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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from South Africa: May 3, 2001 through August 31, 2002

SUMMARY:

We have analyzed the case and rebuttal briefs of interested parties in response to Certain Hot-Rolled Carbon Steel Flat Products from South Africa: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 40903 (July 9, 2003) (Preliminary Results). As a result of our analysis, we have made no changes from the Preliminary Results. The comments in the case and rebuttal briefs are addressed in this memorandum. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review:

Comments

1. There Has Been Continued Injurious Dumping & Lack of Cooperation by Respondents
2. The Statute and the Department's Practice Require It to Recalculate the Margin: The Margins Should Reflect Current Industry/Market Conditions and Trading Practices
3. The Department Should Recalculate the Margin to Update It to the POR

4. The Cases Cited in the Preliminary Results Provide No Basis for the Department's Determination

DISCUSSION OF THE ISSUES

Comment 1: There Has Been Continued Injurious Dumping & Lack of Cooperation by Respondents

United States Steel Corporation (USS) argues that the Department should recalculate the total adverse facts available (AFA) margins for Iscor (Pty.) Ltd. and Saldanha Steel Ltd. (Iscor/Saldanha) and Highveld Steel and Vanadium Corporation (Highveld) for the final results because the current margin has proven inadequate either to stop injurious dumping by respondents or to induce cooperation by those respondents. USS states that information on the record of this review indicates that subject merchandise from South Africa was sold at extremely low prices during the POR. USS points out that the use of AFA under the statute is intended to induce respondents to provide the Department with complete and accurate information in a timely manner, referencing Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998) (Semiconductors from Taiwan). USS argues that the current 9.28 percent rate would reward respondents for their non-cooperation, and thus be contrary to the purpose of section 776(b) of the Tariff Act of 1930 (the Act). In support of its argument that the Department must increase the rate, USS cites Barium Chloride From the People's Republic of China: Final Results and Rescission in Part of Antidumping Duty Administrative Review, 68 FR 12669 (March 17, 2003) (Barium Chloride), and accompanying Issues and Decision Memorandum at Comment 1, Ta Chen Stainless Steel Pipe, Inc. v. United States, 2000 Ct. Int. Trade Lexis 107, Slip op 2000-107 (August 25, 2000), and Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 66 FR 56272 (November 7, 2001) (SSPC Belgium).

Nucor Corporation (Nucor) supports USS's arguments, stating that the current antidumping margin has not deterred the dumping of subject merchandise. Rather, Nucor claims, Commerce data on imports show that South African producers sharply increased their shipments immediately after conclusion of the period of review (POR).

Iscor/Saldanha contends that USS's insistence that the Department must increase the rate because it is insufficiently punitive to induce respondent cooperation indicates misunderstanding or disregard of U.S. antidumping law. Iscor/Saldanha states that the courts have repeatedly held that while the AFA margin may be adverse, it cannot be punitive (see F.Ili DeCecco di Filippo Fara S. Marino S.p.A v. United States 216 F. 3d 1027, 1032 (Fed.Cir. 2000) (F.Ili DeCecco). Iscor/Saldanha also contends that the Department may not choose a margin solely to induce cooperation. See D & L Supply Co. Vs. United States, 113 F.3d 1220 (Fed.Cir.1997) (D&L

Supply) and Ferro Union, Inc. V. United States, 44 F Supp. 2d 1310 (CIT 1999) (Ferro Union). Iscor/Saldanha claims there is no evidence that it, or any respondent, benefitted from non-participation in this review, and that imports from South Africa have declined substantially since the investigation.

Highveld states that the Department was right in using the rate it selected in the final determination of the original investigation as the AFA rate from among the four options provided by the statute, because that rate was based on total AFA and thus was considered to be a deterrent to non-compliance pursuant to 19 U.S.C. 1677e(b). In addition, Highveld argues that the Court has repeatedly ruled that the Department must calculate an AFA rate that is a reasonable estimate of a respondent's actual rate, with some built-in deterrent for non-compliance (see F.Ili DeCecco), yet it should not be unduly harsh or punitive, as the margin should be as accurate as possible (see Krupp Thyssen Nirosta GmbH v. United States, Court No. 99-08-00550, Slip- Op. 00-8, 2000 (CIT, July 31, 2000)).

Department's Position:

We agree with USS that in Barium Chloride,[1] the Department found that respondents not participating in the review would benefit from non-participation because there was evidence on the record of that review that imports of subject merchandise increased dramatically in the years leading up to the review period, and an indication that named respondents were participating in the U.S. market at the China-wide rate, which was the highest margin in any segment of that proceeding. However, we agree with Iscor/Saldanha that in the instant case, there is no evidence on the record of this review indicating that imports of subject merchandise increased during the period of review. The shipment information placed on the record by USS and Nucor demonstrates a dramatic increase in shipments of subject merchandise from South Africa into the United States, but this shipment information is outside the period of this review.

In other cases cited by USS in which the Department established an AFA rate, rather than selecting a previously established rate, there were a number of circumstances that led to that decision. These circumstances are discussed under Comment 2. The fact that average unit values (AUVs) may have been lower during the period covered by this review than they were during the period covered by the petition does not, in and of itself, require a conclusion that the AFA rate determined in the LTFV investigation cannot induce cooperation.

In choosing an AFA margin, the Department followed its standard practice of selecting the highest margin from any segment of the proceeding, which in this case was the margin for the final

[1]In both Ta Chen, and SSPC Belgium, referenced by USS, the use of adverse inferences served the essential statutory purpose of ensuring that parties which choose not to cooperate with the Department do not benefit from their lack of cooperation.

determination in the sales at less-than-fair-value (LTFV) investigation. See e.g., Semiconductors from Taiwan.

Comment 2: The Statute and the Department's Practice Require It to Recalculate the Margin: The Margins should Reflect Current Industry/Market Conditions and Trading Practices

USS says the AFA margin should be relevant and current, and should be indicative of and bear a rational relationship to the respondent's selling practices during the POR. USS claims that the current 9.28 percent rate is neither indicative of current industry or market conditions nor is it reflective of the respondents' current trading practices. USS argues that in Barium Chloride, the Department determined that the existing AFA margin was not indicative of the respondent's current selling practices. See also Ferro Union, at 1335.

Highveld insists that the rate used by the Department in the preliminary results meets the statutory requirements stated in section 776(b) of the Act, and it is the highest margin determined for any respondent in any prior proceeding, in accordance with the Department's practice. See Sigma Corp. V. United States, 117 F.3d 1401 (Fed. Cir. 1997) (Sigma Corp.). Highveld agrees with the Department's conclusion in the preliminary results that the rate was corroborated in the investigation, and is reliable for this segment of the proceeding. Highveld argues that the petition rate used in the preliminary results is indicative of the current industry and market conditions and reflective of respondents' current trading practices because this is the first review following the investigation, where the AFA rate was established. Citing American Silicon Technologies v. United States, 110 F. Supp. 2d 992 (2000) and 240 F. Supp. 2d 1306 (2002) (American Silicon Technologies), Highveld contends that it is only in unusual circumstances, where a selected rate may not be reliable or relevant, that the Department may disregard it and recalculate a margin.

Iscor/Saldanha states that the Department appropriately selected the highest rate established in the investigation, because U.S. antidumping law prescribes that the AFA margin selected must bear a rational relationship to commercial practices of the industry (see World Finer Foods v. United States, Slip.Op. 2000-72, at 19-21 (CIT 2000) (World Finer Foods) and F.Ili DeCecco) and should be a reasonably accurate estimate of the respondent's actual rate. See American Silicon Technologies. Iscor/Saldanha further argues USS is incorrect in asserting that a two-year old rate is not rationally related to the industry practices of the POR, and states that the South African steel industry has not undergone any major changes in the past two years which would mandate or justify an increase in this adverse rate.

Department's Position:

In Barium Chloride, the Department determined that the China-wide rate calculated in the 1985-1986 administrative review did not bear a rational relationship to the practices of the China-wide entity during the 2000-2001 review, as the prices for the majority of imports stayed the same while the prices of the major inputs to produce subject merchandise, as reflected in the surrogate values applied to factors of production, experienced significant increases. From the facts in that case, the Department concluded that there was an increase in the rate of dumping. In contrast to Barium Chloride, there is no information on the record of this case indicating that there have been major increases in the cost of production (COP) of subject merchandise, as there was for major inputs in Barium Chloride. In addition, in Barium Chloride, the information on which the China-wide rate had been based was fifteen years old, whereas in this case only two years have elapsed since the LTFV investigation. As such, we determine that the AFA rate previously applied is still relevant and reasonably current, and reflects a rational relationship to the respondents' selling practices during the POR**.**

Furthermore, we agree with Highveld and Iscor/Saldanha that the AFA rate, established in the LTFV investigation and used in the preliminary results of this review, is corroborated. There is no information on the record of this review that there have been changes in the South African industry and the market conditions upon which the production of subject merchandise depends, which would indicate that the rate from the LFTV investigation is no longer relevant.

In addition, we agree with Highveld that only in unusual and rare circumstances has the Department calculated AFA rates. Examples of such cases have included (1) long periods of time between the initial imposition of the AFA and the new rate, as in Barium Chloride; (2) extremely low AFA rates, as was the case in Steel Wire Rope From the Republic of Korea; Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order, 63 FR 17986 (April 13, 1998) (Steel Wire Rope);[2] and (3) substantial changes in the price and cost/factor-input information, as in Sodium Thiosulfate From the People's Republic of China; Final Results of Antidumping Duty Administrative Review, Final Results of Antidumping Administrative Review, 58 FR 12934 (March 8, 1993) (Sodium Thiosulfate) and Barium Chloride. In Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812 (February 22, 1996) (Mexican Flowers), the Department departed from its practice of choosing the highest margin calculated in any segment of the proceeding as an AFA rate, and assigned the second highest rate calculated because the highest margin was considered to be aberrational. This case did not involve recalculating rates, but instead merely using a different rate

[2]In Steel Wire Rope, the AFA rate was in use for three reviews, but Commerce determined that the rate did not provide enough incentive to induce cooperation by new respondents. The Department determined that an AFA rate which was sufficiently high to induce cooperation, including the cooperation of new respondents, was needed. The AFA rate was revised from 1.51 percent to the highest rate from the petition, which was 13.79 percent.

already on the record. In any case, no unusual circumstances exist in the instant case which are similar to these cases cited above and thus, there is no need to calculate an AFA rate here.

Comment 3: The Department Should Recalculate the Margin to Update It to the POR

USS argues that it has supplied contemporaneous and publicly available information regarding the elements of the dumping margin calculation that will permit the needed recalculation of respondents' facts available margins. USS points out that in similar cases, like Barium Chloride, Steel Wire Rope, and Sodium Thiosulfate, the Department has utilized other information that has been placed on the record during the administrative review to recalculate an AFA margin. In Petroleum Wax Candles from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 66 FR 14545 (March 13, 2001) (Candles) the Department acknowledged that an adverse inference could include any other information placed on the record. USS says that in this case it took the margin calculation used by the Department in the investigation and merely updated two elements - the AUV used as the basis of U.S. price, and the financial ratios used to calculate constructed value. USS submitted the AUV for the same HTSUS number as was used in the petition and financial ratios based on respondents' own financial statements for the POR. Further, USS points out that in SSPC from Belgium, the Department updated the respondent's FA margin in the first administrative review of the order by recalculating the highest margin in the petition, using respondent's most recent financial statements to recalculate factory overhead, selling and general expenses, and the profit ratio.

Highveld contests USS's reliance on non-market economy cases in which the AFA rate was based on surrogate values and costs, such as Barium Chloride and Sodium Thiosulfate From the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review, 57 FR 58792 (December 11, 1992) (Sodium Thiosulfate Prelim), and Candles.

Further, Highveld claims that the information provided by petitioners, *i.e.*, the AUV of one imported product as opposed to the average of all imported products, to support their re-calculation of the new margin is biased and distortive, and would not be reflective of Highveld's actual margin. In addition, Highveld disagrees with USS's methodology for recalculating the margin. Highveld states that the calculation of the general and administrative (G&A) expenses, profit, and depreciation should be based on cost data related to the production of subject merchandise, instead of the corporate financial statements for G&A expenses and the consolidated financial statements for profit, as USS has suggested. (USS did not update depreciation.)

Iscor/Saldanha states that it is the Department's longstanding practice to assign as AFA the highest corroborated margin established in any segment of a proceeding, which the Department followed in these preliminary results by choosing the highest rate in the investigation.

Department's Position:

We agree with USS that in all three cases cited by USS, Barium Chloride, Steel Wire Rope, and Sodium Thiosulfate[3], the Department utilized information placed on the record of the review to recalculate an AFA margin, and contrary to Highveld's indication that non-market economy cases do not apply, we consider that it is irrelevant that the majority of cases cited by USS are non-market economy cases. However, as described under the Department's Position on Comment 2 above, the aforementioned cases constitute unusual circumstances in which the Department calculated an AFA rate. In this instant case there are no such circumstances which would warrant calculating a new AFA margin for the respondents in this segment of the proceeding.

Also, we disagree with USS that in SSPC from Belgium the Department "updated" respondent's facts available margin in the first administrative review of the order. In SSPC from Belgium the Department was making its first AFA determination, and thus, did not have an initial AFA rate to apply. In calculating an appropriate AFA rate for the respondent, the Department utilized information placed on the record, in accordance with 776(b)(4) of the Act. In contrast, in this instant case, an appropriate AFA rate already exists.

We agree with Iscor/Saldanha that it is the Department's practice to assign as AFA the highest margin established in any segment of the proceeding, which is the rate the Department assigned the respondents in the preliminary results of review, 9.28 percent. Furthermore, we have no evidence before us on the record to convince us to depart from our standard practice. Since the Department is not calculating an AFA margin, USS's and Highveld's methodological arguments need not be addressed.

Comment 4: The Cases Cited in the Preliminary Results Provide No Basis for the Department's Determination

USS argues that the cases the Department relied upon in applying the 9.28 percent total FA rate for the preliminary results of review do not provide a basis for its determination. USS does not contest that the unusual circumstances in the two cases cited by the Department, do not apply[4]; however, it argues that the Department must look at other situations where it can and should modify an AFA margin. Citing other cases, USS claims that the Department has consistently determined that, where an AFA margin is not sufficiently adverse to induce cooperation by the respondents, and, in fact, may reward the respondent for its non-cooperation (see Semiconductors from Taiwan, Barium

[3] In Barium Chloride and Sodium Thiosulfate Prelim information placed on the record indicated that prices declined or stayed the same, whereas costs for inputs increased during the same time period.

[4] In Flowers from Mexico at 6814, the Department declined to assign the highest rate to non-responding companies and chose the second highest instead, because it considered the highest rate to be unrepresentative of the industry, and thus, unsuitable to be applied to those companies. In D & L Supply, at 1220, 1221, 1223-24, the Court decided that it is improper for the Department to use a BIA (the predecessor to FA) rate which has been invalidated in the course of a judicial review.

Chloride, Ta Chen, and SSPC Belgium), and further, where the rate is not indicative of the respondent's current trading practices (see Barium Chloride and Steel Wire Rope), the Department may increase the margin using other information placed on the record.

Highveld counters that USS relied mostly upon non-market economy (NME) cases in which the AFA rate was based on surrogate values and costs, whereas, in the instant case, the Department based the AFA rate in the investigation on market economy information provided by USS. In addition, those AFA margins in the cases cited were very old while the AFA rate in this case is based upon a recent petition.

Iscor/Saldanha states that USS has mischaracterized prior Department decisions to support its claim that the Department's practice mandates an increase in the rate in this administrative review, by relying, among others, on a case where the rate was fifteen years old. See Barium Chloride at Comment 1. In contrast, the rate on which the Department relied for its preliminary results for the first administrative review was calculated and corroborated a mere two years ago.

Department's Position:

As discussed in the Department's Position on Comment 1 and Comment 2, the record in this case, for this period of review does not warrant recalculating the AFA margin for the current review. Based on the record evidence in this first review, we cannot determine that the AFA margin established in the investigation was not sufficiently adverse to induce cooperation by the respondents during the POR, or that it rewarded respondents for their non-cooperation during the POR. Further, we find that there is insufficient information on the record to find that the margin applied in the preliminary results is not indicative of the current industry and market conditions and reflective of respondents' current trading practices, and corroborated and reliable for purposes of this review.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results and the final weighted-average dumping margins in the Federal Register.

Agree_____ Disagree_____

James J. Jochum
Assistant Secretary
for Import Administration

Date