

FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND
ELKEM METALS COMPANY and GLOBE METALURGICAL, INC., V. UNITED STATES,
Consol. Court No. 01-00098

Public Version

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 Elkem Metals Company, et al v. United States, No. 01-00098, Slip Op. 04-36 (Ct. Int'l Trade, April 15, 2004) (Elkem Metals). With regard to Companhia Brasileira Carbureto De Calcio (CBCC), Elkem Metals covers one issue from the final results of the administrative review of the antidumping duty order on silicon metal from Brazil covering the period July 1, 1998, through June 30, 1999. The issue involves calculation of CBCC's home market imputed credit expense and the use of the appropriate interest rate. On April 29, 2002, the Department requested a voluntary remand stating that it "may reconsider its position and give its determination full and fair consideration under the applicable law." The Court granted the Department's request for a remand and instructed the Department to recalculate CBCC's home market imputed credit expense. In accordance with the Court's remand instructions, we have recalculated CBCC's credit expense using an interest rate which is more reflective of the market conditions prevailing during this period of review (POR). This change has affected CBCC's margin of dumping, which will now be zero percent for this review period.

With regard to Eletrosilex, S.A. (Eletrosilex), in accordance with the Court's remand instructions, we have imputed anew the margin of dumping for Eletrosilex for the period of review that is in accordance with law and supported by substantial evidence on the record. This change has affected Eletrosilex's margin of dumping, which will now be 61.58 percent for this review period.

BACKGROUND

CBCC

On February 23, 2001, the Department published a notice of final results of antidumping duty administrative review on silicon metal from Brazil in the Federal Register. See Silicon Metal From Brazil: Final Results of Antidumping Duty Administrative Review, 66 FR 11256 (February 23, 2001) (Final Results). In these Final Results, the Department declined to use CBCC's short-term interest rate in calculating CBCC's home market credit expense claiming that the loan does not represent short-term lending activity in the normal course of trade. See "Issues and Decision Memorandum for the Administrative Review of Silicon Metal from Brazil-7/1/1998 through 6/30/1999; Final Results" (Decision Memorandum 98-99), Comment 4. Instead, the Department used a rate, provided by CBCC in the course of the review, based on the Brazilian *taxa referencial* (TR), a publicly available rate which the Department used in a number of prior reviews of this order whenever CBCC and other

respondents had no short-term borrowing in the home market. CBCC challenged the Department's decision in the Court.

Eletrosilex

In the Final Results, the Department also determined that, because Eletrosilex failed to respond to the best of its ability to the Department's request for information, a 93.20 percent rate was applied to the company as a total adverse facts available (AFA) rate. See Final Results, Comment 3.

The Court remanded the Department's final determination. See Elkem Metals. In its opinion, the Court was satisfied with the Department's determination that Eletrosilex failed to act to the best of its ability, but ordered the Department "to impute anew... Eletrosilex's margin of dumping for the period of review implicated that is in accordance with the law and supported by substantial evidence on the record." See Elkem Metals, at 12, 14.

On July 2, 2004, the Department distributed its draft results of redetermination for comments to all parties in this proceeding. On July 8, 2004, we received a comment from Globe Metalurgical, Inc., concurring with our results with regard to Eletrosilex. No additional comments were received.

DISCUSSION

CBCC

In LMI-La Metalli Industriale, S.p.A. v. United States, 912 F.2d455, 460- 461 (Fed. Cir.1990) (LMI), the Court ruled that credit cost should conform with commercial reality and be based on reasonable and commercial behavior. In cases where a respondent has no short-term borrowings in the currency of the transaction, the Department will use publicly available information to establish a short-term interest rate applicable to the currency of the transaction. According to Policy Bulletin 98.2, the Department will use a publicly available surrogate interest rate once such a rate has met three criteria: (1) the rate is reasonable; (2) the rate is readily obtainable and predictable; and (3) the rate is representative of "usual commercial behavior." Therefore, for this remand, we determine that the interest rate which best meets these criteria is the "Special Settlement and Custody System" (SELIC) rate, also known as the Money Market Rate, and is published in the "International Financial Statistics" by the International Monetary Fund (IMF). For details and discussion of the alternative rates, please see Silicon Metal From Brazil: Final Results of Antidumping Duty Administrative Review, 67 FR 6488 (February 12, 2002) (Final Results II) and Memorandum to the File through Thomas F. Futtner from Maisha Cryor; Brazilian Interest Rates, dated February 4, 2002 (Interest Rate Memo).

Before requesting a remand, we relied on the TR rate. The TR rate was created as part of Brazil's inflation stabilization efforts in the early to mid-1990s. See Interest Rate Memo, at Attachment II,

Brazil: Guide to Local Fixed Income Markets, Credit Suisse/First Boston Garantia, May 2000 (Brazil Guide). It is a reference rate for the inflation built into nominal market interest rates. It was used as a means of determining the real interest rate, or the nominal interest rate minus inflation. The main use of the TR rate is as the basic rate for the Brazilian Savings and Loan System. It is the index for savings accounts, which yield the TR rate plus a certain percentage. The TR rate is published by the Central Bank of Brazil on a daily basis.

To determine if the TR rate can be used as a surrogate for short-term interest rates in the Brazilian home market, we must review it against the three criteria outlined in the Department's Policy Bulletin. As stated above, the TR rate is not an interest rate but a reference rate used to correct nominal interest rates for inflation. Various interest rates may be described using the TR rate plus an appropriate amount. For example, savings rates in Brazil are calculated using the TR rate plus a certain percentage. As such, the TR rate is not a stand-alone rate, but is meant to be used in conjunction with other interest rates. Moreover, when it is compared to other interest rates on the record, including those based on actual short-term borrowings in the home market, the TR rate is well below the range of the other nominal interest rates.

Comparing the TR rate to other commercial rates on the record, the TR rate is several times lower than the rates from "International Financial Statistics" published by the IMF for the 1998-1999 POR. See Interest Rate Memo. This fact makes it very unlikely that companies would be able to borrow money with an interest rate identical or similar to the TR rate. As a consequence, while the TR rate is readily available and published daily by the Central Bank of Brazil, it would not be reasonable to use it in this review as a surrogate for a short-term commercial borrowing rate in Brazil.

As an alternative, we reviewed several other interest rates used in the Brazilian financial system that have been referenced in documents placed in the record of this review. See Interest Rate Memo. Our review indicates that the SELIC interest rate is the primary interest rate of the Brazilian economy. It is based on the purchase and sale of public debt securities registered in the SELIC system. The SELIC rate is published daily, in annualized form, and represents the weighted average of rates at which public sector securities were traded. There is also mention of a Discount Rate, which according to the IMF publication, is the bank rate charged by the Central Bank of Brazil on non-collateralized loans between financial institutions. In addition, the IMF publication reports the effective yields on Treasury Bills of 31 days or longer. (For detailed discussion on interest rates comparison, please refer to Final Results II, Comment 1.)

Based on the Department's analysis mentioned above, we believe that the SELIC rate is the most appropriate interest rate for purposes of imputing credit expenses for respondent companies in Brazil. The SELIC rate is described as a "short-term" interest rate and the "primary interest rate" in Brazil's financial system. See Interest Rate Memo. Furthermore, the IMF publication refers to the SELIC rate as a "money market" rate, which suggests that it is derived from a comprehensive market for short-term

debt instruments. Additionally, the SELIC rate satisfies the criteria in Policy Bulletin 98.2: it is reasonable; it is readily obtainable and predictable; and it can be said to be representative of usual commercial behavior.

Moreover, in the Final Results CBCC suggested that, should the Department use a different lending rate in the calculation of the imputed credit expense, the Department should use interest rates published by the IMF which are more comparable to prevailing commercial short-term rates in Brazil during the POR. See Final Results, Comment 4. Finally, in the subsequent administrative review of the order for POR 1999-2000, the Department, facing a similar set of factual circumstances with regard to CBCC and one additional respondent, reviewed the choice of short-term interest rates and applied the SELIC rate as the alternative rate. Consequently, the Department is adopting the SELIC rate in the instant review as a reasonable surrogate for the short-term interest rate for commercial borrowings in the home market. See Final Results II, Comment 1.

Pursuant to the Court's order, the Department recalculated CBCC's home market imputed credit expense using the SELIC rate represented by the Money Market weighted-average interest rate published by the IMF in the May 2000 issue of the "International Financial Statistics." The average rate used by the Department for the 1998-1999 POR is 32.0025 percent. See Attachment I. As a result of the change in the interest rate, CBCC's weighted-average dumping margin declined from 0.63 percent to zero percent. See Attachment II.

Eletrosilex

In determining the appropriate AFA rate to apply to Eletrosilex, Section 776(b) of the Tariff Act of 1930, as amended (the Act), authorizes the Department to use, as AFA, information derived from the petition, the final determination in the investigation, a previous administrative review, or any other information placed on the record.

In determining the relevant AFA rate, the Department assumes that if an uncooperative respondent could have demonstrated that its dumping margin is lower than the highest prior margin, it would have provided information showing the margin to be less. See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190-91 (Fed. Cir. 1990) (Rhone Poulenc). The Department's practice of selecting the highest calculated margin and applying it to uncooperative respondents is also in accordance with law, as it has been affirmed by both the Federal Circuit and this Court. See Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330 (Fed. Cir. 2002) (Ta Chen).

Section 776(c) of the Act, requires the Department to corroborate, to the extent practicable, secondary information used as facts available. Secondary information is defined as "[i]nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject

merchandise, or any previous review under section 751 concerning the subject merchandise.” See “Statement of Administrative Action” (SAA) accompanying the URAA, H.R. Doc. No. 103-316 at 870 (1994) and 19 CFR 351.308(d).

The SAA further provides that the term “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value (see SAA, at 870). Thus, to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. However, unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. Thus, in an administrative review, if the Department chooses, as total AFA, a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin if it was calculated from verified sales and cost data.

As to the relevance of the AFA rate, the courts have stated that “[b]y requiring corroboration of adverse facts available rates, Congress clearly intended that such rates should be reasonable and have some basis in reality.” F.lli De Cecco Di Filippo Fara S. Martino S.p.A., v. U.S., 216 F.3d 1027, 1034 (Fed. Cir. 2000) (F.lli De Cecco).

The Department reviewed all potential rates in the history of the proceeding which could be applied as an AFA rate. The highest rate calculated for Eletrosilex in any segment of this proceeding was 53.63 percent. For this remand redetermination, the Department has selected as AFA the 61.58 percent calculated rate issued in the third administrative review of this proceeding, covering the period of July 1, 1993, through June 30, 1994. See Silicon Metal From Brazil; Amended Final Results of Antidumping Duty Administrative Review, 62 FR 54094 (October 17, 1997). This rate was calculated for CBCC and based on verified sales and cost data. In the instant review, Eletrosilex was found not to have cooperated to the best of its ability. Consequently, the 61.58 percent 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” and consistent, to the extent possible, with the Department’s practice of selecting the highest margin available and applying it to uncooperative respondents. Elkem Metals at 13 (American Silicon Technologies v. United States, 240 F.Supp.2d. at 1213-14 (CIT 2002)).

The 61.58 percent rate is also corroborated. Because this rate is from a review period that began four years before the instant review period, it reflects commercial practices reasonably close to the time period in question. In addition, other respondents in this proceeding have received calculated rates up to 81.61 percent. See 1994-1995 Amended Final Results, Silicon Metal from Brazil, Final Results of Redetermination Pursuant to Court Remand (September 23, 1999), and Final Determination of Sales at Less Than Fair Value: Silicon Metal from Brazil, 55 FR 38716 (September 20, 1990). Moreover, as the 61.58 percent rate is above Eletrosilex’s previously calculated rate of 53.63 percent, the Department finds that this rate reasonably reflects a rate that is not disproportionately punitive in nature.

In situations involving non-cooperative respondents, the Department has stated in the past that its normal practice is to select as AFA the highest margin from the current or any previous segment of the same proceeding. See Elemental Sulphur from Canada: Final Results of Antidumping Duty Administrative Review, 65 FR 11,980 (March 7, 2000); Brass Sheet and Strip from Germany: Final Results of Antidumping Duty Administrative Review, 63 FR 42,823 (Aug. 11, 1998). However, the highest calculated rate of this proceeding, 93.20 percent, was considered “disproportionately punitive” in nature by the Court and, therefore, unuseable by the Department. See American Silicon Technologies v. United States, 240 F.Supp.2d at 1213-14 (CIT 2002).

Therefore, pursuant to the Court’s order, we have selected 61.58 percent as the AFA rate to apply to Eletrosilex for the eighth review of this proceeding. Consequently, Eletrosilex’s dumping margin for the eighth review of this proceeding will change from 93.20 percent to 61.58 percent.

FINAL RESULTS OF REMAND DETERMINATION

As a result of this redetermination, CBCC’s dumping margin for the period of July 1, 1998, through June 30, 1999, is zero percent. This rate is changed from the rate announced in the February 23, 2001, final results of the eighth administrative review.

As a result of this redetermination, Eletrosilex’s dumping margin for the period July 1, 1998, through June 30, 1999, is 61.58 percent. This rate is changed from the rate announced in the February 23, 2001, final results of the eighth administrative review.

James J. Jochum
Assistant Secretary
for Import Administration

Date