



A-823-805

AR: 8/1/2015-7/31/2016

Public Document

E&C/I: DV

May 3, 2017

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Preliminary Results in the
Administrative Review of the Antidumping Duty Order on
Silicomanganese from Ukraine; 2015-2016

I. SUMMARY

In response to requests from interested parties, the Department of Commerce (the Department) is conducting this administrative review of the antidumping duty (AD) order on silicomanganese from Ukraine,¹ covering the period of review (POR) August 1, 2015, through July 31, 2016. The Department preliminarily determines, based on the use of adverse facts available, that during the POR, both exporters covered by this review made sales of subject merchandise at less than normal value. Interested parties are invited to comment on these preliminary results. We intend to issue the final results no later than 120 days from the date of publication of the accompanying *Federal Register* notice, pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act).

II. BACKGROUND

On August 5, 2016, we published a notice of opportunity to request an administrative review of the antidumping duty order on silicomanganese from Ukraine covering the period August 1, 2015, through July 31, 2016.² On August 29, 2016, we received a timely request for an administrative review from two Ukrainian exporters of silicomanganese, PJSC Zaporozhye Ferroalloy Plant (ZFP), and PJSC Nikopol Ferroalloy Plant (NFP).³ On October 14, 2016, we initiated the administrative review with respect to these companies.⁴

¹ See *Suspension Agreement on Silicomanganese from Ukraine; Termination of Suspension Agreement and Notice of Antidumping Duty Order*, 66 FR 43838 (August 21, 2001).

² See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 81 FR 51850 (August 5, 2016).

³ See Letter from ZFP and NFP to Secretary of Commerce, dated August 29, 2016.

⁴ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 FR 71061 (*Initiation Notice*). In the *Initiation Notice*, ZFP's name was misspelled and an incorrect POR was identified. *Id.*, at 81 FR 71066. We

III. SCOPE OF THE ORDER

The merchandise covered by the antidumping duty order is silicomanganese. Silicomanganese, which is sometimes called ferrosilicon manganese, is a ferroalloy composed principally of manganese, silicon, and iron, and normally containing much smaller proportions of minor elements, such as carbon, phosphorous, and sulfur. Silicomanganese generally contains by weight not less than four percent iron, more than 30 percent manganese, more than eight percent silicon, and not more than three percent phosphorous. All compositions, forms and sizes of silicomanganese are included within the scope of this order, including silicomanganese slag, fines, and briquettes. Silicomanganese is used primarily in steel production as a source of both silicon and manganese. This order covers all silicomanganese, regardless of its tariff classification. Most silicomanganese is currently classifiable under subheading 7202.30.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Some silicomanganese may also currently be classifiable under HTSUS subheading 7202.99.8040. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.

IV. USE OF FACTS AVAILABLE AND ADVERSE INFERENCES

Section 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that if necessary information is not available on the record or if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(c)(1) of the Act provides that if an interested party “promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner,” the Department shall consider the ability of the interested party and may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person an opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if: (1) the information is

corrected these discrepancies in *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 FR 78778, 78785.

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.

Under the Trade Preferences Extension Act of 2015 (TPEA), numerous amendments to the antidumping and countervailing duty laws were made.⁵ The amendments to the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this review.⁶

Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In doing so, and under the TPEA, the Department is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.⁷ Section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the less than fair value investigation, a previous administrative review, or other information placed on the record.⁸

Section 776(c) of the Act provides that, in general, when the Department relies on secondary information rather than on information obtained in the course of an administrative review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.⁹ Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.¹⁰

Under section 776(d) of the Act, the Department may use any dumping margin from any segment of a proceeding under an antidumping order when applying an adverse inference, including the highest of such margins.¹¹ The TPEA also makes clear that, when selecting an adverse facts-available (AFA) margin, the Department is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an “alleged commercial reality” of the interested party.¹²

⁵ See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015) and *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015) (*Applicability Notice*).

⁶ See TPEA and *Applicability Notice*.

⁷ See section 776(b)(1)(B) of the Act; TPEA, section 502(1)(B).

⁸ See also 19 CFR 351.308(c).

⁹ See also 19 CFR 351.308(d).

¹⁰ See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (SAA), H.R. Rep. No. 103-316, at 870 (1994), as reprinted in 1994 U.S.C.A.N. 4040, 4199.

¹¹ See section 776(d)(1)-(2) of the Act; TPEA, section 502(3).

¹² See section 776(d)(3) of the Act; TPEA, section 502(3).

A. Use of Facts Available

We preliminarily find that the use of facts available is warranted with respect to ZFP and NFP because the information necessary for calculating the weighted-average dumping margin for each respondent in this review is not available on the record. We preliminarily find that both ZFP and NFP withheld information requested by the Department, failed to provide the requested information by the deadlines, and, thus, significantly impeded this proceeding by withholding the information we find critical and necessary to perform the margin calculations in this administrative review. As discussed below, ZFP and NFP did not provide information requested of them in their questionnaire responses.

In their questionnaire responses, both ZFP and NFP reported that, through a common, partial, and indirect ownership by certain Ukrainian nationals, the companies are affiliated with each other and with a certain U.S. customer.^{13, 14} ZFP and NFP reported that, through a third-country affiliated distributor, they each made one sale to a certain affiliated U.S. customer and one sale to a certain unaffiliated U.S. customer;¹⁵ each company's reported sale to an affiliated U.S. customer constitutes 99 percent of the total volume of U.S. sales.¹⁶ Each company reported both of its U.S. sales as export price (EP) transactions.¹⁷ Neither ZFP nor NFP acknowledged in its response whether the affiliated U.S. customer consumed the subject merchandise it imported or re-sold it, as imported, in the United States to an unaffiliated customer. Both ZFP and NFP reported that their affiliated U.S. customer did not respond to section A of the questionnaire, which requests the information concerning further manufacture of the subject merchandise.¹⁸

The record shows that in their original questionnaire responses, both ZFP and NFP failed to report constructed export price (CEP) transactions for their U.S. sales made through the affiliated U.S. customer, and failed to report all relevant expenses contemplated under section 772(c) and (d) of the Act, including, if applicable, the costs of further manufacture or assembly in the United States. Instead, both ZFP and NFP reported transfer prices to an affiliated U.S. customer as EP transactions, and reported only the selling and movement expenses related to the affiliated party sales.

¹³ See ZFP's November 17, 2016, Section A response (ZFP AQR) at 22-32 and NFP's November 17, 2016, Section A response (NFP AQR) at 8-21; *see also* ZFP's/NFP's March 7, 2017, supplemental questionnaire response at Exhibit A-1-SQ.

¹⁴ We are withholding the identities of individual shareholders and the U.S. customer because both ZFP and NFP claimed business proprietary treatment for this information.

¹⁵ See ZFP's AQR at 31-32, 35, 38, 40-41, 48, and Exhibit 5; *see* NFP's AQR at 8, 22, 25, 28, 30, and Exhibit 6; *see also* Letter from Eramet Marietta, Inc., to Secretary of Commerce, "Silicomanganese from Ukraine: Eramet's Initial Comments on Respondents' U.S. Sales Transactions," dated November 1, 2016, at Exhibit 3 (for sales documents pertaining to ZFP's and NFP's sales to an affiliated U.S. customer), and ZFP's/NFP's March 7, 2017, supplemental questionnaire response (SQR) at Exhibit A-20-SQ (for sales documents pertaining to ZFP's and NFP's sales to an unaffiliated U.S. customer).

¹⁶ See ZFP's December 16, 2016, Sections B-D response (ZFP CQR) at C-12 and Exhibit C-1 (U.S. sales list), and NFP's December 16, 2016, Sections B-D response (ZFP CQR) at C-11, C-12 and Exhibit C (U.S. sales list).

¹⁷ See ZFP CQR at C-11 and Exhibit C-1 and NFP CQR at C-11 and Exhibit C.

¹⁸ See ZFP AQR at 57-58 and NFP's AQR at 39-41.

ZFP's and NFP's reporting of their U.S. sale prices and price adjustments in such a manner is contrary to the Department's instructions in the AD questionnaires issued to ZFP and NFP in this review,¹⁹ and is unsupported by the plain and clear requirements of the statute (defining the terms EP and CEP as prices of sales made to the first unaffiliated purchaser in the United States).²⁰ 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 of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c)." 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 to an unaffiliated purchaser 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, as adjusted under subsections (c) and (d)." As is apparent from the plain statutory language, to calculate EP or CEP prices, the Department requires the price to the first unaffiliated purchaser in the United States. U.S. price is not calculated based on the sales price to an affiliate.

We provided ZFP and NFP an opportunity to remedy their reporting deficiencies. Specifically, we issued a supplemental questionnaire to ZFP and NFP explicitly instructing the respondents to provide either: (1) the U.S. affiliate's re-sales of the imported subject merchandise to an unaffiliated customer in the United States; or (2) the U.S. affiliate's sales during the POR of product that it manufactured including the imported subject merchandise and sold to an unaffiliated customer in the United States, along with the further manufacturing cost information requested in section E of the questionnaire.²¹ We clarified that we were requesting that the respondents report appropriate CEP transactions, along with all applicable CEP price adjustments contemplated by section 772(c) and (d) of the Act, including, if applicable, the costs of further manufacture or assembly in the United States.²² Neither respondent provided the requested information in their supplemental questionnaire response.²³ As such, for both ZFP and NFP, the record lacks: (1) CEP transaction data from the U.S. affiliate to an unaffiliated purchaser in the United States (if the U.S. affiliate re-sold the imported subject merchandise in

¹⁹ See the Department's Letters to ZFP and NFP, dated October 19, 2016 (appending the antidumping duty questionnaires) at, e.g., G-10, item G ("If you make sales to unaffiliated customers in the United States through an affiliated reseller located in the United States, your sales will generally be classified as constructed export price sales..."); and at I-7 (defining what factors qualify a sale to an unaffiliated party as either EP or CEP, and listing typical adjustments to the price to the first unaffiliated customer in calculating EP and CEP): "Export price and constructed export price refer to the two types of calculated prices for merchandise imported into the United States. The Department compares these prices to normal values to determine whether goods are dumped. Both export price and constructed export price are calculated from the price at which the subject merchandise is first sold to a person not affiliated with the foreign producer or exporter. Generally, a U.S. sale is classified as an export price sale when the first sale to an unaffiliated person occurs *before* the goods are imported into the United States... Generally, a U.S. sale is classified as a constructed export price sale when the first sale to an unaffiliated person occurs *after* importation. Constructed export price also applies if the first sale to the unaffiliated person is made by a person in the United States affiliated with the foreign exporter before importation..."

²⁰ See *AK Steel Corp. v. United States*, 226 F.3d 1361 (CAFC 2000).

²¹ See the Department's supplemental questionnaire to ZFP and NFP, dated February 14, 2017, at 1.

²² *Id.*

²³ See the respondents' March 7, 2017, supplemental questionnaire response (SQR) at 1.

the United States); or (2), if the U.S. affiliate further manufactured the imported subject merchandise, CEP transaction and further manufacturing data from the U.S. affiliate of the product that was further manufactured using the imported subject merchandise and sold to an unaffiliated purchaser in the United States. We find that the need for this information was sufficiently apparent from the instructions in the questionnaires that we issued to the respondents. Further, in a conference call held on April 12, 2017, Commerce officials confirmed the respondents' understanding of the reporting requirements with their legal counsel.²⁴

Based on the foregoing, we find that the information necessary for calculating the dumping margins for the respondents in this review is not available on the record. Despite being afforded an opportunity to remedy the deficiency in their original questionnaire responses, consistent with section 782(d) of the Act, both ZFP and NFP failed to provide the requested information. Further, we find that by failing to provide the information requested of them, both ZFP and NFP significantly impeded this segment of the proceeding by withholding the information we find critical for the proper conduct of this administrative review. Without this information, we are unable to determine the dumping margins for the respondents in this review, because we cannot rely on the reported U.S. prices between affiliated parties in our calculations. Therefore, in accordance with sections 776(a)(1), (a)(2)(A), (a)(2)(B), and (a)(2)(C) of the Act, we are making the determination based on facts otherwise available.

B. Application of Facts Available with an Adverse Inference

Section 776(b) of the Act provides that in selecting from among the facts otherwise available, the Department may use an inference that is adverse to the interests of a party if that party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Further, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.²⁵

Despite the clear reporting instructions set out in the antidumping questionnaire that we issued to both ZFP and NFP, along with our subsequent request for specific information, ZFP and NFP each failed to provide the required information. When preparing a response to our inquiries, it is reasonable to presume that each of the respondents will have read the instructions in the questionnaire (or in any other supplemental requests) and will have endeavored, to the best of their ability, to report data consistent with our instructions and the requirements of the statute. Further, ZFP and NFP provided no explanation or documentation establishing the reasons for their inability to obtain the information requested by the Department, including the records relating to the U.S. affiliate's POR manufacturing and sales operations, nor sought guidance from the Department under section 782(c)(1) of the Act. In fact, when we requested each of the respondents to provide evidence showing their attempts to obtain the U.S. affiliate's records relating to its POR manufacturing and sales operations at any point in time since the respondents

²⁴ See Memorandum to the File, "Silicomanganese from Ukraine - *Ex Parte* Telephone Call," dated April 12, 2017.

²⁵ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); *Antidumping Duties, Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997); and *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (CAFC 2003) (*Nippon Steel*).

made U.S. sales to the United States (and first determined to seek an administrative review of these sales), none was provided.²⁶

As explained above, information regarding the sales price to the first unaffiliated customer in the United States is essential to the dumping calculation. Therefore, when respondents make U.S. sales through a U.S. affiliate, the affiliate's downstream sales information is essential.²⁷ A reasonable importer subject to an antidumping proceeding would maintain its downstream sales information, and a reasonable exporter – especially one that requests an administrative review – would ensure that the necessary information from its affiliated importer is available. Under these circumstances, we find that both ZFP and NFP failed to cooperate to the best of their abilities to comply with our requests for information, as ZFP's and NFP's responses clearly demonstrate a failure to comply with the Department's requests for information.²⁸ Thus, we also find the both ZFP and NFP have impeded the Department in the completion of this administrative review. Accordingly, we preliminarily find that an adverse inference is warranted in selecting from among the facts otherwise available with respect to ZFP and NFP, pursuant to section 776(b) of the Act.²⁹

C. Selection of the AFA Rate

In applying an adverse inference, the Department may rely on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record.³⁰ In selecting an AFA rate, the Department selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.³¹ Under the TPEA, the Department is not required to corroborate a dumping margin that has already been applied in a separate segment of the same proceeding,³² and the Department may use a dumping margin from any segment of the same proceeding when applying an adverse inference, including the highest of such rates. As total AFA, we have applied the AFA rate of 163.00 percent determined in the

²⁶ See SQR at 1 and Exhibit SQ 1.

²⁷ See *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 54269 (September 14, 2006), and attached Decision Memorandum at comment 10 (using AFA as a result of a failure to report CEP sales by affiliate).

²⁸ In *Nippon Steel*, 337 F.3d at 1382-83, the U.S. Court of Appeals for the Federal Circuit (CAFC) noted that while the statute does not provide an express definition of the "failure to act to the best of its ability" standard, the ordinary meaning of "best" is "one's maximum effort." Thus, according to the CAFC, the statutory mandate that a respondent act to the "best of its ability" requires the respondent to do the maximum it is able to do. The CAFC indicated that inadequate responses to an agency's inquiries would suffice to find that a respondent did not act to the best of its ability.

²⁹ Although each respondent also reported a sale to an unaffiliated party, constituting one percent of the total volume of U.S. sales, the record lacks any information showing that the underlying shipments entered during the POR. See Memorandum to the File, "Customs and Border Protection Data for Respondent Selection," dated October 19, 2016, and SQR at 11. Accordingly, a complete reliance on AFA is warranted here because we find it is not reliable, under such circumstances, to rely on sales made to an unaffiliated party, when the record lacks information for 99 percent of the remaining U.S. sales.

³⁰ See section 776(b) of the Act.

³¹ See SAA at 870.

³² See section 776(c)(2) of the Act; TPEA, section 502.

less-than-fair-value investigation, which is the highest rate determined in a completed, previous segment of this proceeding.³³

V. RECOMMENDATION

We recommend applying the above methodology for these preliminary results.

☒

Agree

☐

Disagree

5/3/2017

X 

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

³³ See *Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese from Ukraine*, 59 FR 62711 (December 6, 1994) (where an AFA rate of 163 percent was applied to ZFP and NFP, the mandatory respondents in the original investigation).