



A-580-890

Administrative Review

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

Public Document

E&C/OV: ES

July 8, 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: Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order: Emulsion Styrene-Butadiene Rubber from the Republic of Korea; 2017-2018

I. SUMMARY

We analyzed the comments of the interested parties in the 2017-2018 administrative review of the antidumping duty (AD) order covering emulsion styrene butadiene rubber (ESB rubber) from the Republic of Korea (Korea). As a result of our analysis, we made changes to the margins found in the preliminary results. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of issues in this administrative review for which we received comments from the interested parties:

Comment 1: Constructed Export Price (CEP) Offset Treatment

Comment 2: Cost of Production (COP) Adjustment

Comment 3: Value Added Tax (VAT) Adjustment

II. BACKGROUND

On November 26, 2019, the Department of Commerce (Commerce) published the *Preliminary Results* of the 2017-2018 administrative review of the AD order on ESB rubber from Korea.¹

The administrative review covers seven exporters/producers. Commerce selected LG Chem, Ltd. (LG Chem) as the mandatory respondent for individual examination. The period of review (POR) is February 24, 2017 through August 31, 2018.²

¹ See *Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 65114 (November 26, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

² See 19 CFR 351.213(e)(1)(ii).



We invited parties to comment on the *Preliminary Results*.³ On December 30, 2019, we received a case brief from the Lion Elastomers, LLC (the petitioner).⁴ On January 6, 2020, we received a rebuttal brief from LG Chem.⁵

On March 2, 2020, Commerce extended the deadline for issuing the final results of this review by 57 days, until May 21, 2020.⁶ On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days, thereby extending the deadline for these final results until July 10, 2020.⁷

III. SCOPE OF THE ORDER

The merchandise subject to this order is cold-polymerized emulsion styrene-butadiene rubber. Subject merchandise 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 review 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.”

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 the 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 the order is dispositive.

³ See *Preliminary Results* 84 FR at 65115.

⁴ See Petitioner’s Letter, “Case Brief,” dated December 30, 2019 (Petitioner Case Brief).

⁵ See LG Chem’s Letter, “LG Chem’s Rebuttal Brief,” dated January 6, 2020 (LG Chem Rebuttal Brief); *see also* LG Chem’s Letter, “Errata to LG Chem’s Rebuttal Brief,” dated January 7, 2020.

⁶ See Memorandum, “Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Extension of Deadline for Final Results of Antidumping Duty Administrative Review, 2017-2018,” dated March 2, 2020.

⁷ 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.

IV. CHANGES TO THE *PRELIMINARY RESULTS*

We calculated constructed export price (CEP), normal value (NV) and COP using the same methodology as stated in the *Preliminary Results*,⁸ except as follows:⁹

- We are not granting LG Chem a CEP offset. *See* Comment 1.
- We corrected minor margin calculation errors to incorporate all of LG Chem's reported CEP expenses.¹⁰

The margin changes to LG Chem resulted in a margin change for the respondents not selected for individual examination for the final results of this review. The final rate for the non-selected respondents is 4.19 percent.

V. DISCUSSION OF THE ISSUES

Comment 1: CEP Offset Treatment

In the *Preliminary Results*, we determined that LG Chem's home market sales were made at a different level of trade (LOT) than its CEP sales during the POR.¹¹ We also found that LG Chem's home market LOT was at a more advanced stage of distribution than its CEP sales.¹² Thus, we granted LG Chem a CEP offset, pursuant to section 773(a)(7)(B) of the Act and 19 CFR 351.412.(f).

⁸ *See* Memorandum, "Administrative Review of the Antidumping Duty of Emulsion Styrene Butadiene Rubber from the Republic of Korea: Preliminary Results Analysis Memorandum for LG Chem, Ltd. and LG Chem America, Inc.," dated November 6, 2019.

⁹ *See* Memorandum, "Administrative Review of the Antidumping Duty Order on Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Final Results Analysis Memorandum for LG Chem, Ltd.," dated concurrently with this memorandum.

¹⁰ *Id.*

¹¹ *See* PDM at 9-11.

¹² *Id.* at 10-11.

*Petitioner Case Brief*¹³

- Commerce determines whether sales are made at different LOTs by reviewing a respondent's distribution system in each market (*i.e.*, the chain of distribution), including (1) the selling functions;¹⁴ (2) the class of customer (*i.e.*, customer category); and (3) the level (intensity) of selling expenses incurred for each sale.¹⁵ Where Commerce determines that the respondent made sales in its home market and U.S. markets at different LOTs, Commerce makes other adjustments, such as a CEP offset, to NV to ensure fair price comparisons take place.
- Although LG Chem reported that it made CEP sales during the POR through two channels of distribution, Commerce failed to analyze how many LOTs existed with respect to these sales. When Commerce performs this analysis, it should find that two LOTs exist, given that LG Chem performs additional selling functions for its "channel two"¹⁶ sales and it also performs some of the same selling functions for those sales at a higher level of intensity.
- Commerce should also find that LG Chem made its CEP channel two sales at the same LOT as its home market sales because the company engaged in identical selling activities, for effectively identical customer categories, at approximately the same level of intensity for these sales.
- While LG Chem reported that it performed sales functions in the home market at a higher level of intensity, LG Chem did not provide adequately-differentiated¹⁷ per-unit¹⁸ quantitative evidence to support this claim.¹⁹ There is no precedent for Commerce to find that sales were made at different LOTs where the selling activities and customer categories were identical, but certain differences in selling intensity are reported.
- In the underlying investigation, Commerce granted LG Chem a CEP offset based on the fact that its affiliated U.S. importer, LGCAI, held inventory at warehouses in the United States and handled the logistics of shipping the merchandise from these warehouses to end-users and distributors.²⁰ The record of the instant review has relevant changes which

¹³ See Petitioner Case Brief at 1-12.

¹⁴ *Id.* at 2 (citing *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 Issues and Decision Memorandum (IDM) at Comment 4).

¹⁵ See Petitioner Case Brief at 2 (citing *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 91120 (December 16, 2016) (*Pasta from Italy*), and accompanying IDM at Comment 6).

¹⁶ LG Chem reported merchandise shipped directly to the unaffiliated U.S. customer as "channel two" sales, while it reported ESB rubber shipped to its U.S. affiliate, LG Chem America Inc. (LGCAI), as "channel one" sales.

¹⁷ See Petitioner Case Brief at 9 (citing *Bethlehem Steel Corp. v. United States*, 27 F. Supp. 2d 201, 204 (1998)).

¹⁸ See Petitioner Case Brief at 9 (citing *Pasta from Italy* IDM at Comment 6).

¹⁹ See Petitioner Case Brief at 9 (citing *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27327 (May 19, 1997)).

²⁰ See Petitioner Case Brief at 11 (citing *Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Affirmative Determination of Critical Circumstances, in Part, Postponement of Final Determination, and Extension of Provisional Measures*, 82 FR 11536 (February 24, 2017) and accompanying PDM, unchanged in *Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 FR 33045 (July 19, 2017), and accompanying IDM (*LTFV Investigation*)).

undercut Commerce's rationale used in the underlying investigation, such that LG Chem now should not be granted a CEP offset.

- Under similar facts, Commerce did not grant LG Chem a CEP offset in *DOTP from Korea*.²¹

*LG Chem Rebuttal Brief*²²

- Commerce concluded the information on the record fully supported granting the CEP offset in the *Preliminary Results*. The totality of the facts and circumstances since the *Preliminary Results* have not changed.
- The petitioner did not indicate any changes in the applicable law to support a change to the preliminary decision, nor did the petitioner state that Commerce applied the incorrect legal standard in undertaking this analysis.
- The petitioner also incorrectly states that there are significant differences between the facts in original investigation and this administrative review regarding LG Chem's channels of distribution. However, the only difference in this review is that LG Chem made no export price (EP) sales.
- Given that the petitioner provided no legitimate justification for Commerce to change its preliminary finding, Commerce should continue granting the CEP offset.

Commerce's Position: After considering the information on the record further, we agree with the petitioner that a CEP offset adjustment is not warranted for the final results.

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, Commerce will calculate NV based on sales at the same LOT as the U.S. sales. Commerce will grant a CEP offset under section 773(a)(7)(B) of the Act, if it determines that 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).²³ Commerce's regulations at 19 CFR 351.412(c)(2) outline Commerce's policy regarding differences in the LOTs as follows:

The Secretary will determine that sales are made at different LOTs if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.²⁴

²¹ *Id.* (citing *Dioctyl Terephthalate from the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value of Sale at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 82 FR 9195 (February 3, 2017) (*DOTP from Korea*), and accompanying PDM).

²² See LG Chem Rebuttal Brief at 2-4.

²³ See, e.g., *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 32720 (July 9, 2019), and accompanying IDM at Comment 16; 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.

²⁴ See 19 CFR 351.412(c)(2) (emphasis added).

In performing the LOT analysis, 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 activities for each type of sale. Pursuant to 19 CFR 351.412(c), in identifying LOTs for EP and comparison market sales (*i.e.*, NV based on either home market or third country prices),²⁵ 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.²⁶

In this review, we obtained information from LG Chem regarding the marketing stages involved in making reported home market and U.S. sales, including a description of the selling activities performed for each channel of distribution.²⁷ In the *Preliminary Results*, we analyzed these selling activities and found that: (1) all home market sales were at the same LOT;²⁸ (2) LGCAI performed significant selling activities in the U.S. market for its CEP sales that LG Chem handles in the home market;²⁹ and (3) the home market LOT was at a more advanced stage of distribution than the CEP LOT. Accordingly, we preliminarily determined that a CEP offset was warranted for LG Chem, pursuant to section 773(a)(7)(B) of the Act and 19 CFR 351.412(f).³⁰

For these final results, we have reexamined the data on which these conclusions were based. Our analysis, as set forth below, continues to show that LG Chem made home market sales at a single LOT. However, we now find that LG Chem also made its CEP sales at a single LOT, and this LOT does not differ from the home market LOT. Therefore, we no longer find that a CEP offset is appropriate in this review.

With respect to the home market, LG Chem reported that it performed seven selling functions during the POR, all at a “high” level. These were: (1) strategic/economic planning and sales forecasting; (2) marketing; (3) packing; (4) inventory maintenance; (5) inputting and processing of orders; (6) employing direct sales personnel; and (7) arranging for freight and delivery.³¹ Based on these selling functions, we find that LG Chem performed sales activities in three of the five³² general categories used in Commerce’s LOT analysis: (1) provision of sales support; (2) provision of logistical services; and (3) performance of sales-related administrative activities. Because LG Chem claimed that it performed these activities for all home market customers, we continue to find that LG Chem sold ESB rubber in the home market at one LOT.

²⁵ Where NV is based on constructed value (CV), we determine the NV LOT based on the LOT of the sales from which we derive selling, general and administrative expenses, and profit for CV, where possible. See 19 CFR 351.412(c)(1).

²⁶ See 19 CFR 351.412(c)(ii); see also *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314-16 (Fed. Cir. 2001).

²⁷ See PDM at 9-11.

²⁸ *Id.* at 10.

²⁹ See LG Chem’s Section A Response (LG Chem AQR) at 13-27.

³⁰ *Id.* at 11.

³¹ *Id.* at 13 and Exhibit A-14.

³² These categories are (1) provision of sales support; (2) provision of training services; (3) provision of technical support; (4) provision of logistical services; and (5) performance of sales-related administrative activities. See *e.g.*, *Polyester Textured Yarn from India: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures*, 84 FR 31301 (July 1, 2019), and accompanying PDM at 15, unchanged in *Polyester Textured Yarn from India: Final Determination of Sales at Less Than Fair Value*, 84 FR 63843 (November 19, 2019).

With respect to the U.S. market, LG Chem reported that it sold ESB rubber to its U.S. affiliate, LGCAI, through two channels of distribution. In the first channel, LG Chem shipped the merchandise directly to LGCAI, who then resold the products from its own inventory; in the second channel, LG Chem sold the merchandise to LGCAI but shipped it directly to LGCAI's U.S. unaffiliated customer.³³ LG Chem reported that it performed four selling functions when selling to LGCAI in both distribution channels: (1) strategic/economic planning and sales forecasting; (2) marketing; (3) packing; and (4) inventory maintenance; it also reported that it performed three additional functions when selling to LGCAI through the second channel: (1) inputting and processing of orders; (2) arranging for freight and delivery; and (3) employing direct sales personnel.³⁴

As a first step in our U.S. LOT analysis, we examined the claimed differences in selling functions between the two distribution channels. We noted that, although LG Chem maintained that it performed three selling functions exclusively for its sales to LGCAI of products shipped to LGCAI's resale customer, evidence on the record contradicts this claim. In particular, the record shows that LG Chem accepted and processed orders for sales to LGCAI in both channels of distribution,³⁵ and it arranged for freight for merchandise shipped in both channels as well.³⁶ Further, the record contains no evidence that LG Chem had a sales force dedicated to handling sales to LGCAI through only one channel.³⁷ Thus, we disagree with LG Chem that it performed additional selling functions with respect to its drop-shipped U.S. sales.

In light of the foregoing, we find that LG Chem performed the same selling functions when selling to LGCAI, regardless of distribution channel. Further, given that LG Chem reported that it performed four of these functions at the same level of intensity for both channels, and it provided no information showing significant differences in the remaining three functions,³⁸ we find that LG Chem sold ESB rubber to LGCAI at one LOT.

³³ See LG Chem AQR at 13 and Exhibit A-13.

³⁴ *Id.*

³⁵ See LG Chem AQR at Exhibits A-15 and A-16, showing that the same documents are prepared for sales through both channels of distribution. Further, LG Chem notes that, although its and LGCAI's order processing systems are linked, it nevertheless checks the quantity and price of the order, checks inventory levels, and submits production orders to the factory. *Id.* at 18. While LG Chem limits its description to sales of drop-shipped merchandise, it still must perform these basic functions for merchandise shipped to LGCAI for its own inventory. *Id.* (stating that "{e}xpenses associated with these activities are reported under indirect selling expenses incurred in Korea on U.S. sales (DINDIRSU)" and LG Chem's Section C Response (LG Chem CQR) at Exhibit C-36 (showing a single indirect selling expense ratio for all export sales).

³⁶ See LG Chem CQR at 24 (stating that LG Chem "incurred inland truck freight from the factory to the port of exportation for all of its sales to the United States during the POR. For all sales, {LG Chem} incurs these expenses, and not LGCAI") and 27-31 (showing that LG Chem incurred for all its U.S. sales, foreign and U.S. brokerage and handling expenses, international freight, and marine insurance).

³⁷ See, generally, LG Chem CQR (showing no direct selling expense related to direct sales personnel); see also LG Chem CQR at Exhibit C-36 (showing export-related salaries and wages allocated equally to all export sales).

³⁸ In fact, LG Chem's response is silent on the selling activity performed by LG Chem for these three functions and instead discusses only the activities performed by LGCAI. See, e.g., LG Chem AQR at 18 (stating "{LG Chem} is not involved in . . . sales made by LGCAI from inventory)" (emphasis added). However, as noted above, LGCAI's selling functions are not relevant to this analysis.

We disagree with the petitioner that LG Chem sold ESB rubber to LGCAI at two LOTs. The primary basis for the petitioner's argument is that LG Chem performs more selling activities at greater intensity for its channel two sales than its channel one sales. However, as noted above, record evidence does not bear out LG Chem's claim in this regard. The petitioner also contends that the level of inventory maintenance differs between the two distribution channels.³⁹ Again, however, record evidence shows otherwise. Not only does LG Chem rate this selling function with a "low" intensity,⁴⁰ but LG Chem also reported holding ESB rubber inventory in Korea for the same number of days for all sales to LGCAI.⁴¹

Finally, we compared the home market LOT to the U.S. LOT to determine whether the LOTs differed. As noted above, LG Chem reported performing the same seven selling activities for each market, falling into the same three general categories (*i.e.*, provision of sales support; provision of logistical services; and performance of sales administrative activities). However, LG Chem reported that it performed five of these activities at a "high" level in the home market and only at a "low" level when selling to LGCAI. Despite LG Chem's characterization, however, the record does not demonstrate significant differences between the selling activities in these markets as discussed below:

- Sales support: LG Chem reported that it performed forecasting activity; sales/marketing support and market research; and employment of direct sales personnel under this category in both markets.⁴² With respect to forecasting, LG Chem stated that it projects future home market demand based on prior years' sales, and it monitors U.S. market trends and demand.⁴³ For marketing, LG Chem merely stated that it performed "sales/marketing activity including sales/marketing support, market research" for its home market customers,⁴⁴ while it "engages in some marketing activities in the United States, working with LGCAI to develop overall market plans, ideas for new features based on customer demands, and conduct competitor research."⁴⁵ Finally, LG Chem reported that it maintains a sales team for selling subject merchandise in the home market,⁴⁶ and it stated that its sales personnel may directly interface with U.S. customers.⁴⁷ LG Chem provided no additional specifics beyond the ones stated here, and it reported all expenses related to these activities as part of its indirect selling expenses.⁴⁸ Thus, we find that the record does not show that LG Chem provided sales support in the home market at a higher level of intensity than it did to sell to LGCAI, despite its claim to the contrary.

³⁹ See Petitioner Case Brief at 6.

⁴⁰ See LG Chem AQR at Exhibit A-13.

⁴¹ See LG Chem CQR at 49 and Exhibit C-38.

⁴² See LG Chem AQR at 16-25.

⁴³ *Id.* at 16 and 22.

⁴⁴ *Id.* at 23 and Exhibit A-14.

⁴⁵ *Id.* at 20.

⁴⁶ *Id.* at 24.

⁴⁷ *Id.* at 18.

⁴⁸ *Id.* at 18-24 (showing LG Chem reported the listed sales support activities as indirect selling expenses in both markets).

- Logistical services: LG Chem reported arranging freight and maintaining inventory maintenance under this category. LG Chem reported performing freight and delivery at a “high” intensity level, in both markets,⁴⁹ and it also reported holding ESB rubber in inventory for an identical number of days for all sales as well.⁵⁰ Consequently, we find no meaningful difference in LG Chem’s provision of logistical services in the home and U.S. markets.
- Sales-related administrative activity: LG Chem reported order input/processing in this category. LG Chem described this activity in the home market as, “{f}or all channel of distribution, sales personnel is always inputting order,” thereby requiring a “high” level of selling activity.⁵¹ For the U.S. market, in contrast, LG Chem stated that, “{b}ecause {LG Chem} and LGCAI’s order processing systems are linked, the amount of effort required by {LG Chem} to process LGCAI’s orders is extremely low. However, they do perform some functions, such as checking the quantity and price of the order, checking inventory levels, and submitting a production order to the factory, if necessary.”⁵² Based on these descriptions, it appears that LG Chem determined the intensity level of this function solely by reference to the frequency at which it performed the task, and not by reference to differences in the task itself. Further, LG Chem’s order processing is a basic administrative function which involved little activity and minimal differences between the markets.⁵³ Therefore, we also find no meaningful differences between the home and U.S. markets in this selling function category.

Consequently, when LG Chem’s selling activities are viewed as a whole, we find that the differences between those activities performed for the home market and U.S. market do not rise to the level of a “substantial difference in selling activities,” nor that LG Chem’s CEP and home market sales were at different stages of marketing (or their equivalent). As the Court of International Trade (CIT) has explained, “{a}lthough {an importer} may perform more selling functions or may perform selling functions more intensely in its home market, these differences do not warrant a CEP offset. The CEP offset provision applies in situations in which there is a *substantial difference* in the level of trade.”⁵⁴ Minor variations are inadequate; the differences in selling functions must be substantial, “such as the difference between wholesale and retail,” to warrant a CEP offset.⁵⁵ In light of the foregoing, Commerce finds that LG Chem is not eligible for a CEP offset for these final results.

Section 351.401(b)(1) of Commerce’s regulations state that “{t}he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the

⁴⁹ See LG Chem AQR at Exhibits A-13 and A-14.

⁵⁰ See LG Chem’s Section B Response at Exhibit B-18 and LG Chem CQR at Exhibit C-38; *see also* LG Chem AQR at 17 (stating “{a}ll subject merchandise is stored at {LG Chem’s} automation warehouse in the Daesan plant before the shipment regardless of whether the merchandise is exported or sold to the domestic market”).

⁵¹ See LG Chem AQR at 24.

⁵² *Id.* at 18.

⁵³ *Id.* at 18 and 24.

⁵⁴ See *Sucocitricon Cutrale Ltda. v. United States*, Court No. 10–00261, 2012 WL 2317764 (CIT June 1, 2012) at *6) (emphasis added).

⁵⁵ See *Hyundai Steel Co. v. United States*, 279 F. Supp. 3d 1349, 1370 (CIT 2017) (citing *Sucocitricon Cutrale Ltda.* Court No. 10–00261, Slip-Op. 12-71 (Fed. Cir. 2001)).

Secretary the amount and nature of a particular adjustment.” LG Chem has not met its burden in this instant review and has not shown that it made sales in the home market at a more advanced stage than the U.S. market.⁵⁶ Therefore, we determine that sales to the home market during the POR were made at the same LOT as sales to the United States. Because LG Chem’s home market LOT is not at a more advanced stage of distribution than LG Chem’s U.S. LOT, as required by section 773(a)(7)(B) of the Act, a CEP offset is not warranted.⁵⁷

Finally, we disagree with LG Chem that Commerce should grant it a CEP offset because Commerce found that a CEP offset was appropriate in the original investigation of this case. The courts have recognized “each administrative review is a separate segment of proceedings with its own unique facts.”⁵⁸ Moreover, Commerce’s acceptance of LG Chem’s methodology in the original investigation does not supersede Commerce’s analysis in this administrative review. The courts have affirmed Commerce’s discretion to change its position as long as the agency provides an explanation for doing so,⁵⁹ and, thus, Commerce is not forever bound by its previous determinations.⁶⁰ Accordingly, in drawing reasonable conclusions, based on record evidence in this segment of the proceeding, we are not granting LG Chem a CEP offset for the final results.

Comment 2: COP Adjustment

*Petitioner Case Brief*⁶¹

- To account for the imperfect yield of its prime merchandise, and the related offset taken for the value generated by scrap and co-products, Commerce must adjust LG Chem’s COP.
- In the current administrative review of *ESB Rubber from Brazil*,⁶² Commerce found that the ESB rubber production process generates non-prime material at a loss, and it assigned

⁵⁶ The CIT has noted that “{a} party seeking a CEP offset bears the burden of establishing that the differences in selling functions performed in the home and U.S. markets are ‘substantial.’” See *Hyundai Steel Co. v. United States*, 319 F. Supp. 3d 1327, 1335 (CIT 2018).

⁵⁷ See, e.g., *Sucocitrico Cutrale Ltda. v. United States*, Court No. 10-00261, Slip Op. 12-71 (CIT June 1, 2012) at *6.

⁵⁸ See *Shandong Huarong Mach. Co. v. United States*, Court No. 03-00676, Slip Op. 05-54 (CIT May 2, 2005); see also *Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 7519 (February 13, 2006), and accompanying IDM at Comment 17 (“each administrative review of the order represents a separate administrative review proceeding and stands on its own”); and *Fresh Garlic from the People’s Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002) (“what transpired in previous reviews is not binding precedent in later reviews”).

⁵⁹ See *Timken Co. v. United States*, 59 F. Supp. 2d 1371, 1376 (CIT 1999); see also *Asociacion Colombiana de Exportadores de Flores v. United States*, 6 F. Supp. 2d 865, 879-80 (CIT 1998); and *Anshan Iron & Steel Co. v. United States*, 358 F. Supp. 2d 1236, 1242 (CIT 2004).

⁶⁰ Commerce’s decision in the *LTFV Investigation* involved a comparison of LG Chem’s and LGCAI’s selling functions. See *LTFV Investigation* IDM at Comment 1 (distinguishing the facts in that segment of the proceeding from the facts in *DOTP from Korea* on the basis that LGCAI “held inventory at warehouses located in the U.S. and handled the logistics of the warehouse cost and the freight from the warehouse to the final customer”). However, as noted above, under the Act and Commerce’s regulations, Commerce does not take into account selling activities performed by U.S. affiliates in the United States. Thus, it would not be appropriate to rely on that analysis here.

⁶¹ See Petitioner Case Brief at 12.

⁶² See *Emulsion Styrene-Butadiene Rubber from Brazil: Preliminary Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 61889 (November 14, 2019) (*ESB Rubber from Brazil*), and accompanying PDM.

a portion of these costs back to ESB rubber products.⁶³ Commerce should do the same here.

*LG Chem Rebuttal Brief*⁶⁴

- The petitioner fails to demonstrate that the facts in *ESB Rubber from Brazil* are similar to the facts in this proceeding. Thus, there is no legitimate justification for the petitioner's argument.
- The petitioner provides no specific guidance for adjusting LG Chem's COP to account for this yield loss. Therefore, Commerce should reject the petitioner's suggestion on this basis as well.

Commerce's Position: We disagree that Commerce should adjust LG Chem's COP in accordance with the *ESB Rubber from Brazil* proceeding. As noted above, Commerce evaluates the record of each administrative segment of a proceeding, such as an administrative review, on its own.⁶⁵ Significantly, the record of this administrative review is separate and distinct from the record in *ESB Rubber from Brazil*, and contains different data submitted by a different respondent in a different country. Not only does the petitioner fail to demonstrate, or even claim, that the facts and circumstances facing the respondent in *ESB Rubber from Brazil* are analogous to circumstances facing LG Chem, the petitioner also fails to demonstrate how Commerce should attempt to make such an adjustment given the record evidence in this proceeding.

Furthermore, we find the record evidence in this proceeding specifically demonstrates that an adjustment to LG Chem's COP is not warranted. The record indicates that LG Chem reuses the only ESB rubber by-product, butadiene with low purity, in its production process.⁶⁶ LG Chem deducts its rejected butadiene value from the cost of manufacturing and separately records this in its accounting system.⁶⁷ We therefore find no basis to adjust LG Chem's COP.

Comment 3: VAT Adjustment

*Petitioner Case Brief*⁶⁸

- The record evidence does not support LG Chem's exclusion of VAT for certain home market sales. Commerce must add VAT to home market price for those transactions.

*LG Chem Rebuttal Brief*⁶⁹

- The petitioner provided no rationale for its proposal, other than that Commerce should ignore LG Chem's questionnaire response.
- LG Chem certified in its questionnaire response that certain home market customers consume ESB rubber in the production of exported non-subject merchandise, therefore

⁶³ See Petitioner Case Brief at 12 (citing *ESB Rubber from Brazil* PDM at 9).

⁶⁴ See LG Chem Rebuttal Brief at 4-5.

⁶⁵ See, e.g., *Inland Steel Industries, Inc. v. United States*, 967 F. Supp. 1338, 1361 (CIT 1997), *affirmed* 188 F. 3d 1349 (Fed. Cir. 1999).

⁶⁶ See LG Chem's Letter, "LG Chem's Section D Response," dated January 17, 2019 at 20.

⁶⁷ *Id.*

⁶⁸ See Petitioner Case Brief at 12-13.

⁶⁹ See LG Chem Rebuttal Brief at 5.

making such transactions exempt from VAT. The petitioner has not provided any arguments or facts demonstrating that LG Chem's statement is not true.

Commerce's Position: We have not adjusted LG Chem's reported prices to include VAT for these final results. As a general matter, Commerce does not include VAT in the price of foreign like product sold in the home market. Specifically, the Statement of Administrative Action (SAA) states:

{T}he deduction from normal value for indirect taxes constitutes a change from the existing statute. The change is intended to ensure that dumping margins will be tax-neutral.⁷⁰

Consistent with the SAA, Commerce's standard questionnaire instructs respondents to "{r}eport the sale price . . . net of value added taxes (VAT)."⁷¹

In any event, LG Chem reported that it did not collect VAT on certain home market sales.⁷² As nothing on the record called into question this statement, we have continued to accept LG Chem's reported information for the final results and have made no changes to our calculations, in accordance with our practice.

⁷⁰ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316 Vol 1 (1994), at 827

⁷¹ See Commerce's Initial Questionnaire, dated December 3, 2018 at B-14.

⁷² See LG Chem's January 16, 2019 Section B Questionnaire Response at 21-22; *see also* LG Chem Rebuttal Brief at 5-6; and LG Chem's May 20, 2019 Supplemental Questionnaire Response at 18-20 and Exhibit SB-17. In these submissions, LG Chem reported that the Korean government does not require companies to pay VAT on exported goods, and, thus, LG Chem does not collect VAT from its customers where they used the ESB rubber as an input to produce non-subject merchandise that they then exported.

VI. RECOMMENDATION

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



Agree



Disagree

7/8/2020

X



Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance