

FINAL RESULTS OF REDETERMINATION  
PURSUANT TO COURT REMAND  
AMERICAN SILICON TECHNOLOGIES V. UNITED STATES, CONSOL.  
Court No. 99-03-00149

SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to a remand from the Court of International Trade (the Court) in American Silicon Technology, et al v. United States, No. 99-03-00149, Slip Op. 02-123 (Ct. Int'l Trade October 17, 2002) (American Silicon Tech). American Silicon Tech covers three issues from the final results of the administrative review of the antidumping duty order on silicon metal from Brazil covering the period July 1, 1996 through June 30, 1997. The three issues covered are (1) whether Eletrosilex, S.A. (Eletrosilex) failed to act to the best of its ability by not responding to the Department's supplemental antidumping questionnaires; (2) whether it was necessary to use total facts available (FA) as a result of Eletrosilex's failure to respond to the Department's supplemental antidumping questionnaires; and (3) whether the Department's selection of 93.20 percent as a surrogate margin rate as applied to Eletrosilex was relevant and reliable. The Court sustained the Department's positions as stated in points (1) and (2) by finding that Eletrosilex failed to act to the best of its ability and that it was necessary for the Department to resort to total adverse FA. American Silicon Tech No. 99-03-00149, Slip Op. at 3. However, with regards to point (3), the Court found that the surrogate margin selected by the Department lacks a rational relationship to Eletrosilex and remanded the decision to the Department. American Silicon Tech, No. 99-03-00149, Slip Op. at 13. In accordance with the Court's remand instructions, we have selected an alternative surrogate margin for Eletrosilex in this review segment. This change has affected Eletrosilex's margin of dumping, which will now be 67.93 percent for this review period.

BACKGROUND

On February 9, 1999, the Department published a notice of final results of antidumping duty administrative review on silicon metal from Brazil. See Silicon Metal From Brazil: Final Results of Antidumping Duty Administrative Review, 64 FR 6305 (February 9, 1999) (Final Results). In these Final Results, the Department stated that "[a]s adverse FA for Eletrosilex, we have used the highest rate calculated for any respondent in any segment of this proceeding. This rate is 93.20 percent." See Final Results at 6306.

In 2000, the Court remanded the Department's final determination, American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 1003-1004 ( Ct. Int'l Trade 2000). In its remand, the Court ordered the Department to (1) reconsider whether Eletrosilex failed to respond to the best of its ability; (2) reconsider whether it was appropriate to resort to total, as opposed to partial, FA; and (3) explain the relevance and reliability of the total FA margin applied to Eletrosilex, if the Department concluded that it was still necessary to use total FA.

In the Department's first redetermination on remand, Silicon Metal from Brazil: Final Results of Redetermination Pursuant to Court Remand (January 29, 2001) (Remand Results), the Department reached the same conclusions it reached in the final results of the administrative review; namely, that: (1) Eletrosilex failed to act to the best of its ability by not responding to the Department's supplemental antidumping questionnaires; (2) it was necessary to use total FA since Eletrosilex's submitted information on the record was too incomplete; and (3) the 93.20 percent surrogate margin applied to Eletrosilex was relevant and reliable. See Remand Results at 8, 10-12, 14-15; see also American Silicon Tech. No. 99-03-00149, Slip Op. at 3.

In its remand of the Department's January 29, 2001, Remand Results, the Court sustained the Department's findings that Eletrosilex failed to act to the best of its ability and that it was necessary to resort to total FA. However, the Court also found that "the 93.20 percent surrogate margin selected by Commerce lacks a rational relationship to Eletrosilex, as required by 19 U.S.C. Sec. 1677e(c) and F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000)." American Silicon Tech. at 12-13. The Court ordered the Department to select a margin that is a "reasonably accurate estimate of the respondent's actual rate ... [albeit with] some built-in increase intended as a deterrent to non-compliance." Id.

The Department issued its Draft Results on December 26, 2002 pursuant to the Court's remand order. On January 6, 2003, Eletrosilex submitted comments. On January 9, 2003, petitioners submitted rebuttal comments. As explained below in the Interested Party Comments section of this remand, the Department was not persuaded by Eletrosilex's comments to change the results of its analysis in the Draft Results. The following is the Department's final determination after considering parties' comments to the Draft Results.

## DISCUSSION

Pursuant to the Court's directive, the Department selected an alternate rate to apply as adverse FA to Eletrosilex. The highest rate calculated for Eletrosilex in any segment of this proceeding was 53.63 percent. The highest rates calculated for other respondents in other segments of this proceeding were 91.06 ("all others rate" from the less-than-fair-value (LTFV) investigation), 93.20 (highest rate calculated for any respondent during the LTFV investigation), 61.58 (highest rate calculated for any respondent during the third review of this proceeding) and 81.61 and 67.93 percent (the two highest rates calculated for respondents during the fourth review of this proceeding).

Eletrosilex's previously calculated rate of 53.63 percent is not an appropriate rate for use as adverse

FA because the rate was calculated for a review period during which Eletrosilex was cooperative. Hence, the use of this rate would not carry an adverse inference. The Court dismissed the 81.61 rate issued in the fourth review period and indicated that margins above 90 percent in this proceeding “lack a rational relationship to Eletrosilex.” The Department therefore chose as adverse FA the 67.93 percent calculated rate issued in the fourth administrative review of this case.<sup>1</sup> Because this rate is from a review period that began two years before the instant review period, it should reasonably reflect commercial practices at or around the time in question. Moreover, as the 67.93 percent rate is above Eletrosilex’s previously calculated rate of 53.63 percent, the Department finds that this rate serves the Court’s directive of selecting a rate that is a “reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.” Therefore, in order to comply with the Court’s order, we have selected 67.93 percent as the adverse FA rate to apply to Eletrosilex for the sixth review of this proceeding. Consequently, Eletrosilex’s dumping margin for the sixth review of this proceeding will change from 93.20 percent to 67.93 percent.

#### INTERESTED PARTY COMMENTS

##### Comment 1:

Eletrosilex contends that the Department’s selection of 67.93 percent as adverse FA is not a “reasonably accurate estimate” of its “actual rate” during the review period in question. First, Eletrosilex argues that simply because 67.93 percent was derived from a review period two years prior to the review period in question does not mean that the rate is indicative of Eletrosilex’s actual margin. Further, Eletrosilex notes that during the same review period in which CBCC received the 67.93 percent margin, Eletrosilex’s margin was 13.18 percent. Moreover, Eletrosilex asserts that CBCC is the only respondent, since the LTFV investigation, to receive a calculated dumping margin significantly over 50 percent. Therefore, Eletrosilex argues that, in light of the history of margins calculated for all participating respondents in this proceeding, and given the fact that the rates calculated for Eletrosilex, in the preliminary results and in the three reviews immediately preceding the review period in question, were 33.10, 38.39, 13.18 and 39.00 percent, respectively, a margin of less than 39 percent would more accurately reflect its actual commercial practices during the review period in question.

Specifically, Eletrosilex argues that 33.10 percent is the most reasonable estimate of its actual dumping margin during the review in question because it was calculated using partial FA. Alternatively,

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<sup>1</sup>The rates calculated during the fifth review period were lower than 53.63 percent, the highest rate calculated for Eletrosilex during this proceeding.

Eletrosilex argues that the Department should use 39 percent as an estimate of its dumping margin because it is the highest margin calculated for Eletrosilex during the four most recent reviews. Eletrosilex argues that because any margin in the 33-39 percent range is sufficiently prohibitive and adverse, it is unnecessary for the Department to increase the adverse FA margin beyond this range for deterrence purposes. Eletrosilex contends that even if the Department decides that “some built-in increase intended as a deterrent for non-compliance” is necessary, the Department’s discretion in this matter is limited. Eletrosilex argues that if the Department determines an increase is necessary, it should not exceed 14.3 percent, which represents the built-in increase used in the Draft Results. Using this guideline, Eletrosilex argues that its adverse FA margin should not exceed 53.63 percent.

Petitioners disagree with Eletrosilex. Petitioners argue that 67.93 percent reasonably reflects Eletrosilex’s commercial practices during the review period in question because it was calculated only two years prior. Petitioners state that the Court did not require the Department to only choose an adverse FA rate that was calculated during the review period in question, but listed rates from other review periods, including 67.93 percent, as rates that could better reflect the commercial practices of Eletrosilex during the POR. In addition, in the Draft Results, petitioners contend that the Department complied with the Court’s order in selecting 67.93 percent as adverse FA because the rate is “a reasonably accurate estimate of the respondent’s actual rate, albeit with some built in increase intended as a deterrent to non-compliance.” In particular, petitioners take exception to Eletrosilex’s argument that the Department should select as adverse FA, a rate that had previously been applied to Eletrosilex in order for the rate to be a reasonably accurate estimate of Eletrosilex’s commercial practices during the review period in question. Petitioners contend that the Court did not require that the rate chosen for Eletrosilex as adverse FA be a rate previously applied to Eletrosilex. Petitioners assert that the Court’s only requirement regarding Eletrosilex’s adverse FA rate was that the rate “be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.” Further, petitioners assert that Eletrosilex’s argument that it should receive a lower rate than 67.93 percent because it and other respondents received lower margins throughout this proceeding is without merit. Petitioners note that since the initiation of this proceeding, foreign producers have received low and high margins. Therefore, petitioners assert that it is not unreasonable for the Department to estimate a high margin for Eletrosilex during the review in question, even though other respondents in the same review period were found to have dumped at lower margins.

Further, petitioners dispute Eletrosilex’s argument that a margin in the 33-39 percent range is a reasonable estimate of what Eletrosilex’s dumping rate should be for the final remand results. Petitioners contend that Eletrosilex has provided no evidence to demonstrate that margins in the 33-39 percent range reflect its actual rate of dumping during the review period in question. In fact, petitioners

assert that 33.10 percent was discredited by the Department because the Department determined that, due to incomplete information supplied by Eletrosilex, partial FA would not result in an accurate estimation of Eletrosilex's dumping margin. Therefore, petitioners argue that since the Department has previously discredited 33.10 percent, it would be improper for the Department to rely on a margin in the 33-39 percent range as an estimate of Eletrosilex's adverse FA dumping margin.

Moreover, petitioners contest Eletrosilex's contention that its adverse FA rate should not exceed 53.63 percent. Petitioners argue that a margin in the 50 percent range would be inconsistent with the Court's instruction that "an adverse facts available margin is to have some built-in increase intended as a deterrent against non-compliance." Petitioners argue that it is reasonable to assume that had the Department calculated a margin for Eletrosilex in the final results of the review in question, it would have been notably higher than 33.10 percent. Petitioners contend that the rate would have been higher given that the margin in the preliminary results (33.10 percent) was based upon incomplete information and partial FA, and given the fact that the Department had determined that 33.10 percent was not substantial enough of a margin to accurately reflect Eletrosilex's level of dumping. Petitioners contend that if Eletrosilex had chosen to fully participate in the review and cooperate with the Department's request for information, it is not unreasonable to assume, given the preliminary results, as well as past calculated margins for Eletrosilex and other producers, that Eletrosilex's final calculated rate would have been in the range of 50 percent or higher. Therefore, petitioners argue that if the Department uses 53.63 as adverse FA, it will only reflect an estimate of an actual dumping margin, and not provide for deterrence, as directed by the Court. Moreover, petitioners note that the Court stated that an adverse FA rate should not go beyond the "highest margin calculated in the proceedings." Petitioners note that the Court specifically noted that the "highest margin calculated in the proceedings" is 67.93 percent and that the Court, in its Opinion, stated that 67.93 percent would be an appropriate dumping margin for Eletrosilex.

#### Department's Position:

The Department maintains that 67.93 percent, as adverse FA for Eletrosilex, best serves the Court's directive of selecting a rate that is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." The Court, as a basis for remanding the Department's selection of 93.20 percent as adverse FA, stated that it "finds it significant that the period of review in question began six years after the LTFV investigation in which the 93.20 percent margin was calculated." See American Silicon Tech No. 99-03-00149, Slip Op. at 13. As stated above, 67.93 percent was calculated for another respondent during the fourth administrative review, which occurred two years prior to the review period in question. Given the close proximity of these two review periods, we find that data from the fourth review of this proceeding is more timely and, in turn, properly addresses the Court's timing concerns. However, we note that, contrary to

Eletrosilex's claims, and as is discussed in more detail below, the proximity of the reviews is not the Department's sole reason for selecting 67.93 percent as Eletrosilex's adverse FA margin.

In addition, we disagree with Eletrosilex's assertion that, based upon a review of the history of margins calculated by the Department for all participating respondents during the course of this proceeding, the Department should find a margin of less than 39 percent as representative of Eletrosilex's commercial practices during the review period in question. Given the lack of information on the record due to Eletrosilex's uncooperativeness, we cannot reasonably estimate that Eletrosilex's commercial practices during the review period in question were similar to those of other cooperating respondents with lower margins. In addition, as noted by petitioners, the course of this proceeding has been marked by high, as well as low, margins. Therefore, we do not find it unreasonable to assume that, during the review period in question, Eletrosilex's actual rate of dumping could have been higher than margins previously calculated throughout the course of this proceeding. Further, we disagree with Eletrosilex's assertion that a margin in the 33-39 percent range is sufficiently adverse as FA to satisfy the Court's directive of estimating a respondents' rate "with some built-in increase intended as a deterrent to non-compliance." The Statement of Administrative Authority (SAA) accompanying the URAA, H.R. Doc. No. 103-316, 103d Cong. 2d Sess., at 870 provides that, "where a party has not cooperated", the Department "may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by not cooperating than if it had cooperated fully." Eletrosilex received a margin of 53.63 percent in the first administrative review and 51.84 percent in the second administrative review of this proceeding. Since 39 percent was Eletrosilex's calculated rate during the fifth review of this proceeding, a review period in which it did in fact cooperate, selecting this or a lower rate as total adverse FA would run counter to the Court's and the SAA's intentions. Consequently, we find that a margin in the 33- 39 percent range is not representative of Eletrosilex's actual commercial practices during the review in question and is not appropriate as adverse FA for Eletrosilex.

Comment 2:

Eletrosilex argues that the use of 67.93 percent is inappropriate because the rate is not a final margin. Eletrosilex states that 67.93 percent was calculated for CBCC during a remand proceeding of the fourth review pursuant to the decision in American Silicon Technologies v. United States, Court No. 97-02-00267, Slip Op. 99-34 (Ct. Int'l Trade Apr. 9, 1999). Eletrosilex notes that, prior to the remand of the fourth review, the calculated rate for CBCC in the Department's final results was 0.37 percent. Eletrosilex argues that because the review is currently under appeal before the Court of Appeals for the Federal Circuit (Case No. 02-1033), and not yet final, 67.93 percent is not a reasonably accurate reflection of its actual rate during the review in question.

Petitioners did not comment on this issue.

Department's Position:

We disagree with Eletrosilex's claim that 67.93 percent is unreliable because it is not a final margin. Although the fourth review of this proceeding is currently under appeal, 67.93 percent, as it stands, is currently the margin on the record. Therefore, the Department will continue to rely upon it as the best information available. Consequently, we find it appropriate to use this margin in our analysis of Eletrosilex's adverse FA rate.

Comment 3:

Eletrosilex notes that, in the Draft Results, the Department stated that it was selecting 67.93 percent as adverse FA for Eletrosilex because the rate is higher than Eletrosilex's previously calculated rate of 53.63 percent. Eletrosilex asserts that this statement by the Department implies that the Department believes that 53.63 percent is a "reasonably accurate estimate" of Eletrosilex's "actual rate" of dumping and that the difference between the rates (14.3 percent) is "the built-in increase intended as a deterrent to non-compliance." However, Eletrosilex argues that 53.63 percent is not an accurate estimate of Eletrosilex's actual rate during the review period in question because the rate was calculated during the hyperinflationary conditions of the first administrative review, which covered the period 1991-1992. Eletrosilex notes that in the Draft Results, the Department rejected 53.63 for use as adverse FA because it was calculated during a review in which Eletrosilex was cooperative. However, Eletrosilex contends that due to the hyperinflationary conditions of that POR, 53.63 percent should not be viewed as representative of its "cooperative" rate. Eletrosilex argues that its cooperative rates, without the presence of hyperinflation, are in the 30 percent range. Eletrosilex asserts that 53.63 percent represents a different economic environment than occurred during the review in question and that it is as old and irrelevant as the 93.20 percent previously selected by the Department. Consequently, Eletrosilex argues that if the Department does not select a rate in the 33-39 percent range, it should find 53.63 percent as sufficiently adverse for FA purposes because it is not representative of a "cooperative" rate.

Petitioners note that during the fourth administrative review, in which the 67.93 percent was calculated, the Brazilian economy did not experience hyperinflation.

Department's Position:

We disagree with Eletrosilex's argument that 53.63 percent is not representative of its commercial practices because it was derived during a period of hyperinflation. Eletrosilex has provided no

evidence to demonstrate that the margin it received was a direct result of the hyperinflationary conditions of the Brazilian economy. In fact, during the same review period in which Eletrosilex states there was hyperinflation, another participating respondent received a margin of 0.42 percent. Further, throughout the course of this proceeding, when hyperinflation has not been present, other participating respondents have received margins of 50 percent or higher. Thus, there is insufficient support for Eletrosilex's claim that the 53.63 percent rate was a result of hyperinflationary conditions.

Further, we find that the 53.63 percent rate is not appropriate for use as adverse FA because it is representative of Eletrosilex's "cooperative" actual dumping margin, as demonstrated in a prior review, and would not provide for deterrence from non-compliance as intended by the Court and the SAA. The fact that Eletrosilex was willing to cooperate in a review to obtain the 53.63 percent rate suggests that, in this review, in which Eletrosilex was not willing to cooperate, Eletrosilex may well have been dumping at a rate significantly higher than 53.63 percent. In the absence of Eletrosilex's cooperation, and because it is impossible to determine exactly what Eletrosilex's actual margin of dumping would have been, the Department must attempt to find the most appropriate adverse FA rate within the guidelines provided by the Court, Congress and the Department's regulations. Therefore, we do not find that 53.63 percent is appropriate for use as a total adverse FA margin for Eletrosilex.

Comment 4:

Eletrosilex argues that a rate between 33.10 percent and 53.63 percent is sufficiently adverse to encourage cooperation without imposing an unnecessary penalty on U.S. companies. Given that in the more recent reviews, most participating respondents have earned rates of zero or close to zero, Eletrosilex contends that a rate between 33.10 and 53.63 percent will serve the Department's interest of acting as a deterrent for non-cooperation without imposing unnecessary penalties on U.S. companies. Since the review at issue concerns sales that took place six years ago, and Eletrosilex has participated in subsequent reviews, Eletrosilex states that the rate selected in this review would not serve as a future duty deposit rate, and will not act as a deterrent. Eletrosilex states that it will be subject to a different deposit rate should it resume exports to the U.S. Eletrosilex argues that due to the Department's mandate to protect U.S. industries, it would be more appropriate for the Department to reduce the rate from 67.93 percent to a maximum of 53.63 percent, which while still acting as a deterrent, does not unduly punish U.S. companies.

Petitioners dispute Eletrosilex's argument that the deterrent nature of the rate selected will be moot for future deposit rates. Petitioners note that the adverse FA rate applied to Eletrosilex in the 1998-1999 POR is currently under appeal for the same issue as in the instant appeal. Therefore, petitioners note that the dumping rate the Court in this instant appeal determines to be appropriate will most likely be

viewed as an appropriate indicator of the adverse FA rate to be applied to Eletrosilex in the 1998-1999 POR appeal. Further, petitioners note that because the 1998-1999 POR was the last review in which Eletrosilex participated, the rate determined to be appropriate by the Court in the appeal of the 1998-1999 POR, will be the antidumping duty assessment rate for imports of silicon metal from Eletrosilex going forward.

Further, petitioners argue that the well-being of an uncooperative foreign producer's U.S. customer is not a criterion the Department should consider in applying adverse FA under either the relevant statute or the Court's Opinion. Petitioners argue that with the application of adverse FA is the expectation that the importing party will bear the cost of a higher than expected duty due to the uncooperativeness of a foreign producer and that the impact of making Eletrosilex's products more costly for U.S. purchasers is the deterrence component of adverse FA. Petitioners argue that the application of adverse FA will only work as a deterrent if U.S. purchasers choose not to purchase future shipments from Eletrosilex in situations where Eletrosilex is uncooperative in administrative reviews.

#### Department's Position:

We disagree with Eletrosilex's argument that the Department will run counter to its mandate to protect U.S. industries if we select a margin exceeding the 50 percent range. As stated by the Court, "an adverse facts available margin is to have "some built-in increase intended as a deterrent to non-compliance." See American Silicon Tech No. 99-03-00149, Slip Op. at 13. If, as suggested by Eletrosilex, the Department selects as adverse FA, a rate previously assigned to Eletrosilex during a review in which it was compliant, the Court's directive will be thwarted. Since margins in the 50 percent range and below are representative of review periods during which Eletrosilex was cooperative, we find that such rates would not carry an adverse inference and would counter the intentions of the Court and the SAA. See Department's Position to Comment 2. Therefore, for these final results of redetermination, we find that Eletrosilex's adverse FA margin should be higher than the 53.63 percent suggested by Eletrosilex.

#### RESULTS OF REMAND DETERMINATION

As a result of this redetermination, Eletrosilex's dumping margin for the period July 1, 1996 - June 30, 1997 is 67.93 percent. This rate is changed from the rate announced in the February 9, 1999 final results of the sixth review and the January 29, 2001 remand determination.

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Faryar Shirzad  
Assistant Secretary  
for Import Administration

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Date