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Investigation
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February 16, 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 Determination in the
Less Than Fair Value Investigation and Negative Determination
of Critical Circumstances of Emulsion Styrene-Butadiene Rubber
from Brazil

I. SUMMARY

The Department of Commerce (the Department) preliminarily determines that emulsion styrene-butadiene rubber (ESB rubber) from Brazil is, or is likely to be, sold in the United States at less-than-fair-value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The Department also preliminarily determined that critical circumstances do not exist for the mandatory respondent or exporters or producers that are not individually examined. The estimated weighted-average dumping margins are shown in the “Preliminary Determination” section of the accompanying *Federal Register* notice.

II. BACKGROUND

On July 21, 2016, the Department received an antidumping duty (AD) petition covering imports of ESB rubber from Brazil,¹ which was filed in proper form by Lion Elastomers LLC and East West Copolymers (collectively, Petitioners). The Department initiated this investigation on August 10, 2016.²

In the *Initiation Notice*, the Department notified the public that only one company from Brazil, Lanxess Elastomeros do Brasil S.A. (Lanxess Brasil), was identified in the Petition.³ Petitioners provided independent third party sources as support and the Department knew of no additional producers/exporters of subject merchandise under consideration.⁴ Accordingly, the Department

¹ See Petitions for the Imposition of Antidumping Duties on Emulsion Styrene Butadiene Rubber from Brazil, the Republic of Korea, Mexico and Poland, dated July 21, 2016 (the Petitions).

² See *Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico and Poland: Initiation of Less Than Fair Value Investigations*, 81 FR 55438 (August 19, 2016) (*Initiation Notice*).

³ See *Initiation Notice*, 81 FR at 55442-43.

⁴ See *Initiation Notice*, 81 FR at 55443.



stated that its intent was to examine the sole Brazilian producer/exporter identified in the Petition, Lanxess Brasil.

The Department invited interested parties to comment on respondent selection.⁵ The Department received no comments regarding respondent selection with respect to Brazil. On August 25, 2016, the Department issued the AD questionnaire to Lanxess Brasil.

On August 29, 2016, Arlanxeo Brasil S.A. (Arlanxeo Brasil) submitted a clarification regarding the production of merchandise under investigation from Brazil.⁶ Arlanxeo Brasil stated that, as of April 1, 2016, Lanxess Brasil's ESB rubber business was transferred to Arlanxeo Brasil.⁷ Arlanxeo Brasil further stated that, currently Arlanxeo Brasil, is the sole Brazilian producer of merchandise under investigation in Brazil.⁸ Record evidence supports Arlanxeo Brasil's assertion that it is the sole producer of ESB rubber in Brazil.⁹ Accordingly, the Department has examined Arlanxeo Brasil as the sole mandatory respondent in this investigation.

Also, in the *Initiation Notice*, the Department notified parties of an opportunity to comment on the appropriate physical characteristics of ESB rubber to be reported in response to the Department's AD questionnaire.¹⁰ On August 30, 2016, Petitioners and various other interested parties in this investigation, and the companion AD investigations for Korea, Mexico, and Poland, submitted comments to the Department regarding the physical characteristics of the merchandise under consideration to be used for reporting purposes. Between September 9 and 12, 2016, Petitioners and various other interested parties filed rebuttal comments. Based on the comments received, the Department issued a memorandum to interested parties which contained the product characteristics for this and the companion AD investigations.¹¹

On September 12, 2016, the U.S. International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of ESB rubber from Brazil.¹²

Between September 2016 and January 2017, Arlanxeo Brasil timely responded to the Department's original and supplemental questionnaires.

In November 2016, and pursuant to section 733(c)(1)(B) of the Act, and 19 CFR 351.205(f)(1), the Department published in the *Federal Register* a postponement of the preliminary

⁵ See *Initiation Notice*, 81 FR at 55443.

⁶ See Letter to the Department from Arlanxeo Brasil, regarding, "Emulsion Styrene-Butadiene Rubber (ESBR) from Brazil," dated August 29, 2016.

⁷ *Id.*

⁸ *Id.*

⁹ See Arlanxeo Brasil's Supplemental Questionnaire Response, dated October 20, 2016 at 2 and Exhibit 2.

¹⁰ See *Initiation Notice*, 81 FR at 55439-40.

¹¹ See Memorandum to The File, entitled, "Antidumping Duty Investigations of Emulsion Styrene-Butadiene Rubber from Mexico, Brazil, Poland and the Republic of Korea: Product Characteristics for Sections B-D Questionnaire," dated September 27, 2016.

¹² See *Emulsion Styrene-Butadiene Rubber from Brazil, Korea, Mexico, and Poland*, 81 FR 62762 (September 12, 2016).

determination until no later than February 16, 2017.¹³

On January 13, 2017, the Department notified parties of an opportunity to comment on the forthcoming preliminary determination.¹⁴ On January 23, 2017, Petitioners and Arlanxeo Brasil filed comments for the Department to consider in its preliminary determination.¹⁵

On January 25, 2017, Petitioners filed a timely critical circumstances allegation.¹⁶ On January 27, 2017, the Department requested monthly quantity and value shipment data from Arlanxeo Brasil.¹⁷ On February 3, 2017, Arlanxeo Brasil submitted the requested shipment data.¹⁸

We are conducting this investigation in accordance with section 733(b) of the Act.

III. PERIOD OF INVESTIGATION

The period of investigation (POI) is July 1, 2015, through June 30, 2016. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition, which was July 2016.¹⁹

IV. SCOPE COMMENTS

In accordance with the preamble to the Department's regulations,²⁰ the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.*, "scope").²¹ No interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice*. Therefore, the Department is preliminarily not modifying the scope language as it appeared in the *Initiation Notice*.

¹³ See *Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico, and Poland: Postponement of Preliminary Determination of Sales at Less Than Fair Value Investigations*, 81 FR 85208 (November 25, 2016).

¹⁴ See Memorandum to All Interested Parties, entitled, "Antidumping Duty Investigation of Emulsion Styrene-Butadiene Rubber from Brazil: Notice of Opportunity to Submit Pre-Preliminary Determination Comments," dated January 13, 2017.

¹⁵ See Letter to the Department from Petitioners, regarding, "Emulsion Styrene-Butadiene Rubber from Brazil: Pre-Preliminary Comments," dated January 23, 2017; and Letter to the Department from Arlanxeo Brasil, regarding, "Emulsion Styrene-Butadiene Rubber from Brazil: ARLANXEO's Pre-preliminary Comments," dated January 23, 2017.

¹⁶ See Letter to the Department from Petitioners, entitled, "Emulsion Styrene-Butadiene Rubber (ESBR) from Brazil and South Korea: Critical Circumstances Allegation," dated January 25, 2017 (Critical Circumstances Allegation).

¹⁷ See Letter to Arlanxeo Brasil from Robert Bolling, Program Manager, AD/CVD Operations, Office IV, regarding, "Antidumping Duty Investigation of Emulsion Styrene-Butadiene Rubber from Brazil: Request for Monthly Quantity and Value Shipment Data," dated January 27, 2017.

¹⁸ See Letter to the Department from Arlanxeo Brasil, entitled, "Emulsion Styrene-Butadiene Rubber from Brazil: Response to Request for Monthly Shipment Data and Petitioners' Critical Circumstances Allegation," dated February 3, 2017.

¹⁹ See 19 CFR 351.204(b)(1).

²⁰ See *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27323 (May 19, 1997).

²¹ See *Initiation Notice*, 81 FR at 55439.

V. DISCUSSION OF THE METHODOLOGY

Comparisons to Normal Value

Pursuant to section 773(a) of the Act and 19 CFR 351.414(c)(1) and (d), in order to determine whether Arlanxeo Brasil's sales of subject merchandise were made in the United States at LTFV, the Department compared the constructed export price (CEP), to the normal value (NV), as described in the "Constructed Export Price" and "Normal Value" sections of this memorandum.

A) Determination of the Comparison Method

Pursuant to 19 CFR 351.414(c)(1), the Department calculates weighted-average dumping margins by comparing weighted-average NVs to weighted-average export prices (EPs) (or CEPs), *i.e.*, the average-to-average method, unless the Secretary determines that another method is appropriate in a particular situation. In LTFV investigations, the Department examines whether to compare weighted-average NVs with the EPs (or CEPs) of individual sales, *i.e.*, the average-to-transaction method, as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the Act.

In recent investigations, the Department has applied a "differential pricing" analysis for determining whether application of the average-to-transaction method is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and section 777A(d)(1)(B) of the Act.²² The Department finds that the differential pricing analysis used in recent investigations may be instructive for purposes of examining whether to apply an alternative comparison method in this investigation. The Department will continue to develop its approach in this area based on comments received in this and other proceedings, and on the Department's additional experience with addressing the potential masking of dumping that can occur when the Department uses the average-to-average method in calculating a respondent's weighted-average dumping margin. The differential pricing analysis used in this preliminary determination examines whether there exists a pattern of EPs or CEPs for comparable merchandise that differ significantly among purchasers, regions, or time periods. The analysis evaluates all export sales by purchasers, regions, and time periods to determine whether a pattern of prices that differ significantly exists. If such a pattern is found, then the differential pricing analysis evaluates whether such differences can be taken into account when using the average-to-average method to calculate the weighted-average dumping margin. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. Purchasers are based on the reported consolidated customer codes. Regions are defined using the reported destination code, *i.e.*, zip code, and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the POI based upon the reported date of sale. For purposes of analyzing sales transactions by purchaser, region, and time period, comparable merchandise is defined using the product control number and all characteristics of

²² See, e.g., *Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013); *Steel Concrete Reinforcing Bar from Mexico: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 79 FR 54967 (September 15, 2014); and *Welded Line Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 80 FR 61362 (October 13, 2015).

the U.S. sales, other than purchaser, region, and time period, that the Department uses in making comparisons between EP (or CEP) and NV for the individual dumping margins.

In the first stage of the differential pricing analysis used here, the “Cohen’s *d* test” is applied. The Cohen’s *d* coefficient is a generally recognized statistical measure of the extent of the difference between the mean, *i.e.*, weighted-average price, of a test group and the mean, *i.e.*, weighted-average price, of a comparison group. First, for comparable merchandise, the Cohen’s *d* coefficient is calculated when the test and comparison groups of data for a particular purchaser, region, or time period each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen’s *d* coefficient is used to evaluate the extent to which the prices to the particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen’s *d* test: small, medium or large (0.2, 0.5 and 0.8, respectively). Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the mean of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. For this analysis, the difference is considered significant, and the sales in the test group are found to pass the Cohen’s *d* test, if the calculated Cohen’s *d* coefficient is equal to or exceeds the large, *i.e.*, 0.8, threshold.

Next, the “ratio test” assesses the extent of the significant price differences for all sales as measured by the Cohen’s *d* test. If the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test accounts for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen’s *d* test as an alternative to the average-to-average method, and application of the average-to-average method to those sales identified as not passing the Cohen’s *d* test. If 33 percent or less of the value of total sales passes the Cohen’s *d* test, then the results of the Cohen’s *d* test do not support consideration of an alternative to the average-to-average method.

If both tests in the first stage, *i.e.*, the Cohen’s *d* test and the ratio test, demonstrate the existence of a pattern of prices that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, the Department examines whether using only the average-to-average method can appropriately account for such differences. In considering this question, the Department tests whether using an alternative comparison method, based on the results of the Cohen’s *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the average-to-average method only. If the difference between the two calculations is meaningful, then this demonstrates that the average-to-average method cannot account for differences such as those observed in this analysis, and, therefore, an alternative comparison method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if: 1) there is a 25 percent relative change in the weighted-

average dumping margins between the average-to-average method and the appropriate alternative method where both rates are above the *de minimis* threshold; or 2) the resulting weighted-average dumping margins between the average-to-average method and the appropriate alternative method move across the *de minimis* threshold.

Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in this preliminary determination, including arguments for modifying the group definitions used in this proceeding.

B) Results of the Differential Pricing Analysis

For Arlanxeo Brasil, based on the results of the differential pricing analysis, the Department preliminarily finds that 72.24 percent of the value of U.S. sales pass the Cohen's *d* test,²³ and confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods. Further, the Department preliminarily determines that there is no meaningful difference between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using an alternative comparison method based on applying the average-to-transaction method to all U.S. sales. Thus, for this preliminary determination, the Department is applying the average-to-average method for all U.S. sales to calculate the weighted-average dumping margin for Arlanxeo Brasil.

VI. DATE OF SALE

Section 351.401(i) of the Department's regulations states that, in identifying the date of sale of the merchandise under consideration or foreign like product, the Department normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. Additionally, the Department may use a date other than the date of invoice if it is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.²⁴

Arlanxeo Brasil reported the date of invoice as the date of sale for all home market and U.S. sales.²⁵ For its home market and U.S. sales, Arlanxeo Brasil reported that material terms of sale can change up to the point of invoice date.²⁶ Accordingly, we used the date of invoice as the date of sale for both home market sales and U.S. sales for purposes of this preliminary determination.

²³ See the Memorandum to the File, "Analysis for the Preliminary Determination of the Less Than Fair Value Investigation of Emulsion Styrene-Butadiene Rubber from Brazil" dated concurrently with this memorandum (Arlanxeo Brasil Preliminary Analysis Memorandum).

²⁴ See 19 CFR 351.401(i); see also *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001) (quoting 19 CFR 351.401(i)).

²⁵ See Arlanxeo Brasil's January 9, 2017, Sections B, C, and D Supplemental Questionnaire Response, Section B at 3, and Section C at 3, and Arlanxeo Brasil's January 26, 2017, Sections B and C Supplemental Questionnaire Response at 1-2.

²⁶ *Id.*

VII. PRODUCT COMPARISONS

In accordance with section 771(16) of the Act, we considered all products produced and sold by Arlanxeo Brasil in Brazil during the POI that fit the description in the “Scope of Investigation” section of the accompanying *Federal Register* notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the home market, where appropriate. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade.

In making product comparisons, we matched foreign like products based on prime versus non-prime merchandise and the physical characteristic reported by Arlanxeo Brasil: IISRP grade. For Arlanxeo Brasil’s sales of ESB rubber in the United States, the reported control number (CONNUM) identifies the characteristics of ESB rubber, as exported by Arlanxeo Brasil.

VIII. CONSTRUCTED EXPORT PRICE

In accordance with section 772(b) of the Act, we calculated CEP for all of Arlanxeo Brasil’s U.S. sales because the merchandise under consideration was sold in the United States by a U.S. seller affiliated with Arlanxeo Brasil, and EP, as defined by section 772(a) of the Act, was not otherwise warranted.

The Department made adjustments to the prices for billing adjustments and discounts. The Department adjusted these prices for movement expenses, including foreign inland freight, U.S. brokerage and handling, international freight, marine insurance, and U.S. inland freight, in accordance with section 772(c)(2)(A) of the Act. In accordance with section 772(d)(1) of the Act, the Department also deducted selling expenses associated with economic activities occurring in the United States, which includes direct selling expenses (credit expenses, advertising expenses, and other direct selling expenses) and indirect selling expenses (inventory carrying costs and other indirect selling expenses). In accordance with section 772(f) of the Act, the Department calculated the CEP profit rate using the expenses incurred by Arlanxeo Brasil and its U.S. importer/affiliate, Arlanxeo USA LLC (Arlanxeo USA), related to their sales of the foreign like product in the comparison market and their sales of the merchandise under consideration in the United States and the profit associated with those sales.²⁷

IX. NORMAL VALUE

A) *Home Market Viability*

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, *i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales, we normally compare the respondent’s volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with sections 773(a)(1)(A)

²⁷ See Arlanxeo Brasil Preliminary Analysis Memorandum.

and (B) of the Act. If we determine that no viable home market exists, we may, if appropriate, use a respondent's sales of the foreign like product to a third-country market as the basis for comparison market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404.

In this investigation, we determined that the aggregate volume of home market sales of the foreign like product for Arlanxeo Brasil was greater than five percent of the aggregate volume of its U.S. sales of merchandise under consideration. Therefore, we used home market sales as the basis for NV for Arlanxeo Brasil, in accordance with section 773(a)(1)(B) of the Act.

B) *Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (LOT) as the U.S. sales. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent).²⁸ Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.²⁹ In order to determine whether the comparison market sales are at different stages in the marketing process than the U.S. sales, we examine the distribution system in each market (*i.e.*, the chain of distribution), including selling functions and class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for comparison market sales, *i.e.*, NV based on either home market or third country prices, we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act.³⁰

When the Department is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, the Department may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP or CEP sales at a different LOT in the comparison market, where available data make it possible, we make a LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.*, no LOT adjustment is possible), the Department will grant a CEP offset, as provided in section 773(a)(7)(B) of the Act.³¹

Based on our examination of Arlanxeo Brasil's submissions, we preliminarily determine that the record does not support Arlanxeo Brasil's most recent assertion that its home market sales were made at two different LOTs. In its initial Section A response, Arlanxeo Brasil reported information regarding the level of intensity at which it performed the following nine types of selling activities for its home market customers in its four reported channels-of-distribution: 1)

²⁸ See 19 CFR 351.412(c)(2).

²⁹ *Id.*; see also *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010), and accompanying Issues and Decision Memorandum ("*OJ from Brazil*"), at Comment 7.

³⁰ See *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314-16 (Fed. Cir. 2001).

³¹ See, *e.g.*, *OJ from Brazil*, at Comment 7.

sales forecasting; 2) order input/processing; 3) direct sales personnel; 4) sales/marketing support; 5) technical assistance; 6) warranty; 7) repacking; freight and delivery; 8) inventory maintenance, and 9) consignment at customer warehouse.³² An analysis of Arlanxeo Brasil's selling activity information from the initial Section A response indicates that all home market sales were made at the same level of trade. Due to the proprietary nature of Arlanxeo Brasil's reported level of selling activities, this information may not be publically disclosed. For a discussion of the proprietary information the Department examined in its LOT analysis, *see* the Arlanxeo Brasil Preliminary Analysis Memorandum.

Subsequently, Arlanxeo Brasil submitted a revised chart depicting the level of selling activities provided in the home market, which contains significantly different information than the information reported in its Section A response.³³ Specifically, a review of Arlanxeo Brasil's most recently submitted selling activity chart would seem to indicate that it sold merchandise at two LOTs in the home market, rather than at one LOT.³⁴ However, Arlanxeo Brasil did not explain why it made substantial revisions to its LOT information or provide any evidentiary documentation to support these significant changes. Accordingly, we preliminarily find that the record contains significant, unexplained discrepancies with respect to Arlanxeo Brasil's LOT information, and without further information, we cannot conclude that the record supports Arlanxeo Brasil's most recent claim that it made home market sales at two LOTs. Further, the Department preliminarily finds that, because of the record discrepancies regarding Arlanxeo Brasil's home market LOT and the need for additional information and examination, we are currently unable to determine the relationship of the CEP LOT with the information submitted regarding the home market LOT(s), and thus whether a CEP offset is appropriate.

In light of the foregoing, for the preliminary determination, the Department has compared Arlanxeo Brasil's U.S. sales to its home market sales without regard to level of trade, and the Department has not made either a LOT adjustment or a CEP offset. The Department intends to request supplemental information regarding Arlanxeo Brasil's LOT information, and to further examine this information during its verification of Arlanxeo Brasil's response.

C) *Cost of Production (COP) Analysis*

Section 773(b)(2)(A)(ii) of the Act controls all determinations in which the complete initial questionnaire has not been issued as of August 6, 2015. It requires the Department to request CV and COP information from respondent companies in all AD proceedings.³⁵ Accordingly, the Department requested this information from Arlanxeo Brasil. We examined Arlanxeo Brasil's cost data and determined that our quarterly cost methodology is not warranted and, therefore, we applied our standard methodology of using annual costs based on the reported data.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of costs of materials and fabrication for the foreign like product, plus amounts for general and

³² See Arlanxeo Brasil's September 19, 2016 Section A Response at Exhibit 6.

³³ See Arlanxeo Brasil's January 9, 2017 Supplemental Questionnaire Response at Exhibit SB-12.

³⁴ See Arlanxeo Brasil Preliminary Analysis Memorandum.

³⁵ *Id.*, 80 FR at 46794-95.

administrative expenses and interest expenses. We relied on the COP data submitted by Arlanxeo Brasil, except as follows:

- We revised the scrap offset for ESB rubber products.³⁶
- We disallowed a downward adjustment Arlanxeo Brasil made to its reported costs for an unreconciled difference.³⁷

2. Test of Comparison Market Sales Prices

On a product-specific basis, pursuant to section 773(b) of the Act, we compared the adjusted weighted-average COPs to the home market sales prices of the foreign like product, in order to determine whether the sales prices were below the COPs. For purposes of this comparison, we used COPs exclusive of selling and packing expenses. The prices were exclusive of any applicable billing adjustments, discounts and rebates, where applicable, movement charges, actual direct and indirect selling expenses, and packing expenses.

3. Results of the COP Test

In determining whether to disregard home market sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether: 1) within an extended period of time, such sales were made in substantial quantities; and 2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with sections 773(b)(2)(B) and (C) of the Act, where less than 20 percent of the respondent's comparison market sales of a given product are at prices less than the COP, we do not disregard any below-cost sales of that product because we determine that in such instances the below-cost sales were not made within an extended period of time and in "substantial quantities." Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below-cost sales because: 1) they were made within an extended period of time in "substantial quantities," in accordance with sections 773(b)(2)(B) and (C) of the Act; and, 2) based on our comparison of prices to the weighted-average COPs for the POI, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

We found that, for certain products, more than 20 percent of Arlanxeo Brasil's home market sales during the POI were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time.³⁸ We, therefore, excluded these sales and used the remaining sales, if any, as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

D) *Calculation of NV Based on Comparison-Market Prices*

For those comparison products for which there were an appropriate number of sales at prices above the COP for Arlanxeo Brasil, we based NV on comparison market prices. We calculated

³⁶ See Memorandum to Neal M. Halper, Director, Office of Accounting, from Stephanie Arthur, Senior Accountant, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – Arlanxeo Brasil" (February 16, 2016).

³⁷ *Id.*

³⁸ See Arlanxeo Brasil Preliminary Analysis Memorandum.

NV based on packed prices to unaffiliated customers. We also made deductions from the starting price for movement expenses, including inland freight under section 773(a)(6)(B)(ii) of the Act.

When comparing U.S. sales with comparison market sales of similar, but not identical, merchandise, the Department also made adjustments for differences in merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. The Department based this adjustment on the difference in the variable cost of manufacturing for the foreign like products and merchandise under consideration.³⁹

The Department calculated the NV based on prices to unaffiliated customers. The Department increased or decreased, where appropriate, the starting price to account for billing adjustments and rebates, in accordance with 19 CFR 351.401(c).⁴⁰ The Department then adjusted the starting price for foreign inland freight and insurance, pursuant to section 773(a)(6)(B) of the Act. Next, the Department made deductions, pursuant to section 773(a)(6)(C) of the Act and 19 CFR 351.410 for differences in circumstances of sale for home market credit expenses. In accordance with 19 CFR 351.410(e), the Department also made adjustments to Arlanxeo Brasil's NV for indirect selling expenses and inventory carrying costs incurred in the comparison market. In accordance with sections 773(a)(6)(A) and (B) of the Act, the Department also deducted home market packing costs, and added U.S. packing costs.

X. PRELIMINARY NEGATIVE DETERMINATION OF CRITICAL CIRCUMSTANCES

On January 25, 2017, Petitioners alleged that critical circumstances exist with respect to imports of the subject merchandise, pursuant to section 733(e)(1) of the Act and 19 CFR 351.206(c)(1).⁴¹ In accordance with 19 CFR 351.206(c)(2)(i), when a critical circumstances allegation is submitted more than 20 days before the scheduled date of the preliminary determination, the Department must issue a preliminary finding of whether there is a reasonable basis to believe or suspect that critical circumstances exist no later than the date of the preliminary determination.

A) *Legal Framework*

Section 733(e)(1) of the Act provides that the Department, upon receipt of a timely allegation of critical circumstances, will determine whether critical circumstances exist in a LTFV investigation if there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and (B) there have been "massive imports" of the subject merchandise over a relatively short period. Further, 19 CFR 351.206(h)(1) provides that, in determining whether imports of the subject merchandise have been "massive," the Department normally will examine: (i) the volume and

³⁹ See 19 CFR 351.411(b); Arlanxeo Brasil Preliminary Analysis Memorandum.

⁴⁰ See Arlanxeo Brasil's Preliminary Analysis Memorandum.

⁴¹ See Critical Circumstances Allegation.

value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports.

In addition, 19 CFR 351.206(h)(2) provides that, “{i}n general, unless the imports during the ‘relatively short period’ have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports ‘massive.’” Under 19 CFR 351.206(i), the Department defines “relatively short period” generally as the period starting on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later.⁴² This section of the regulations further provides that, if the Department “finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely,” then the Department may consider a period of not less than three months from that earlier time.⁴³

B) *Critical Circumstances Allegation*

Petitioners allege that section 733(e)(1)(A) of the Act is met by virtue of the dumping margins alleged in the Petition, which could be as high as 67.99 percent on a transaction specific basis.⁴⁴ Thus, Petitioners assert that certain dumping margins alleged in the Petition exceed the 15 percent threshold used by the Department to impute knowledge of dumping in CEP transactions and the 25 percent threshold in EP transactions.⁴⁵ Petitioners further argue that importers of Brazilian ESB rubber have been on notice that dumped imports are likely to cause injury since the ITC’s September 12, 2016, preliminary affirmative injury finding.⁴⁶

Petitioners argue that, regarding section 733(e)(1)(B) of the Act, which examines whether there have been “massive imports of the subject merchandise over a relatively short period,” the Department should use the minimum 3-month base and comparison periods for shipment data of a base period from May 2016-July 2016 and a comparison period from August 2016-October 2016, as provided under 19 CFR 351.206(i) when considering the date on which the petition was filed, July 21, 2016.⁴⁷ Petitioners allege that import statistics released by the ITC indicate shipments of merchandise under consideration during the comparison period increased significantly in terms of volume (37 percent) between the base period and the comparison period, and, as a result, exceeded the threshold for “massive” imports from Brazil of ESB rubber, as provided under 19 FR 351.206(h) and (i).⁴⁸

⁴² See 19 CFR 351.206(i); *see also* Policy Bulletin 98.4, 63 FR 55364 (October 15, 1998): “Commerce has traditionally compared the three-month period immediately after initiation with the three-month period immediately preceding initiation to determine whether there has been at least a 15 percent increase in imports of-the subject merchandise.”

⁴³ See 19 CFR 351.206(i).

⁴⁴ See Critical Circumstances Allegation, at 3.

⁴⁵ *Id.*

⁴⁶ *Id.* citing (ITC Preliminary Affirmative Injury Determination).

⁴⁷ *Id.* at 5.

⁴⁸ *Id.*

Arlanxeo Brasil argues that a consideration of the appropriate base and comparison periods shows that its imports did not increase after the filing of the Petition.⁴⁹ Arlanxeo Brasil argues that although import statistics show that its imports increased during the comparison period proposed by Petitioners, the increase in imports is due to orders that were placed prior to the filing of the petition.⁵⁰ Arlanxeo Brasil states that a more accurate representation of the timing of its shipments should be based on bill of lading (*i.e.*, shipment) dates. Arlanxeo Brasil argues that an analysis of its shipments based on shipment dates shows that its exports decreased during the comparison period.⁵¹ Further, Arlanxeo Brasil argues that an alternative analysis of its shipments based on purchase order date also shows that imports were not massive during the comparison period.⁵² Arlanxeo Brasil also argues that the level of its imports is consistent with business necessity, as opposed to an effort to increase imports to build inventory to avoid potential dumping duties. For the foregoing reasons, Arlanxeo Brasil asserts that an affirmative finding of critical circumstances is not legally appropriate.⁵³

C) *Analysis*

The Department's normal practice in determining whether critical circumstances exist pursuant to the statutory criteria under section 733(e) of the Act has been to examine evidence available to the Department, such as: (1) the evidence presented in Petitioners' critical circumstances allegation; (2) import statistics released by the ITC; and (3) shipment information submitted to the Department by the respondents selected for individual examination.⁵⁴

In determining whether a history of dumping and material injury exists, the Department generally considers current and previous AD orders on subject merchandise from the country in question in the United States and current orders in any other country on imports of subject merchandise.⁵⁵ Petitioners identify no such proceeding with respect to Brazilian-origin ESB rubber, nor are we aware of an AD order in any country on ESB rubber from Brazil. Thus, we preliminarily find that there is not a history of injurious dumping of ESB rubber from Brazil and this criterion is not met.

We must next determine whether the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at LTFV, and that there was likely to be material injury by reason of such sales. When

⁴⁹ See Letter to the Department from Arlanxeo Brasil, entitled, "Emulsion Styrene Butadiene Rubber from Brazil: Response to Request for Monthly Shipment Data and Petitioners' Critical Circumstance Allegation," dated February 3, 2017.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 FR 31970, 31972-73 (June 5, 2008) ("*Carbon Steel Pipe Final Determination*"); see also *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People's Republic of China*, 74 FR 2049, 2052-53 (January 14, 2009) ("*SDGE Final Determination*").

⁵⁵ See, e.g., *Carbon Steel Pipe Final Determination*.

evaluating whether such imputed knowledge exists, the Department normally considers margins of 25 percent or more for EP sales or 15 percent or more for CEP sales sufficient to meet the quantitative threshold to impute knowledge of dumping.⁵⁶ For purposes of this investigation, the Department preliminarily determined a margin higher than 15 percent for CEP sales, which is sufficient to impute that imports knew or should have known that the exporter was selling merchandise at less than fair value.⁵⁷

A preliminary affirmative finding of material injury by the ITC provides an additional reasonable basis for the Department to determine that importers knew or should have known that dumped subject imports were likely to cause material injury. The ITC determined that there is a “reasonable indication” of material injury to the domestic industry by reason of the imported merchandise under consideration.⁵⁸ Furthermore, for purposes of initiation of this investigation, the Department found that estimated dumping margins for merchandise under consideration from Brazil could be as high as 67.99 percent.⁵⁹ Both of these factors demonstrate that importers knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury to a domestic industry.

In determining whether imports of the subject merchandise were “massive,” the Department normally will examine the volume and value of the imports, seasonal trends, and the share of domestic consumption accounted for by the imports.⁶⁰ In determining whether there are “massive imports” over a “relatively short period,” pursuant to section 733(e)(1)(B) of the Act, the Department normally compares the import volumes of the subject merchandise for at least three months immediately preceding the filing of the Petition (*i.e.*, the “base period”) to a comparable period of at least three months following the filing of the Petition (*i.e.*, the “comparison period”). If the Department finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, the Department may consider a period of not less than three months from that earlier time.⁶¹ Imports normally will be considered massive when imports during the comparison period have increased by 15 percent or more compared to imports during the base period.⁶²

⁵⁶ See, e.g., *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17416 (March 26, 2012).

⁵⁷ See “Preliminary Determination” section of the accompanying *Federal Register* notice.

⁵⁸ See *Emulsion Styrene-Butadiene Rubber from Brazil, Korea, Mexico, and Poland; Determinations*, 81 FR 62762, 62763 (September 12, 2016).

⁵⁹ See *Initiation Notice* at 55442.

⁶⁰ See 19 CFR 351.206(h)(1).

⁶¹ See 19 CFR 351.206(i).

⁶² *Id.*

Moreover, it is the Department's practice to base its critical circumstances analysis on all available data, using base and comparison periods of no less than three months.⁶³ The Department's normal practice is to conduct its massive imports analysis with respect to the mandatory respondents based on their reported monthly shipment data.⁶⁴ Accordingly, we based our massive import analysis on shipment data submitted by Arlanxeo Brasil, rather than the ITC import data submitted by Petitioners.⁶⁵ We found that Arlanxeo Brasil's reported shipments of subject merchandise during the five-month period⁶⁶ August 2016 to December 2016 comparison period did not increase by more than 15 percent⁶⁷ over their respective imports for the five-month March 2016 to July 2016 base period.⁶⁸

Based on our analysis of Arlanxeo Brasil's data, we preliminarily find that there were not massive imports of subject merchandise from Arlanxeo Brasil, pursuant to section 733(e)(1)(B) of the Act and 19 CFR 351.206(c)(2)(i). Further, for the companies subject to the "all others" rate, it is the Department's normal practice to conduct its critical circumstances analysis for these companies based on the experience of investigated companies.⁶⁹ Accordingly, we find that the critical circumstances determination for Arlanxeo Brasil should also be applied to all others, given that Arlanxeo Brasil is the only mandatory respondent for this investigation.

We will make a final determination concerning critical circumstances for ESB rubber from Brazil when we issue our final determination of sales at LTFV for this investigation.

⁶³ See, e.g., *1,1,1,2-Tetrafluoroethane (R-134a) from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 81 FR 69786, 69786 (October 7, 2016) and accompanying Preliminary Decision Memorandum; *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India*, 69 FR 47111, 47118-47119 (August 4, 2004), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value and Negative Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India*, 69 FR 76916 (December 23, 2004).

⁶⁴ See, e.g., *Carbon Steel Pipe Final Determination* and accompanying Issues and Decision Memorandum at Comment 14; see also *SDGE Final Determination* at 2052.

⁶⁵ See Letter to the Department from Arlanxeo Brazil, entitled, "Emulsion Styrene Butadiene Rubber from Brazil: Response to Request for Monthly Shipment Data and Petitioners' Critical Circumstance Allegation," dated February 3, 2017.

⁶⁶ Because Arlanxeo Brasil submitted shipment data through December 2016, we based our preliminary critical circumstance findings on a five-month comparison period ending December 2016, and a corresponding five-month base period.

⁶⁷ We note that while Petitioners allege that imports were massive over a relatively short period of time, this allegation is based on ITC import data, rather than Arlanxeo Brasil's shipment data.

⁶⁸ See Memorandum to the File from Drew Jackson, International Trade Compliance Analyst, AD/CVD Operations, Office IV, entitled, "Antidumping Duty Investigation of Emulsion Styrene Butadiene Rubber from Brazil: Critical Circumstances Analysis," dated concurrently with this memorandum.

⁶⁹ See, e.g., *Sodium Metal from France: Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances*, 73 FR 62252, 62254 (October 20, 2008); *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413, 17415-416 (March 26, 2012).

XI. CURRENCY CONVERSION

We made currency conversions into U.S. dollars in accordance with section 773A of the Act and 19 CFR 351.415(a), based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

XII. CONCLUSION

We recommend applying the above methodology for this preliminary determination.

☒

☐

Agree

Disagree

2/16/2017

X *Ronald K. Lorentzen*

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance