated for Winner is higher than the highest margin from the initiation; however this calculated rate was insufficient to induce cooperation given that Winner withdrew from verification after the Preliminary Determination. As a result, the Department has decided to use, as the AFA rate, 55.21 percent, the highest CONNUM-specific dumping margin calculated in the Preliminary Determination. There is no need, in this case, to revise the initiation margins, as suggested by Petitioners, because, as noted, there are other margins available on the record from which to select an AFA margin. Moreover, there is no need to corroborate the selected margin because it is based on, and calculated from, information submitted by Winner in the course of this investigation, i.e., it is not secondary information. See 19 CFR 351.308(c) and (d) and section 776(c) of the Act.

We disagree with Petitioners' contention that the Department cannot use a dumping margin from the Preliminary Determination as AFA because it would be based on unverified information. There is no such limitation in the statute or the regulations with respect to the application of facts available. Furthermore, the Department has, in other cases, selected a margin under similar circumstances as a total AFA rate. See Stainless Steel Bar from India: Final Results of Antidumping Duty New Shipper Review, 72 FR 72671 (December 21, 2007) (the Department was unable to verify respondent's home market sales data and as a result assigned to the respondent, as total AFA, its dumping margin from the preliminary results of review because the Department found that this rate was higher than the other rates in the proceeding and therefore, sufficiently adverse to serve the purposes of facts available); see also 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 (June 24, 2008) (LWR from China), and accompanying Issues and Decision Memorandum at 1, dated June 13, 2008 (the Department applied total AFA to a respondent because its information could not be verified and assigned the respondent its preliminary dumping margin, which was the highest rate in the investigation).

Additionally, there is no basis for reexamining the surrogate values used in the Preliminary Determination, as requested by Winner. The Department selects surrogate values based on information on the record regarding the type of inputs used and examines the nature of the

respondent's operations (e.g., whether the respondent is an integrated or non-integrated producer) in selecting surrogate financial statements. In this case, Winner prevented the Department from verifying any of the information needed to select surrogate values. There is no verified information on the record regarding the physical characteristics of the inputs used by Winner (e.g., the concentration of gases used by Winner), the production processes used by Winner, or even whether Winner reported all of the FOP that it used in manufacturing subject merchandise (a factor which affects surrogate country selection given that the Department will examine data availability in selecting a surrogate country). Thus, due to Winner's refusal to allow verification of its submissions, the Department is not in a position to determine which surrogate values, including surrogate financial ratios, are more appropriate or which surrogate values are aberrational. Any determination with respect to surrogate values would be arbitrary because Winner did not allow the Department to verify its submissions. Therefore, there is no basis for the Department to change any of the surrogate values relied upon in its Preliminary Determination, nor to revisit our choice of India as the appropriate surrogate country.

Even if there were a basis to reexamine the surrogate values used in the Preliminary Determination, the record does not support Winner's claims regarding the surrogate values used by the Department. Contrary to Winner's claim that Ratnamani's financial statements should not be used to determine surrogate financial expenses because the statements indicate the company received subsidies, we continue to find that the financial statements do not indicate that the company received subsidies found to be countervailable by the Department. Further, much of the information submitted by Winner[10] to substantiate its claim that the welding gas values are aberrational is unsupported. Specifically, the worksheet listing alleged prices of welding gases created by Winner is not supported with source documentation, and the one-sentence quote containing an alleged gas price from a website appears to originate from a source document that was not placed on the record, and therefore, we are unable to evaluate the credibility of the source. In addition, although Winner cited Chlorinated Isos in support of its claim that the Department used an aberrant WTA figure to value hydrogen, unlike Chlorinated Isos in which the completeness and accuracy of the respondent's FOP data was not called into question, in this case, information regarding the FOP (e.g., hydrogen) was called into question because the Department was prevented from verifying such information. Moreover, we note that in the instant case, we are not using the same Indian WTA value for hydrogen that was used in Chlorinated Isos because the period of review in Chlorinated Isos differs from the POI in this case.

Therefore, we have based the AFA dumping margin on the information on the record at the time that we made our Preliminary Determination, without making any adjustments to our calculations. This approach is consistent with other cases where the Department has not adjusted a respondent's preliminary dumping margin that was assigned to the respondent as AFA, except to correct ministerial errors.[11] In this case, no party has alleged that there are ministerial errors in

10 In this case, given that Winner's October 16, 2008 surrogate value submission was only one day late, the Department exercised its discretion and accepted the submission.

11 See LWR from China; see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Venezuela, 67 FR 62119 (October 3, 2002), and accompanying Issues and Decision Memorandum at Comment 1 ("we have not adjusted the preliminary rate {being

the Department's preliminary margin calculations. Therefore, as AFA, we have assigned the PRC-wide entity the highest CONNUM-specific dumping margin calculated in the Preliminary Determination.

**Recommendation**

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

Agree ___ Disagree ____

_____
Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

_____
(Date)

used as AFA} other than to correct for the ministerial error and minor corrections presented at verification . . . ").