



A-351-849

POR: 02/24/2017 - 08/31/2018

**Public Document**

E&C/OIV: DJ

June 23, 2020

**MEMORANDUM TO:** Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance

**FROM:** James Maeder  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Issues and Decision Memorandum for the Final Results of the  
2017-2018 Administrative Review of the Antidumping Order on  
Emulsion Styrene-Butadiene Rubber from Brazil

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## I. SUMMARY

We analyzed the comments submitted by interested parties in the above-referenced administrative review covering the sole mandatory respondent, ARLANXEO Brasil S.A. (ARLANXEO Brasil), and recommend making changes to the *Preliminary Results*.<sup>1</sup> We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

Below is a complete list of the issues for which we received comments from interested parties:

- Comment 1: Whether Sales Occurred at Different Levels of Trade
- Comment 2: Whether to Deduct *Impostos Sobre Produtos Industrializados* (IPI) Taxes from Home-Market Price
- Comment 3: Preliminary Margin Calculations

## II. BACKGROUND

On November 14, 2019, we published the *Preliminary Results* of this administrative review.<sup>2</sup> On December 12, 2019, ARLANXEO Brasil requested that the Department of Commerce (Commerce) hold a hearing in this proceeding,<sup>3</sup> and on December 13, 2019, Lion Elastomers,

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<sup>1</sup> See *Emulsion Styrene-Butadiene Rubber from Brazil: Preliminary Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 61889 (November 14, 2019) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (ESB Rubber PDM).

<sup>2</sup> *Id.*

<sup>3</sup> See ARLANXEO Brasil’s Letter, “Emulsion Styrene-Butadiene Rubber from Brazil: ARLANXEO’s Request for



LLC (the petitioner) requested that it be allowed to participate in any hearing held in this proceeding.<sup>4</sup> On December 13, 2019, ARLANXEO Brasil filed a case brief<sup>5</sup> and on December 23, 2019, the petitioner filed a rebuttal brief.<sup>6</sup> On January 29, 2020, Commerce held a public hearing.<sup>7</sup> On February 10, 2020, Commerce extended the deadline for issuing the final results of this review by 42 days.<sup>8</sup> On April 17, 2020, Commerce extended the deadline for issuing the final results of this review by an additional 18 days.<sup>9</sup> On April 24, 2020, Commerce extended the extended the deadline for issuing the final results of this review by an additional 50 days.<sup>10</sup> The deadline for the completion of these final results of review is now July 1, 2020.<sup>11</sup>

### III. SCOPE OF THE ORDER

The product covered by this order is cold-polymerized emulsion styrene-butadiene rubber (ESB rubber). The scope of the order includes, but is not limited to, ESB rubber in primary forms, bales, granules, crumbs, pellets, powders, plates, sheets, strip, *etc.* ESB rubber consists of non-pigmented rubbers and oil-extended non-pigmented rubbers, both of which contain at least one percent of organic acids from the emulsion polymerization process.

ESB rubber is produced and sold in accordance with a generally accepted set of product specifications issued by the International Institute of Synthetic Rubber Producers (IISRP). The scope of the order covers grades of ESB rubber included in the IISRP 1500 and 1700 series of synthetic rubbers. The 1500 grades are light in color and are often described as “Clear” or “White Rubber.” The 1700 grades are oil-extended and thus darker in color, and are often called “Brown Rubber.”

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Hearing,” dated December 12, 2019.

<sup>4</sup> See Petitioner’s Letter, “Antidumping Review of Emulsion Styrene-Butadiene Rubber (E-SBR) from Brazil: Request to Participate in Hearing,” dated December 13, 2019.

<sup>5</sup> See ARLANXEO Brasil’s Letter, “Emulsion Styrene-Butadiene Rubber from Brazil: ARLANXEO’s Case Brief,” dated December 13, 2019 (ARLANXEO Brasil’s Case Brief).

<sup>6</sup> Commerce rejected the petitioner’s December 23, 2019 rebuttal brief because it contained untimely filed new factual information. See Commerce’s Letter, “Antidumping Duty Administrative Review of Emulsion Styrene-Butadiene Rubber from Brazil: Rejection of Rebuttal Brief,” dated January 16, 2020. On January 17, 2019, the petitioner submitted a redacted rebuttal brief, which Commerce also rejected because it contained additional revisions that were not requested by Commerce. See Commerce’s Letter, “Antidumping Duty Administrative Review of Emulsion Styrene-Butadiene Rubber from Brazil: Rejection of Lion Elastomers, LLC’s January 17, 2020 Rebuttal Brief,” dated January 31, 2020. On January 31, 2020, the petitioner refiled its redacted rebuttal brief. See Petitioner’s Letter, “Antidumping Review of Emulsion Styrene-Butadiene Rubber (E-SBR) from Brazil: Rebuttal Brief, dated January 31, 2020 (Petitioner’s Rebuttal Brief).

<sup>7</sup> See Public Hearing Transcript (undated), submitted February 5, 2020.

<sup>8</sup> See Memorandum, “Emulsion Styrene Butadiene Rubber from Brazil: Extension of Deadline for Final Results of Antidumping Duty Administrative Review; 2017-2018,” dated February 10, 2020.

<sup>9</sup> See Memorandum, “Emulsion Styrene Butadiene Rubber from Brazil: Extension of Deadline for Final Results of Antidumping Duty Administrative Review; 2017-2018,” dated April 17, 2020.

<sup>10</sup> See Memorandum, “Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID-19,” dated April 24, 2020.

<sup>11</sup> *Id.*

Specifically excluded from the scope of this order are products which are manufactured by blending ESB rubber with other polymers, high styrene resin master batch, carbon black master batch (*i.e.*, IISRP 1600 series and 1800 series) and latex (an intermediate product).

The products subject to this order are currently classifiable under subheadings 4002.19.0015 and 4002.19.0019 of the Harmonized Tariff Schedule of the United States (HTSUS). ESB rubber is described by Chemical Abstract Services (CAS) Registry No. 9003-55-8. This CAS number also refers to other types of styrene butadiene rubber. Although the HTSUS subheadings and CAS registry number are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

#### **IV. CHANGES SINCE THE PRELIMINARY RESULTS**

1. Commerce has deducted certain indirect taxes from ARLANXEO Brasil's home-market price.<sup>12</sup>
2. Commerce has included two reported period of review (POR) U.S. sales, and reported home-market sales made within the window period established by 19 CFR 351.414, which were excluded from the preliminary margin calculations.<sup>13</sup>

#### **V. DISCUSSION OF THE ISSUES**

##### **Comment 1: Whether Sales Occurred at Different Levels of Trade**

###### *ARLANXEO Brasil's Case Brief*

- Commerce should match ARLANXEO Brasil's home-market and U.S. sales by level of trade (LOT) in accordance with section 773(a)(1)(b)(i) of the Tariff Act of 1930, as amended (the Act).<sup>14</sup> Sales are made at different LOTs if they are made at different marketing stages.<sup>15</sup>
- The Preamble to Commerce's LOT regulation indicates that demonstrating a difference in selling functions is sufficient to prove different LOTs, although demonstrating differences in the amount of selling expenses may not be sufficient to establish different LOTs.<sup>16</sup>
- ARLANXEO Brasil made sales to end users and distributors at different marketing stages. Commerce improperly rejected the same type of information it relied on in the underlying investigation (*i.e.*, an allocation of indirect selling expenses by customer

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<sup>12</sup> See Memorandum, "Final Results Margin Calculation for ARLANXEO Brasil S.A.," dated concurrently with this memorandum (Final Analysis Memorandum).

<sup>13</sup> *Id.*

<sup>14</sup> See ARLANXEO Brasil's Case Brief at 2-3.

<sup>15</sup> *Id.* at 3 (citing 19 CFR 351.412(c)(2), and *Micron Technology, Inc. vs. United States*, 243 F.3d 1301, 1305 (Fed. Cir. 2001)).

<sup>16</sup> *Id.* at 4 (emphasis in the original) (citing *Antidumping Duties; Countervailing Duties*, 62 FR 27,296, 27371 (May 19, 1997), and *Pasta Zara SpA v. United States*, 34 CIT 355 (CIT 2010) (*Pasta Zara*)).

category) and ignored “overwhelming” qualitative and quantitative record evidence that is sufficient to demonstrate two home-market LOTs exist.<sup>17</sup>

- Even assuming that Commerce is justified in not accepting ARLANXEO Brasil’s indirect selling expense allocation, the amount of indirect selling expenses is not the only or even a necessary factor in the LOT determination.<sup>18</sup>
- Substantial record evidence indicates that ARLANXEO Brasil performed a greater number of selling functions for end users than for distributors and, in instances where it performed the same activity for both services, it performed services for end users at a greater level of intensity.<sup>19</sup>
- The existence of two home-market customer categories supports a finding of two home-market LOTs.
- ARLANXEO Brasil performed qualitatively and quantitatively different selling functions between the two LOTs.<sup>20</sup> Commerce verified these functions in the underlying investigation and the relevant facts remain the same in the instant review.<sup>21</sup>
- ARLANXEO Brasil’s LOT information is supported by record evidence.<sup>22</sup>
- ARLANXEO Brasil’s indirect selling expenses support a finding of two home-market LOTs. The record indicates that ARLANXEO Brasil’s indirect selling expenses vary by customer category. This variance is attributable to the difference in selling functions performed by ARLANXEO Brasil for sales to end users and distributors.
- Commerce recognizes sales, marketing, and technical service department expenses as “indirect” because it understands that such expenses cannot be tied to individual sales. ARLANXEO Brasil allocated these indirect selling expenses using a reasonable methodology based on differences in the amount of time spent by relevant employees in performing the activities based on declarations of department managers.
- Commerce’s dismissal of ARLANXEO Brasil’s claims as “unsupported and unverifiable” is contrary to law.<sup>23</sup> Commerce’s position that the only accepted quantitative evidence must be accounting entries, time sheets and the like is divorced from commercial reality and inconsistent with Commerce’s recognition of these expenses as indirect.<sup>24</sup>
- The amount of selling expenses associated with two LOTs may or may not provide an indication that the two customer groups are at different LOTs and is not the only nor the defining factor.<sup>25</sup> Moreover, the methodology for allocating selling expenses is not relevant to the LOT inquiry.<sup>26</sup>

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<sup>17</sup> *Id.* at 5 (“Commerce rejected the allocation of the expenses because they were based on statements as to the employees’ time spent on end users and distributors.”).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 8, and Exhibit 1.

<sup>23</sup> *Id.* at 10-11 (citing *Timken United States, Corp. v. United States*, 434 F.3d 1345, 1354 (Fed. Cir. 2006) and *Changzhou Trina Solar Energy Co. v. United States*, 352 F.Supp.3d 1316, 1327 (CIT 2018))

<sup>24</sup> *Id.* at 11.

<sup>25</sup> *Id.* (citing *Pasta Zara*, 34 CIT 355, 364 (CIT 2010)).

<sup>26</sup> *Id.*

- Commerce cited no legal authority to support its overly narrow quantitative analysis in the Preliminary Results.<sup>27</sup> Commerce's LOT analysis is primarily qualitative in nature.<sup>28</sup>
- Commerce's prior decisions support matching by LOT in the instant review.<sup>29</sup>
- Commerce should apply a constructed export price (CEP) offset under section 773(a)(7) of the Act if it does not make an LOT comparison.<sup>30</sup> Record evidence indicates that sales in Brazil as a whole are at a more advanced stage of distribution and thus, a CEP offset is warranted pursuant to section 773(a)(7)(B) of the Act. Granting a CEP offset is in accordance with 19 CFR 351.412(f)(2) and consistent with Commerce precedent.<sup>31</sup>

#### *Petitioner's Rebuttal Brief*

- Commerce should continue to find a single equivalent LOT existed in the Brazilian and U.S. markets during the POR.
- ARLANXEO Brasil failed to overcome its burden of proof to demonstrate that two LOTs existed in the Brazilian market and that sufficient evidence exists to grant a CEP offset.<sup>32</sup>
- Similarities between the record of prior proceedings and the instant review are not relevant because prior administrative determinations are not legally binding on other reviews.<sup>33</sup> Further, Commerce may deviate from past practices if it provides a reasonable explanation for its methodology.<sup>34</sup> The cost allocation submitted in the instant review is different than the allocation submitted in the underlying investigation.<sup>35</sup>
- ARLANXEO Brasil's allocation of indirect selling expenses on the basis of employee estimates of time spent on activities is unverifiable and potentially unreliable.<sup>36</sup>
- Sales to different customer categories is insufficient, by itself, to establish different LOTs.<sup>37</sup> Commerce combines different categories into a single LOT when warranted by the facts.<sup>38</sup>
- Commerce has frequently rejected LOT claims because of absence of evidence to support claimed intensity levels.<sup>39</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 12-13 (citing *Pasta Zara*, 34 C.I.T. 355, 367-369 (CIT 2010); *Stainless Steel Bar from Brazil: Preliminary Results of Antidumping Duty Administrative Review*, 2013-2014, 79 FR 75789 (December 19, 2014), and accompanying PDM at 7-8; and *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Final Determination of Sales at Less Than Fair Value*, 81 FR 47352 (July 21, 2016), and accompanying Issues and Decision Memorandum (IDM) at Comment 8).

<sup>30</sup> *Id.* at 14-16.

<sup>31</sup> *Id.* at 17 (citing *Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria: Preliminary Determination of Sales at Less Than Fair Value and Postponement of the Final Determination*, 81 FR 79416 (November 14, 2016)).

<sup>32</sup> See Petitioner's Rebuttal Brief at 1-2.

<sup>33</sup> *Id.* at 4-5.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.* at 7 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 FR 24329 (May 6, 1999) and accompanying IDM at Comment 3.)

<sup>38</sup> *Id.* at 7 (citing *Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 16366 (April 4, 2017), and accompanying IDM at Comment 3.)

<sup>39</sup> *Id.* at 9-11 (citing, *inter alia*, *Bethlehem Steel Corp. v. United States*, 27 F. Supp. 2d 201, 204 (CIT 1998); *Pasta*

- Commerce should continue to find that substantial evidence does not support the granting of a CEP offset.<sup>40</sup> The record does not support a finding that ARLANXEO Brasil's home-market sales were made at a more advanced stage of distribution.<sup>41</sup>
- Commerce precedent indicates that a CEP offset is not warranted.<sup>42</sup>

**Commerce's Position:** Commerce disagrees with ARLANXEO Brasil and continues to find that the record does not support its claims that it made POR sales to home-market customers at two LOTs. Commerce also disagrees with ARLANXEO Brasil's claim that it has established its eligibility for a CEP offset. Accordingly, for these final results of review, Commerce has continued to compare ARLANXEO Brasil's home market sales to its U.S. sales without regard to its reported LOTs, and has not granted ARLANXEO Brasil's requested CEP offset.

### *Statutory Framework*

As explained in the *Preliminary Results*, section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, Commerce will calculate normal value based on sales at the same LOT as the U.S. sales.<sup>43</sup> Sales are made at different LOTs if they are made at different marketing stages (or their equivalent).<sup>44</sup> Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.<sup>45</sup> In order to determine whether the comparison market sales are at different stages in the marketing process than the U.S. sales, Commerce examines 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 export price (EP) and comparison market sales (*i.e.*, normal value based on either home market or third country prices),<sup>46</sup> Commerce considers the starting prices before any adjustments. For CEP sales, Commerce considers only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act.<sup>47</sup>

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*Zara*, 34 CIT 355, 363 (CIT 2010); *Dong-A Steel Co. v. United States*, 337 F. Supp. 3d 1356 (CIT 2018); and *Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China*, 69 FR 67313 (November 17, 2004)).

<sup>40</sup> *Id.* at 11.

<sup>41</sup> *Id.* at 11-12.

<sup>42</sup> *Id.* at 13 (citing *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 91120 (December 16, 2016), and accompanying IDM at Comment 6; *Certain Carbon and Alloy Steel Cut-to-Length Plate from France: Final Determination of Sales at Less Than Fair Value*, 82 FR 16363 (April 4, 2017), and accompanying IDM at Comment 4; and *Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 16366 (April 4, 2017), and accompanying IDM at Comment 3.)

<sup>43</sup> See *Preliminary Results* and accompanying ESB Rubber PDM at 10.

<sup>44</sup> See 19 CFR 351.412(c)(2).

<sup>45</sup> *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 IDM at Comment 7.

<sup>46</sup> Where normal value is based on constructed value, we determine the normal value LOT based on the LOT of the sales from which we derive selling, general and administrative expenses, and profit for constructed value, where possible. See 19 CFR 351.412(c)(1).

<sup>47</sup> See *Micron Technology, Inc. vs. United States*, 243 F.3d 1301, 1314-16 (Fed. Cir. 2001).

When Commerce 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, Commerce 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 an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the normal value 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 normal value and CEP affects price comparability (*i.e.*, no LOT adjustment is possible), Commerce will grant a CEP offset, as provided in section 773(a)(7)(B) of the Act.<sup>48</sup>

Furthermore, Congress has explained that:

there is no requirement for Commerce to make a level of trade or offset adjustment in every case. Indeed, the express language of the statute and Statement of Administrative Action indicate that there are circumstances where neither adjustment is appropriate or permissible. For example, Commerce may only make a level of trade adjustment where there are different levels of trade and where that difference is shown to affect price comparability. Commerce's analysis of these issues must be based on the actual circumstances involved.<sup>49</sup>

Accordingly, Commerce will make an LOT or CEP adjustment following an analysis of the case-specific information and if the record supports such an adjustment.<sup>50</sup> Further, Commerce's LOT analysis is holistic and evaluates the seller's marketing scheme as a whole.<sup>51</sup>

*Record Evidence Does Not Support a Finding that ARLANXEO Made Sales at More than One LOT*

We find ARLANXEO Brasil's claim that it made home-market sales at two LOTs is not supported by record evidence. Specifically, Commerce explained the following in our *Preliminary Results*:

Based on our examination of ARLANXEO Brasil's submissions, we preliminarily find that the record does not support ARLANXEO

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<sup>48</sup> See, e.g., *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 IDM at Comment 7.

<sup>49</sup> See Senate Remarks on the Uruguay Round Agreements Act, Congressional Record — Senate, S5516 (April 6, 1995).

<sup>50</sup> See *Pasta Zara*, 34 CIT 355, 366 (CIT 2010) (“The *Preamble* draws a distinction between mere differences in selling activities and differences in selling activities that establish a separate selling *function*....”) (citing *Antidumping Duties; Countervailing Duties*, 62 FR 27,296, 27,371 (May 19, 1997) (*Preamble*)).

<sup>51</sup> See *Preamble*, 62 FR at 27,371 (“{A}n analysis of selling activities alone is insufficient to establish the LOT. Rather, the Department must analyze selling functions to determine if levels of trade identified by a party are meaningful. In situations where some differences in selling activities are associated with different sales, whether that difference amounts to a difference in the levels of trade will have to be evaluated in the context of the seller's whole scheme of marketing.”).

Brasil's assertion that its home market sales were made at two different LOTs. ARLANXEO Brasil reported information about the level of intensity at which it performed the following eight selling activities during the POR for home-market sales to end users and distributors, and U.S. sales to its U.S. affiliate, ARLANXEO USA: (1) sales forecasting; (2) order input processing; (3) direct sales personnel; (4) sales/marketing support; (5) pricing methodology; (6) technical assistance; (7) repacking; (8) consignment at customer warehouse. ARLANXEO Brasil reported that it undertook significantly more selling functions in connection with sales to Brazilian end users than to Brazilian distributors and to its U.S. affiliate. ARLANXEO Brasil claimed that it made home-market POR sales at two levels of trade corresponding to its home-market customer types (*i.e.*, end users and distributors), and that it made U.S. sales to its U.S. affiliate at one LOT. ARLANXEO Brasil asserted that it made home-market sales to distributors at the same LOT as sales to its U.S. affiliate, {ARLANXEO USA LLC (ARLANXEO USA)}.

During the instant proceeding, Commerce requested quantitative information related to ARLANXEO Brasil's claimed LOTs, including, *inter alia*, a request for ARLANXEO Brasil to demonstrate how indirect selling expenses varied by the different levels of trade claimed. In response to this request for quantitative information, ARLANXEO Brasil provided certain information and an analysis of its indirect selling expenses and stated that its analysis demonstrated that "selling expenses for U.S. exports, domestic sales to distributors and domestic sales to end users are consistent with the reported differences in services and levels of intensity." Commerce has examined ARLANXEO Brasil's indirect selling expense information, which may not be publicly disclosed, and preliminarily finds that it does not provide the required quantitative support for ARLANXEO Brasil's claimed home-market LOTs.... Accordingly, Commerce preliminarily finds that ARLANXEO Brasil's claim that it made home-market sales at two LOTs is not supported by record evidence.<sup>52</sup>

Commerce provided an additional analysis of record evidence, including a discussion of proprietary information, in its Preliminary Analysis Memorandum.<sup>53</sup> Significantly, Commerce explained the following:

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<sup>52</sup> See ESB Rubber PDM (citations omitted).

<sup>53</sup> See Memorandum, "Antidumping Duty Administrative Review of Emulsion Styrene Butadiene Rubber from Brazil: Preliminary Results Analysis Memorandum for ARLANXEO Brasil S.A.," dated November 7, 2019 (Preliminary Analysis Memorandum).



While ARLANXEO Brasil asserts that it has provided documents that support its allocation of indirect selling expenses, none of these documents provide direct quantitative support for claims made by its employees about the hours worked on home-market sales to end users and distributors.<sup>54</sup>

Commerce further explained that the qualitative evidence provided by ARLANXEO Brasil could not be linked to its indirect selling expense information. Specifically, Commerce stated:

Documents provided by ARLANXEO Brasil include, *inter alia*, employee statements, correspondence, reports on personnel visits with customers, sample orders, and order tracking reports. None of these documents can be directly tied to the claims about the amount of time spent by employees on sales to end users and distributors.<sup>55</sup>

Additionally, Commerce discussed the results of its analysis of ARLANXEO Brasil's home-market sales database by customer category, the details of which may not be publicly disclosed.<sup>56</sup> This analysis indicates that ARLANXEO Brasil's claims about differences in the level of intensity between sales to end users and distributors may be attributable to the factors that are not related to differences in LOT.<sup>57</sup>

Since the *Preliminary Results*, Commerce has considered ARLANXEO Brasil's claim that price differences between home-market sales to end users and distributors is attributable to differences in LOTs between these two customer categories and finds that this claim is not supported by record evidence.<sup>58</sup> ARLANXEO Brasil has not demonstrated, and Commerce does not find record evidence indicating that differences in prices between these two customer categories is attributable to differences in LOTs, and not to other reasons, such as discretionary pricing decisions or differences in sales volumes.

In light of the foregoing, Commerce finds that ARLANXEO Brasil has not met its burden to establish its eligibility for an LOT adjustment or a CEP offset. Section 351.401(b)(1) of Commerce's regulations states that "[t]he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment." ARLANXEO Brasil has not shown that it made sales in the home market at more than one LOT because it has not demonstrated that its LOT claims are supported by quantitative evidence. Furthermore, because the record does not establish that ARLANXEO Brasil made sales at more than one LOT, neither an LOT adjustment nor a CEP offset is warranted. Regarding ARLANXEO Brasil's request for a CEP offset, Commerce noted in the *Preliminary Results* that the record lacks sufficient information required to determine the

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<sup>54</sup> *Id.* at 5.

<sup>55</sup> *Id.* at n.19.

<sup>56</sup> *Id.* at 5-6.

<sup>57</sup> *Id.*

<sup>58</sup> *See* ARLANXEO Brasil's Case Brief at 11-12 and n.16.

relationship of the CEP LOT with the information submitted regarding the home market LOT(s), and thus whether a CEP offset is appropriate.<sup>59</sup>

*Commerce's LOT Analysis Is Consistent with Established Practice and Precedent*

Although ARLANXEO Brasil argues otherwise, the requirement that respondents provide quantitative support for claims made about differing LOTs is consistent with current practice and judicial precedent.

Commerce's requirement that respondents support LOT claims with quantitative evidence in all proceedings was implemented in 2018 to enhance Commerce's ability to determine whether reported differences in selling functions are substantial enough to warrant a finding that sales were made at different LOTs.<sup>60</sup> Although qualitative information is helpful and relevant to the LOT analysis, reliance on this information alone limits Commerce's ability to analyze selling functions to determine if LOTs identified by a party are meaningful and to evaluate whether a respondent's LOT claims are reasonable and accurate.<sup>61</sup> Indeed, reliance on qualitative evidence, such as narrative descriptions of differences in selling functions, customer correspondence, sample sales records, meeting presentations and the like, without supporting quantitative evidence frequently does not present a complete understanding of a respondent's selling activities. Additionally, reliance on purely qualitative information may create the potential for manipulation (or inaccurate reporting) by permitting respondents to create a narrative that is not linked in any way to its verifiable financial data. Requiring quantitative evidence enhances our LOT analysis because such information allows us to determine whether differences in prices among various customer categories or differences in levels of expenses in different claimed LOTs are, in fact, attributable to differences in LOTs or to some other unrelated factor such as relative sales volumes.<sup>62</sup> Quantitative information, such as the selling expense information requested by Commerce in the instant review, permits Commerce to examine whether respondent's narrative explanations and qualitative evidence are supported by its books and records maintained in the ordinary course of business. Additionally, the requirement that respondents provide quantitative support for their claimed LOTs reduces

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<sup>59</sup> See ESB Rubber PDM at 12 (citing ARLANXEO Brasil's December 14, 2018 Section A Questionnaire Response at A-27 – A-28).

<sup>60</sup> See, e.g., *Magnesium from Israel: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 84 FR 32712 (July 9, 2019), and accompanying PDM at 13 (unchanged in *Magnesium from Israel: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 FR 65781 (November 29, 2019)); and *Certain Cold-Rolled Steel Flat Products from the United Kingdom: Preliminary Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 34868 (July 19, 2019), and accompanying PDM at 10 (unchanged in *Certain Cold-Rolled Steel Flat Products from the United Kingdom: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 59771 (November 6, 2019)).

<sup>61</sup> See *Pasta Zara*, 34 CIT 355, 366 (CIT 2010) (“{T}he statute indicates that two sales with substantial differences in selling activities nevertheless may be at the same level of trade, and the {Statement of Administrative Action} adds that two sales with some common selling activities nevertheless may be at different levels of trade. Rather, the Department must analyze selling functions to determine if levels of trade identified by a party are meaningful.” (emphasis added).) (citing *Antidumping Duties; Countervailing Duties*, 62 FR 27,296, 27,371 (May 19, 1997)).

<sup>62</sup> See, e.g., *Timken United States Corp. v. United States*, 434 F.3d 1345 (Fed. Cir. 2006); *Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1138 (CIT 2010); and *Alloy Piping Prods. v. United States*, 33 CIT 349, 358-59 (CIT 2009).

subjectivity and the likelihood of inconsistency in the application of Commerce's analytical framework that results from the analysis of purely qualitative information, which can be, by its nature, subject to different interpretations.

Since 2018 Commerce has required respondents to provide quantitative evidence in support of their LOT claims. For instance, in *Corrosion Resistant Steel from Korea*, Commerce considered, *inter alia*, the following quantitative information in its LOT and CEP offset analysis: (1) how expenses assigned to POR sales made at different claimed LOT impact price comparability functions; (2) a demonstration of how indirect selling expenses vary by the different LOT claimed; and (3) an explanation of how the quantitative analysis provided by respondent supported its claimed levels of intensity for the reported selling activities.<sup>63</sup> In *Corrosion Resistant Steel from Korea*, Commerce found that the quantitative analysis submitted by the respondent corroborated its reported level of intensity information.<sup>64</sup> Additionally, in *Warmwater Shrimp from Thailand*, in conducting its LOT/CEP offset analysis, Commerce considered a respondent's selling expenses in combination with the analysis of selling functions in order to determine if the level of selling expenses substantiated the narrative explanation of selling functions.<sup>65</sup> Furthermore, in recent preliminary determinations, Commerce has declined to find the existence of different LOTs or grant a CEP offset when the record lacks sufficient quantitative evidence corroborating a respondent's LOT claims.<sup>66</sup>

Moreover, even though Commerce began expressly requesting that respondents support their LOT claims with quantitative evidence in 2018, respondents have long borne the burden of establishing their eligibility for a LOT adjustment by demonstrating that different prices and

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<sup>63</sup> See *Corrosion-Resistant Steel Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments*; 2017-2018, 85 FR 15114 (March 17, 2020) (*Corrosion Resistant Steel from Korea*), and accompanying IDM at Comment 4.

<sup>64</sup> *Id.* ("Further, Dongkuk's traceable expenses (e.g., wages) for home market sales are seventy times of that for U.S. sales. A ratio derived from the traceable expenses is used to allocate indirect selling expenses to home market sales and CEP sales. As result, the indirect selling expense ratio for home market sales is more than two times of that for U.S. sales. Thus, we find that the quantitative analysis corroborated the reported level of intensity.") (Citation omitted).

<sup>65</sup> See *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (December 23, 2004) (*Warmwater Shrimp from Thailand*), and accompanying IDM at Comment 5.

<sup>66</sup> See *Polyethylene Terephthalate Sheet from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 12500 (March 3, 2020), and accompanying PDM at 15 ("The only support that JYC provided for these three questions were a sales/production forecast and business plan that covered both the home and U.S. market and a reference to the sales documentation in the sales traces in Exhibits A-8 and A-9. None of this documentation provides the quantitative analysis requested by Commerce, nor is there an explanation of how the quantitative analysis supports the levels of intensity reported in the selling functions chart." (citations omitted)); see also *Utility Scale Wind Towers from Canada: Preliminary Affirmative Determination of Sales at Less-Than-Fair-Value, Preliminary Negative Determination of Critical Circumstances, and Postponement of Final Determination and Extension of Provisional Measures*, 85 FR 8562 (February 14, 2020), and accompanying PDM at 15-16 (finding that the claimed differences in reported levels of intensity in selling functions between claimed LOTs to be unsubstantiated when respondent did not provide requested quantitative information supporting its claims).

selling expenses are caused by differences in LOT and not by other factors, such as volume sold or arbitrary pricing.<sup>67</sup>

*The Precedent Cited by ARLANXEO Brasil Does not Preclude a Finding that Its LOT Claims Are Not Supported by the Record of the Instant Review*

Although ARLANXEO Brasil cites prior determinations, including the underlying less-than-fair value investigation in this proceeding, as support for its claim that Commerce may not require quantitative information in support of LOT claims, its reliance on these cases is misplaced. As an initial matter, we note that Commerce is not necessarily bound by its determinations in a prior segment of a proceeding because each segment has its own unique factual record.<sup>68</sup> The factual record of the instant review is distinct from that of the investigation because, as explained above, Commerce sought quantitative support for ARLANXEO Brasil's LOT claims – information that Commerce neither requested nor considered in the underlying less-than-fair-value investigation. For example, in the instant review, Commerce requested information about the methodology that ARLANXEO Brasil relied upon to allocate indirect selling expense between end users and distributors, and conducted an analysis of ARLANXEO Brasil's home-market sales data by customer category.<sup>69</sup>

Furthermore, Commerce's implementation of the quantitative requirement is a refinement to its practice, and Commerce has the discretion to alter its practices, so long as we present a reasonable rationale for its departure from the previous practice.<sup>70</sup> In applying this analytical framework, Commerce has reached a different result in the instant review than it reached in the underlying investigation because it has considered whether the record of this review contains adequate support for ARLANXEO Brasil's LOT claims.

For the foregoing reasons, Commerce continues to find that the record does not support a finding that ARLANXEO Brasil made sales at more than one LOT, and has not granted a CEP offset.

**Comment 2: Whether to Deduct *Impostos Sobre Produtos Industrializados* (IPI) Taxes from the Home-Market Price**

*ARLANXEO Brasil's Case Brief*

- Pursuant to Section 773(a)(6)(B)(iii) of the Act, Commerce should deduct IPI taxes reported by ARLANXEO Brasil from gross home-market price.<sup>71</sup>

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<sup>67</sup> See *NSK Ltd. v. Koyo Seiko Co.*, 190 F.3d 1321, 1330 (Fed. Cir. 1999) (“Although NTN submitted evidence that merchandise at different levels of trade had different prices and selling expenses, NTN did not provide evidence to prove that those differences were not caused by other factors, such as volume sold or arbitrary pricing practices. In other words, NTN did not present evidence to establish that the difference in the level of trade caused the differences in price and selling expenses.”).

<sup>68</sup> See *Dong-A Steel Co. v. United States*, 337 F. Supp. 3d 1356, 1374 (CIT 2018).

<sup>69</sup> See Preliminary Analysis Memorandum.

<sup>70</sup> See *NTN Bearing Corp. of Am. v. United States*, 27 CIT 129 (CIT 2003) (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (USSC 1984); *Timken Co. v. United States*, 22 CIT 621, 628 (CIT 1998)).

<sup>71</sup> See ARLANXEO Brasil's Case Brief at 17-19.

- Commerce erred in its preliminary finding that IPI taxes are not directly imposed on sales of the foreign like product. Record evidence, including sample invoices for foreign like product, demonstrates that the IPI taxes are directly charged on sales, and that ARLANXEO Brasil's reported gross price includes IPI taxes.
- The IPI tax is a Brazilian federal value added tax (VAT), and Commerce excludes VAT in calculating normal value in antidumping proceedings involving market economy countries.<sup>72</sup>
- Commerce has previously determined that IPI tax must be deducted from gross unit price.<sup>73</sup>
- The precedent Commerce cited in the *Preliminary Determination* does not support a finding that IPI taxes are not imposed directly on sales of foreign like product.<sup>74</sup>

#### *Petitioner's Rebuttal Brief*

- Commerce reasonably determined not to deduct IPI taxes in calculating normal value.
- There is sufficient ambiguity on the record of the instant review to conclude that the deduction of IPI taxes is not warranted.
- The record is inadequate to affirmatively establish that IPI taxes were either rebated or not collected, or that ARLANXEO Brasil consistently and completely included the expense in the price of foreign like product. Commerce has refused to deduct IPI taxes where the record did not affirmatively establish that an adjustment is warranted.<sup>75</sup>

**Commerce's Position:** Commerce agrees with ARLANXEO Brasil, and, therefore, has deducted reported per-unit IPI taxes from the reported home-market gross unit price to calculate normal value for the final results of review.<sup>76</sup>

As an initial matter, Commerce disagrees with the petitioner's assertion that the *Small Diameter Pressure Pipe from Brazil 2003-2004 Preliminary Results* supports a finding that deduction of IPI taxes in the instant review is unwarranted.<sup>77</sup> The discussion cited by the petitioner refers to Commerce's methodology for determining whether home-market sales have been made at prices below the cost of production in accordance with section 773(b) of the Act (*i.e.*, comparing home-market sales to the reported cost of production), rather than calculation of normal value in accordance with section 773(a) of the Act.<sup>78</sup> Moreover, in *Small Diameter Pressure Pipe from*

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<sup>72</sup> *Id.* at 20 (citing *Silicon Metal from Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Order in Part*, 66 FR 40980 (August 6, 2001) (unchanged in *Silicon Metal from Brazil: Final Results of Antidumping Duty Administrative Review*, 67 FR 6488 (February 12, 2002))).

<sup>73</sup> *Id.* at 21 (citing, *inter alia*, *Certain Uncoated Paper from Brazil: Final Determination of Sales at Less Than Fair Value*, 81 FR 3115 (January 20, 2016)).

<sup>74</sup> *Id.* at 22.

<sup>75</sup> See Petitioner's Rebuttal Brief at 15 (citing *Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Brazil; Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 24524 (May 10, 2005) (*Small Diameter Pressure Pipe from Brazil 2003-2004 Preliminary Results*)).

<sup>76</sup> See Final Analysis Memorandum.

<sup>77</sup> See Petitioner's Rebuttal Brief at 15 (citing *Small Diameter Pressure Pipe from Brazil 2003-2004 Preliminary Results*).

<sup>78</sup> See *Small Diameter Pressure Pipe from Brazil 2003-2004 Preliminary Results* ("We compared the weighted-average COP {cost of production} figures to the home market sales prices of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales had been made at prices below COP. On a

*Brazil 2003-2004 Preliminary Results*, Commerce deducted indirect taxes from normal value, and there is no indication that it did not deduct IPI taxes, which are indirect taxes.<sup>79</sup>

Pursuant to section 773(a)(6)(B)(iii) of the Act, Commerce adjusts for the amount of any taxes imposed directly upon the foreign like product, which have been rebated or not collected on subject merchandise, to the extent that such taxes are added to or included in the price of the foreign like product.<sup>80</sup> Additionally, 19 CFR 351.102(b)(28) defines an “indirect tax” as a tax on “sales, excise, turnover, value added, franchise, stamp, transfer, inventory, or equipment tax, a border tax, or any other tax other than a direct tax or an import charge.” Further, it is our practice to treat taxes such as PIS and COFINS, as “indirect taxes” that should be deducted from the home market price because they are charged to the customer as they are paid indirectly by the buyer as part of the sales price.<sup>81</sup> Additionally, Commerce has found that IPI taxes are indirect taxes and has deducted these taxes from a respondent’s home-market price when calculating normal value.<sup>82</sup>

Although the petitioner argues that the record is ambiguous, we find that the record sufficiently demonstrates that ARLANXEO Brasil’s reported home-market gross unit price includes an amount for IPI taxes collected on sales.<sup>83</sup> Therefore, in accordance with section 773(a)(6)(B)(iii) of the Act, and consistent with our practice in prior reviews, Commerce has deducted these indirect taxes from ARLANXEO Brasil’s home market gross unit price for the final results of review.<sup>84</sup>

### **Comment 3: Preliminary Margin Calculations**

#### *ARLANXEO Brasil’s Case Brief*

- Commerce erred in excluding two POR U.S. sales made in August 2018.

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product-specific basis, we compared the COP to home market prices net of any applicable billing adjustments, indirect taxes (ICMS, IPI, COFINS and PIS), and any applicable movement charges.”).

<sup>79</sup> *Id.* (“We matched all U.S. sales to NV {normal value}. We calculated NV based on prices to unaffiliated customers. We adjusted gross unit price for billing adjustments, interest revenue, *indirect taxes*, and the per-unit value of any post-transaction complimentary invoices (or credit notes) that were issued to adjust for any errors in the originating invoice.” (emphasis added)) (unchanged in *Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Brazil*, 70 FR 60282 (October 17, 2005)).

<sup>80</sup> See, e.g., *Certain Uncoated Paper from Brazil: Final Determination of Sales at Less Than Fair Value*, 81 FR 3115 (January 20, 2016), and accompanying IDM at Comment 5, and *Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review*, 77 FR 14729 (March 13, 2012), and accompanying IDM at Comment 6.

<sup>81</sup> See *Certain Uncoated Paper from Brazil: Final Determination of Sales at Less Than Fair Value*, 81 FR 3115 (January 20, 2016), and accompanying IDM at Comment 5; and *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Brazil*, 67 FR 62134 (October 3, 2002), and accompanying IDM at Comment 2.

<sup>82</sup> See *Certain Uncoated Paper from Brazil: Final Determination of Sales at Less Than Fair Value*, 81 FR 3115 (January 20, 2016), and accompanying IDM at Comment 5.

<sup>83</sup> See ARLANXEO Brasil’s January 9, 2019 Sections B, C, and D Questionnaire Response at B-20, and Exhibits B-5 (sales invoice) and B-6 (tax calculation worksheet).

<sup>84</sup> See Final Analysis Memorandum.

- Commerce erred in including one reported U.S. sample sale in its margin calculations.<sup>85</sup>

No other party commented on this issue.

**Commerce's Position:** Commerce agrees with ARLANXEO Brasil, in part. Specifically, Commerce agrees with ARLANXEO Brasil's assertion that a typographical error in the preliminary margin calculation program excluded two reported U.S. sales that occurred during the POR. Commerce further notes that the error alleged by ARLANXEO Brasil also resulted in the inadvertent exclusion of home-market sales within the window period established by 19 CFR 351.414. Therefore, for these final results of review, Commerce has included the two U.S. sales and has included home-market sales within the window period that were omitted from the preliminary margin calculations.<sup>86</sup>

Commerce disagrees, however, with ARLANXEO Brasil's claim that Commerce improperly included in its margin calculations a U.S. sales transaction that ARLANXEO Brasil identified as a sample sale. Commerce excludes from its dumping calculations sample transactions for which a respondent has established that there is either no transfer of ownership or no consideration.<sup>87</sup> This policy does not mean that Commerce automatically excludes from its analysis any transaction to which a respondent applies the label "sample."<sup>88</sup> ARLANXEO Brasil has not identified any record information establishing that it retained ownership of the subject merchandise at issue, nor that it received no consideration.<sup>89</sup> Moreover, ARLANXEO Brasil has neither argued nor demonstrated that the transaction in question is outside the ordinary course of trade. Therefore, Commerce has continued to include this transaction in its final margin calculations.

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<sup>85</sup> See ARLANXEO Brasil's Case Brief at 22-23.

<sup>86</sup> See Final Analysis Memorandum.

<sup>87</sup> See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Reviews and Revocation in Part*, 65 FR 11767 (March 6, 2000), and accompanying IDM at Comment 9.

<sup>88</sup> *Id.*

<sup>89</sup> See ARLANXEO Brasil's Case Brief at 23.

## VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of this administrative review in the *Federal Register*.



\_\_\_\_\_  
Agree



\_\_\_\_\_  
Disagree

6/23/2020

X  \_\_\_\_\_

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance