

**Final Results of Redetermination Pursuant to Court Remand
Certain Carbon and Alloy Steel Cut-to-Length Plate from France
Dillinger France S.A., v. United States,
Court No. 17-00159, Slip. Op. 18-150 (CIT October 31, 2018)**

Summary

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the Court) in *Dillinger France S.A., v. United States*, Court No. 17-00159, Slip. Op. 18-150 (October 31, 2018) (*Dillinger France*). This action arises out of the final determination in the less-than-fair-value (LTFV) investigation of *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) (*Final Determination*); see also *Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Determinations for France, the Federal Republic of Germany, the Republic of Korea and Taiwan, and Antidumping Duty Orders*, 82 FR 24096 (May 25, 2017) (*Amended Final Determination*). The sole issue remanded by the Court is how Commerce applied partial adverse facts available (AFA) to certain downstream home market sales reported by Dillinger France S.A. (Dillinger France), a mandatory respondent in the LTFV investigation. The Court sustained Commerce's determination to apply partial AFA. Thus, upon reconsideration of the record evidence and the Court's remand order, Commerce is relying on the prices Dillinger France reported for the downstream sales where the manufacturer

was reported as “unknown.” As a result, we recalculated Dillinger France’s estimated weighted-average dumping margin using the sale prices reported for these downstream sales; however, our recalculation results in an estimated weighted-average dumping margin 6.15 percent, which is the same as Dillinger France’s rate in the *Amended Final Determination*.

Background

Dillinger France challenged Commerce’s application of partial AFA to certain downstream home market sale prices. In the underlying administrative proceeding, Commerce determined that Dillinger France did not act to the best of its ability to identify the manufacturers of certain of its downstream home market sales where Dillinger France identified the manufacturer as “unknown.”¹ Therefore, as facts available, we treated these sales as Dillinger-France-produced cut-to-length plate and included these sales in our margin calculations. Further as partial AFA for these sales, we determined the highest non-aberrational net price among Dillinger France’s downstream home market sales and assigned that price to the sales where Dillinger France reported the manufacturer as “unknown.”² Dillinger France challenged Commerce’s application of partial AFA to these downstream home market sale prices, arguing that it was not supported by substantial evidence because: 1) Dillinger France put forth its best efforts to provide the sale prices and manufacturer information requested by Commerce for its downstream home market sales; and 2) for transactions where Dillinger France did not know the manufacturer, but reported the sale price of the transaction, Commerce impermissibly replaced these sale prices with the highest non-aberrational net price among its downstream home market sales.³ The Court disagreed with Dillinger France and held that “substantial evidence supports

¹ See *Dillinger France* at 7.

² *Id.* at 18.

³ *Id.* at 13.

Commerce’s conclusion that Dillinger France did not put forth best efforts to provide the manufacturer data for all downstream service center transactions, and thus {Commerce} permissibly resorted to partial AFA.”⁴ However, the Court concluded that “Commerce did not adequately justify its decision to ignore existing record price data and replace this record evidence with the highest non-aberrational net price.”⁵ The Court held that “Commerce did not explain what authority permitted it to replace known information with adverse facts available.”⁶ Therefore, the Court remanded for Commerce to reconsider its application of partial AFA to “the sales price recorded in transactions where the CTL plate’s manufacturer was unknown.”⁷

Analysis

Pursuant to *Dillinger France*, we have reconsidered how we applied partial AFA, *i.e.*, by determining the highest non-aberrational net price among Dillinger France’s downstream home market sales and assigning that price to the downstream home market sale prices for which Dillinger France reported the manufacturer as “unknown.” However, we have not reconsidered our determination to apply partial AFA. Indeed, the Court upheld Commerce’s application of AFA, stating:

In light of *Nippon Steel’s* requirements, Commerce’s determination that “{t}he information in question (*i.e.*, the identity of the manufacturers of the CTL plate at issue that was resold by Dillinger France’s affiliate...is the type of information that a large steel manufacturer such as Dillinger France should reasonably be able

⁴ See *Dillinger France* at 13, 16-17.

⁵ *Id.* at 13, 18-19.

⁶ *Id.* at 18-19.

⁷ *Id.* at 18; see also *Id.*, at 2.

to provide,” and that Dillinger’s failure to have this information available merited the application of partial AFA, was supported by substantial evidence.⁸

However, the Court also stated that “Commerce did not explain what authority permitted it to replace known information with adverse facts available.”⁹ Further, the Court stated that

the reliability of the reported sales prices has not been called into question and there is no information gap in the sales prices for Commerce to fill. Therefore, Commerce’s decision to apply partial AFA to replace information in the record was not supported by substantial evidence and was contrary to law.¹⁰

We understand the Court’s decision to mean that, while Commerce’s application of partial AFA to these downstream sales was supported by substantial evidence, our method of applying partial AFA (by replacing the reported sale prices with the highest non-aberrational net price among Dillinger France’s downstream sales) was not adequately justified.¹¹ In reconsidering “how Commerce applied partial AFA,” we recognize the Court’s statement that “the reliability of the reported sales prices has not been called into question and there is no informational gap in the sale prices for Commerce to fill.”¹² Given this holding, we have reevaluated the record evidence, and, as our application of partial AFA, we are treating the downstream home market sales where Dillinger France reported the manufacturer as “unknown” as sales by Dillinger France to calculate the estimated weighted-average dumping margin for these final results of redetermination. However, in our application of partial AFA, there is no impact on Dillinger France’s estimated weighted-average dumping margin determined in the *Amended Final Determination*.¹³

⁸ *Id.* at 16-17.

⁹ *Id.* at 18-19.

¹⁰ *Id.*

¹¹ *Id.* at 12, 19.

¹² *Id.* at 18-19.

¹³ See *Amended Final Determination*, 82 FR at 24098.

Interested Party Comments

On December 13, 2018, Commerce released the draft results of redetermination to all interested parties, and invited parties to comment. On January 28, 2019, we received comments from Dillinger France and Nucor Corporation (Nucor).¹⁴ Dillinger France did not object to Commerce's draft results of remand redetermination. Nucor's comments are summarized below.

Nucor's Comments

- The Court found that Commerce's decision to apply partial AFA to Dillinger France was supported by substantial evidence. However, the Court found the manner in which Commerce applied partial AFA was not adequately justified.
- The Court did not conclude that Commerce was prohibited from applying partial AFA in the manner it did in the *Final Determination*, but rather that Commerce had failed to provide an adequate explanation for its determination.¹⁵
- The purpose of section 776(b)(1) of the Act is to provide respondents with an incentive to cooperate. Accordingly, the courts have recognized the role of deterrence in the application of AFA. For example, in affirming Commerce's application of AFA, the U.S. Court of Appeals for the Federal Circuit has recognized that "consideration of the deterrent effect of {Commerce's} determination reflects the law's expectation."¹⁶ The Court has also recognized that "the statute's expectation is that Commerce's selected AFA rate will have a deterrent effect."¹⁷ Indeed, the Court has remanded determinations where Commerce has failed to adequately explain how a selected AFA rate is sufficiently adverse.¹⁸
- By selecting the highest non-aberrational price as partial AFA in the *Final Determination*, Commerce used an approach that will have a deterrent effect on future non-cooperation and thus effectuates the purpose of the statute. Although this approach would not result in a higher estimated weighted-average dumping margin for Dillinger France, reliance on an adverse inference is a signal to Dillinger France and other respondents that a failure to fully cooperate will have consequences.
- In the draft remand determination, despite reaffirming that the application of partial AFA was appropriate, Commerce applied neutral facts available. Failing to rely on partial AFA regardless of the effect on the estimated weighted-average dumping margin, is

¹⁴ See Letters, dated January 4, 2019, from Dillinger France, "Comments on Draft Results of Redetermination Pursuant to Court Remand; Certain Carbon and Alloy Steel Cut-to-Length Plate from France; *Dillinger France S.A. v. United States*, Court No. 17-00159, Slip. Op. 18-150 (CIT Oct. 31, 2018)," and from Nucor, "Certain Carbon and Alloy Steel Cut-to-Length Plate from France: Comments on Draft Results of Redetermination" (Nucor's Comments).

¹⁵ *Id.* (citing Slip Op. 18-150 at 18-19).

¹⁶ See Nucor Comments at 7 (citing *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1348 (Fed. Cir. 2016)).

¹⁷ *Id.* (citing *Arcelor Mittal USA LLC v. United States*, Consol. Court No. 16-00168, Slip Op. 18-121 at (Ct. Int'l Trade Sept. 19, 2018 (*Arcelor Mittal USA LLC v. United States*))).

¹⁸ *Id.* (citing *Arcelor Mittal USA LLC v. United States* at 22).

inconsistent with the purpose of the AFA statute and renders Commerce's decision to apply an adverse inference moot.

- Therefore, Commerce should revise its draft remand redetermination to follow its application of partial AFA from the *Final Determination* and provide additional explanation regarding why its application of partial AFA is appropriate. This approach would be consistent with the Court's order as well as with the underlying purpose of the AFA statute.

Commerce's Position:

We have evaluated the comments submitted by Nucor and Dillinger France. As discussed above, we understand the Court's decision to mean that, while Commerce's application of partial AFA to these downstream sales was supported by substantial evidence, our method of applying partial AFA (by replacing the reported sale prices with the highest non-aberrational net price among Dillinger France's downstream sales), in this particular case, was not adequately justified. Specifically, we relied on the Court's statement that "the reliability of the reported sales prices has not been called into question and there is no informational gap in the sale prices for Commerce to fill."¹⁹ Given this holding, and contrary to Nucor's argument that we should use the highest non-aberrational price as partial AFA, we find that we cannot ignore record information that is not in dispute, pursuant to the facts on the record of this investigation and the Court's decision.

As we discuss above, and as we discussed in the draft results of redetermination, we have reevaluated the record evidence and determine that, because of the small number of affected transactions whose prices are used as a basis for normal value and which are actually compared to U.S. sale prices, these home market transactions have no measurable impact on Dillinger France's estimated weighted-average dumping margin. Thus, as our application of partial AFA to calculate the estimated weighted-average dumping margin, we: 1) treated these downstream

¹⁹ See *Dillinger France* at 19.

home market sales transactions as Dillinger France-produced plate, rather than treating these transactions as sales of plate produced by an unrelated manufacturer; and 2) relied on the sale prices as reported. We have made no changes to the draft results of redetermination for these final results of redetermination in response to either Nucor's or Dillinger France's comments.

Final Remand Results

Consistent with the instructions of the Court, we have continued to use the same approach in the final results of redetermination. As a result of our redetermination, Dillinger France's estimated weighted-average dumping margin is 6.15 percent.²⁰ Because Dillinger France's estimated weighted-average dumping margin calculated in this remand redetermination is the same as its estimated weighted-average dumping margin in the *Amended Final Determination*, we do not intend to issue a *Timken* Notice, should the Court sustain these results.

3/11/2019

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Signed by: CHRISTIAN MARSH

Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance

²⁰ Because Dillinger France's estimated weighted-average dumping margin is unchanged, we have not revised the "all-others rate," which as explained in the *Amended Final Determination*, Dillinger France's rate was the basis for the estimated weighted-average dumping margin determined for all other French producers and exporters of the subject merchandise. See *Amended Final Determination*, 82 FR at 24096.