

68 FR 12669, March 17, 2003

A-570-007

POR: 10/01/2000-09/30/2001

Public Document

AD/CVD GII04: JSC/DEJ

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Holly A. Kuga
Acting Deputy Assistant Secretary
for Import Administration, Group II

SUBJECT: Issues and Decision Memorandum for the 2000-2001 Administrative
Review of Barium Chloride from the People's Republic of China: Final
Results

Summary

We have analyzed the comments and rebuttal comments of interested parties in the administrative review of barium chloride from the People's Republic of China (PRC). As a result of our analysis, we have made no changes to the preliminary margin calculations. However, the PRC-wide rate calculated in these final results differs from that calculated in the preliminary results because we have changed the wholesale price index used to inflate the surrogate value for electricity. See the Memorandum to the File from Drew Jackson, "Changes to the Calculation of the PRC-wide rate." We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum for these final results.

Below is the complete list of issues in this administrative review for which we received comments and rebuttal comments from parties:

Comments

Comment 1: Whether the Department Should Redetermine the PRC-Wide Rate
Comment 2: Whether the Department Should Grant Zhangjiaba a Separate Rate
Comment 3: Whether the Department Inappropriately Resorted to Adverse Facts Available With
Respect to Zhangjiaba

Background

On November 8, 2002, the Department of Commerce (the Department) published in the Federal Register (67 FR 68094) the preliminary results and rescission, in part, of its administrative review of the

antidumping duty order on barium chloride from the PRC (Preliminary Results). In response to the Department's invitation to submit comments on the preliminary results, one respondent, Zhangjiaba Salt Chemical Co., Ltd., Barium Salts Branch (Zhangjiaba), submitted a case brief and the petitioner, Chemical Products Corporation (CPC) submitted a rebuttal brief on November 27, 2002 and December 4, 2002, respectively. A public hearing was held on February 11, 2003.

Discussion of the Issues

COMMENT 1: Whether the Department Should Redetermine the PRC-Wide Rate

In the preliminary results of review, the Department determined that the current PRC-wide rate, which is the highest rate calculated in any segment of the proceeding (the rate calculated in the 1985-1986 administrative review), is not sufficiently adverse to induce cooperation from named respondents. None of the named respondents in this review, other than Zhangjiaba¹, or in the last administrative review conducted in this proceeding responded to the Department's questionnaire. Therefore, the Department recalculated the PRC-wide rate using factors of production and factor value information provided by the petitioner. In the preliminary results the Department changed the PRC-wide rate from 60.84 percent to 153.88 percent.

For the following reasons, Zhangjiaba argues that the Department should not recalculate the PRC-wide rate. First, Zhangjiaba contends that there is no basis to conclude that there has been an increase in the incidence or rate of dumping Chinese produced barium chloride. To support its position, Zhangjiaba points to record evidence showing that the average unit value (AUV) of barium chloride imports into the United States increased from \$232.46 U.S. dollars per metric ton in the 1985-1986 period of review (POR), the review in which the current PRC-wide rate was established, to \$238.97 U.S. dollars per metric ton in the instant POR. Zhangjiaba also claims that the petitioner failed to support its assertion that there have been changes in the prices of inputs and in the process used to produce barium chloride. Furthermore, Zhangjiaba claims that import statistics do not indicate that Chinese producers of barium chloride are flooding the U.S. market with their products, given that the quantity and value of barium chloride imports into the United States during the instant POR are only 247,990 kilograms (kgs) and 59,263.00 U.S. dollars, respectively. Moreover, Zhangjiaba contends that the petitioner provided no evidence to support its assertion that imports of barium chloride into the United States have risen by more than 150 percent from 1996 to 2000. Thus Zhangjiaba dismisses the petitioner's assertion that the magnitude of dumping has increased.

Second, Zhangjiaba maintains that the petitioner failed to provide an appropriate authority for recalculating the PRC-wide rate. Zhangjiaba argues that the Department's actions in this review are inconsistent with its actions in the administrative review of stainless steel plate in coils from Belgium, a

¹ Zhangjiaba reported, and the Department confirmed, that it made no shipments of subject merchandise during the period of review.

case the petitioner relies upon to support using new information placed on the record of a review to calculate a margin higher than that calculated in earlier segments of the proceeding. According to Zhangjiaba, in stainless steel plate in coils from Belgium, the Department used publicly available financial reports from an uncooperative respondent to calculate factory overhead, selling, general and administrative expenses, and profit. In contrast, Zhangjiaba asserts that it is not an uncooperative respondent and the information used to recalculate the PRC-wide rate in this review is not publicly available. See Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 66 FR 56,272 (November 7, 2001), and accompanying Issues and Decision Memorandum, at Comment 1 (Steel Plate Decision Memorandum).

Third, Zhangjiaba contends that the methodology used to recalculate the PRC-wide rate is inconsistent with prior determinations because it relies upon the petitioner's non-public, uncorroborated factor value information which is unrelated to the factors of production used by Chinese producers of barium chloride. Specifically, Zhangjiaba notes that the Department has expressed a preference for corroborated information in past cases. See Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Final Determination of Sales at Less Than Fair Value, 65 FR 5554, 5567 (February 4, 2000) (where the Department applied adverse facts available (AFA) to a respondent that refused to allow the Department to conduct verification, and, therefore, the Department was unable to corroborate information reported by the respondent).² In addition, Zhangjiaba notes that the courts have required that there be some connection between the data used to calculate AFA and respondents' actual dumping margins. See F. LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1033 (Fed. Cir. 2000) (De Cecco) ("Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to a respondent's actual dumping margin."); see also, Ferro Union, Inc. v. United States, 44 F. Supp.2d 1310, 1335 (CIT) (Ferro Union), ("Commerce cannot select a rate which focuses only on inducing the exporter to cooperate and ignores the interest in selecting a margin which relates to the past practices of the industry. . . . Commerce must assure itself that the margin it applies is relevant and not outdated, or lacking a rational relationship to {the respondent}"). Furthermore, Zhangjiaba notes that if the petitioner rejected its factor usage rates as unrepresentative of those of other PRC producers, the petitioner certainly cannot find its own U.S. factor usage rates representative. Based on the foregoing, Zhangjiaba contends that the Department must reject the calculation methodology proposed by the petitioner for recalculating the PRC-wide rate. See Petroleum Wax Candles from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 66 FR 14,545 (March 13, 2001), and accompanying Issues and Decision Memorandum at Comments 5, 6 (the Department rejected three calculation methodologies proposed by the petitioner because they are inconsistent with the methods used to calculate normal value in non-market economy (NME) cases).

Finally, Zhangjiaba argues that the 1999 sunset review in this proceeding calls into question the

² As a means or corroboration, Zhangjiaba suggests that the Department verify the factor usage rates placed on the record by the petitioner.

petitioner's claims of increased dumping because the Department concluded in that review that dumping would continue at a rate of only 14.50 percent if the barium chloride order were revoked. See Final Results of Expedited Sunset Review: Barium Chloride From the People's Republic of China, 64 FR 5633 (February 4, 1999). Nevertheless, Zhangjiaba maintains that if the Department decides to recalculate the PRC-wide rate, the rate should be 14.50 percent, the rate determined in the sunset review, the most recent determination in this proceeding.

CPC argues that the facts in this review support recalculating the PRC-wide rate. First, CPC notes that there is no reason to believe that the current PRC-wide rate, which was calculated more than 15 years ago, has any probative value relative to current market conditions. Second, CPC contends that the existing PRC-wide rate is not encouraging cooperation from respondents. CPC notes that PRC producers of barium chloride have consistently flouted the Department's requests for information (no producer or exporter provided information in the previous review of barium chloride from the PRC and no exporting PRC producer provided information in the instant review). Because the Department does not have subpoena power, CPC maintains that it is appropriate to adjust the adverse facts available PRC-wide rate to induce respondents to provide complete and accurate information and ensure that they do not obtain more favorable results than cooperating parties. See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Semiconductors from Taiwan, 63 FR 8,909, 8932 (February 23, 1998) (Random Access Semiconductors) (the basic purpose of the AFA statutory provision is to "induce respondents to provide the Department with complete and accurate information in a timely manner"); see also, Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act at 870. Third, CPC contends that the current PRC-wide rate has not prevented dumping. CPC claims that the 170 percent increase in U.S. imports of barium chloride from the PRC between 1996 and 2001 indicates that PRC producers have adapted to the current adverse PRC-wide rate and will continue to ignore the Department's requests for information.

Moreover, CPC claims that the Department has faced similar facts in other cases and revised the adverse facts available rate. In sodium thiosulphate from the PRC, the Department recalculated the adverse facts available rate using information submitted by the petition because no party responded to the questionnaire and the petitioner supplied information demonstrating that costs and prices in the industry have changed and the existing best information available margin is no longer sufficiently adverse to induce cooperation from respondents. See Sodium Thiosulphate from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 58 FR 12,934 (March 8, 1993) (Sodium Thiosulphate). In steel wire rope from the Republic of Korea, the Department determined that the current adverse facts available rate did not provide the adequate sanction to induce respondents to cooperate and thus it revised the rate from 1.51 percent to 13.79 percent. See 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).

Furthermore, CPC finds Zhangjiaba's arguments for rejecting the recalculation methodology to be without merit. With respect to the use of non-public information, CPC points out that, with the

exception of factor value information, there is no requirement that information used to calculate a margin be public information. See section 776 (b)(4) of the Tariff Act of 1930, as amended (the Act), noting that the Department may use “any other information placed on the record.” In fact, CPC notes that petitions invariably contain sensitive data. With respect to corroboration, CPC states that 1) the U.S. prices used in the recalculation are from official U.S. government statistics which do not require corroboration, 2) the factor values used are publicly available and consistent with those used in many other administrative reviews, and 3) the consumption quantities placed on the record may be used without corroboration because the statute only requires the Department to corroborate information to the extent practicable. See the SAA at 870 stating that “[T]he fact that corroboration may not be practicable in a given circumstance will not prevent the agencies from applying an adverse inference under subsection (b).” In any case, according to CPC, its experience as a producer of barium chloride provides assurance that the reported consumption quantities do have probative value with respect to the likely quantities used by Chinese producers of barium chloride.

Finally, CPC contends that the dumping margin from the sunset review in this proceeding should not be used as the PRC-wide rate. First, CPC argues that the information it provided for recalculating the PRC-wide rate is contemporaneous with the instant POR, accurate, and has more probative value than information used in the sunset review which was concluded more than three years ago.³ Second, CPC asserts that the rate from the sunset review is in keeping with the Department’s general policy of using rates from the investigation to predict the behavior of exporters without the discipline of an order, and thus it cannot be viewed as an accurate measurement of dumping during the POR – particularly since the investigation was more than 18 years ago. Third, CPC contends that Zhangjiaba’s argument for using a rate of 14.5 percent completely ignores the need for the dumping margin assigned to the PRC-wide entity in this review to be adverse and essentially rewards the producers for their non-compliance.

Department’s Position:

We have determined that the PRC-wide rate should be recalculated. Information on the record of this review indicates that the current PRC-wide rate, which was calculated in the 1985-1986 administrative review, may not bear a rational relationship to the practices of the PRC-wide entity during the instant review because prices for the majority of U.S. imports of barium chloride from the PRC have remained virtually unchanged since the 1985-1986 administrative review while the price of major inputs used to produce barium chloride has increased significantly. Thus, contrary to Zhangjiaba’s claim, there is a basis to conclude that there has been an increase in the rate of dumping.

³ Contrary to Zhangjiaba’s claim, CPC maintains that the rate from the sunset review is not the most recently calculated rate in this proceeding. According to CPC, the most recent administrative review of the order was completed in November 1999. The PRC-wide rate used in that administrative review was 60.84 percent. See Barium Chloride from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 64 FR 62,168 (November 16, 1999).

More importantly, the record information indicates that the current PRC-margin is not adverse, as respondents would benefit from its use. We note that despite the fact that the volume of U.S. imports of barium chloride from the PRC is increasing⁴—and there are indications that at least some of the named respondents are participating in the U.S. market at the current PRC-wide rate⁵ — none of the respondents have participated in the Department’s two most recent administrative reviews of barium chloride from the PRC.

Moreover, in past cases the Department has recalculated the PRC-wide and the “all others” rates where it found such rates inappropriate. In Sodium Thiosulphate, a case with facts similar to those in the instant review, the Department determined the adverse facts available rate using information submitted by the petitioner because no party responded to the questionnaire and the petitioner supplied information demonstrating that costs and prices in the industry had changed and the best information available margin previously used was no longer sufficiently adverse to induce cooperation from respondents. See Sodium Thiosulphate, 58 FR 12934. In Steel Wire Rope, the Department determined that the rate previously used as adverse facts available was not sufficiently adverse to induce respondents to cooperate and thus it revised the rate from 1.51 percent to 13.79 percent. See Steel Wire Rope, 63 FR 17986, 17987.

Additionally, although Zhangjiaba maintains that it is appropriate to continue using the PRC-wide rate from the 1985-1986 administrative review as an adverse facts available rate, it notes that the CIT stated that “Commerce must assure itself that the margin it applies is relevant and not outdated, or lacking a rational relationship to {the respondent}.” Ferro Union, Inc. v. United States, 44 F. Supp.2d 1310, 1335 (CIT 1999). In this case we find the evidence on the record demonstrates that the current PRC-wide rate is outdated, and lacks a rational relationship to the PRC-wide entity. Therefore, we have recalculated this rate.

Furthermore, the methodology used to recalculate the PRC-wide rate is appropriate. We recalculated the PRC-wide rate following the Department’s NME methodology using publicly available U.S. price and factor value information. Where appropriate, we valued certain factors of production using surrogates other than those proposed by the petitioner. The factor values used are contemporaneous (or were adjusted to be contemporaneous) with the period under consideration and generated by independent sources. Thus, we consider the information used to calculate the PRC-wide rate to be corroborated to the extent practicable. Also, it is appropriate to use the petitioner’s factor usage rates as facts available given that the named respondents that exported during the POR did not reply to the

⁴ Although Zhangjiaba claims that the petitioner provided no evidence of increasing imports, there is evidence on the record supporting the petitioner’s assertion that imports have risen more than 170 percent from 1996 to 2001.

⁵ See Memorandum to the File from Drew Jackson regarding factual information used in our analysis, dated November 8, 2002.

Department's questionnaire and the usage rates are contemporaneous with factor values used in the calculation.⁶ The fact that this information is proprietary does not preclude its use. As the petitioner noted, in other cases the Department has used proprietary data from the petition to calculate a facts available rate.

Finally, with respect to the 14.50 percent margin advocated by Zhangjiaba, we agree with the petitioner that this is not an appropriate measure of dumping in this review because, as noted above, information placed on the record of this review indicates that production costs, and hence constructed value, have changed significantly and, therefore, the margin no longer reflects current market behavior. Moreover, even without the information provided by the petitioner, the 14.50 percent rate would not reflect an adverse inference in light of the 60.84 percent rate that is currently applicable to all imports of subject merchandise. Therefore, we have not used this rate as the PRC-wide rate.

COMMENT 2: Whether the Department Should Grant Zhangjiaba a Separate Rate

Zhangjiaba asserts that the Department should grant it a separate rate because its section A response, filed on November 27, 2002, demonstrates that it is sufficiently independent from government control so as to be entitled to a separate rate. Moreover, Zhangjiaba argues that the Department should consider its section A response, which was filed as a factual submission pursuant to section 351.301(c)(3)(ii) of the Department's regulations⁷ to be properly and timely filed since Department officials specifically stated that Zhangjiaba, which had no shipments during the POR, need not file anything. Zhangjiaba points out that the instant review contrasts with the Department's position in bristle brushes from the PRC in which the Department required a respondent to file a separate rates response even though it had no shipments or imports of subject merchandise during the POR, and the respondent established its entitlement to a separate rate in a prior review. See Natural Bristle Paintbrushes and Brush Heads from the People's Republic of China; Notice of Rescission, in Part, of Antidumping Duty Administrative Review, 67 FR 58018 (September 13, 2002) (Bristle Brushes from the PRC). Lastly, Zhangjiaba notes that in tapered roller bearings from the PRC, the Department accepted factual information other than that used to value factors of production. See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of New Shipper Reviews, 67 FR 10665 (March 8, 2002) (TRBs from the PRC). Thus, Zhangjiaba argues that its section A response should be accepted, it should be granted a separate rate, and its future shipments should not be subject to the increased PRC-wide rate.

⁶ After the preliminary determination and more than eight months after the deadline for submitting questionnaire responses, Zhangjiaba requested that it be allowed to submit section D information. The Department rejected Zhangjiaba's request. Zhangjiaba did not sell subject merchandise during the POR, nor did it attempt to submit section D data in connection with a sales response from an exporter, as no exporter participated in this review.

⁷ This regulation establishes the deadline for submitting publicly available factor values.

CPC claims that the problem with Zhangjiaba's argument is that the Department has no means to grant Zhangjiaba a separate rate because the company did not sell barium chloride to U.S. customers during the POR. According to CPC, any separate rate assigned to Zhangjiaba would be based on nothing more than pure speculation. CPC observes that Zhangjiaba's position is similar to that of a respondent in foundry coke from the PRC. See Final Determination of Sales at Less Than Fair Value: Foundry Coke Products from the People's Republic of China, 66 FR 39487 (July 31, 2001) (Foundry Coke from the PRC). In that case, Taiyuan (TY), a respondent that did not ship subject merchandise during the period of investigation, argued that it fully cooperated with the Department, and thus should not be subject to the adverse PRC-wide rate. However, the Department rejected TY's argument stating "as it is not possible to conduct an antidumping duty analysis with respect to TY, there is no basis to assign TY a rate distinct from the PRC-wide rate." CPC urges the Department to reach the same conclusion with respect to Zhangjiaba.

Additionally, given that Zhangjiaba reported that it did not ship subject merchandise during the POR, CPC believes that the Department correctly informed the company that no further submissions were required of it and noted that its submission reporting no shipments was "a sufficient response to indicate that it had no shipments or entries during the POR." See Memorandum to the File from John Conniff, "Conversation with Counsel for Zhangjiaba", dated September 20, 2002. Thus, CPC contends that Zhangjiaba is mistaken if it believes that the Department restricted its ability to participate in this administrative review.

Department's Position:

We have determined that there is no basis to assign Zhangjiaba a rate distinct from the PRC-wide rate for several reasons. First, Zhangjiaba never established its entitlement to a separate rate in any segment of this proceeding, including the instant review. Although Zhangjiaba filed a response to section A of the Department's questionnaire after the preliminary results, we rejected this response because it was filed more than nine months after the due date. Moreover, the Department would not have analyzed the response because Zhangjiaba did not ship subject merchandise to the United States during the instant POR. As the Department noted in Foundry Coke from the PRC, it is not possible to conduct an antidumping analysis of a company that did not ship subject merchandise during the period under consideration. See Foundry Coke from the PRC, 66 FR 39487 and accompanying Issues and Decision Memorandum, at Comment 8.

Additionally, the Department did not advise Zhangjiaba that "it need not file anything." Rather, as stated in the September 20, 2002 file memorandum cited by the petitioner, the Department indicated that Zhangjiaba's submission reporting no shipments was "a sufficient response to indicate that it had no shipments or entries during the POR." At the time that Zhangjiaba contacted the Department, the company had already reported that it did not ship barium chloride to the United States during the POR, and requested that the Department rescind the review of the company.

Regarding Bristle Brushes from the PRC, we find that Zhangjiaba's reliance on that case is misplaced. The record in Bristle Brushes from the PRC does not indicate that the Department required a "separate rates" response from a respondent. Rather, as in the instant review, the Department issued a questionnaire (including section A) to a respondent after it reported that it made no shipments of subject merchandise during the POR. The respondent in that case replied in full to section A of the questionnaire whereas, in the instant case, we accepted Zhangjiaba's letter stating that it had no shipments as a response to the Department's questionnaire. In any event, in Bristle Brushes from the PRC, as here, we rescinded the review based on no shipments.

Similarly, with respect to TRBs from the PRC, we find that Zhangjiaba's reliance is misplaced. Section 351.301(c)(3)(ii) of the Department's regulations establishes a statutory time limit for the submission of publicly available information to value factors, not the submission of questionnaire responses. Although Zhangjiaba did not identify the factual information accepted by the Department in TRBs from the PRC which allegedly supports its position here, the notice and the Issues and Decision Memorandum in that case refers to two submissions of factual information made within the time limit established under section 351.301(c)(3)(ii). Unlike Zhangjiaba's section A response, both of these submissions relate to factor valuation.⁸ Therefore, TRBs from the PRC does not support Zhangjiaba's argument that its section A response should be accepted pursuant to section 351.301(c)(3)(ii) of the Department's regulations.

COMMENT 3: Whether the Department Inappropriately Resorted to Adverse Facts Available With Respect to Zhangjiaba

Zhangjiaba claims that by recalculating the PRC-wide rate, the Department inappropriately resorted to AFA with respect to it. Section 776 of the Act permits the Department to resort to adverse facts available when a respondent, among other things, withholds requested information and fails to cooperate by not acting to the best of its ability to comply with requests for information. See sections 776(a)(2) and 776(b) of the Act. According to Zhangjiaba, although it was not required to supply sales and factors of production information because it made no shipments during the POR, it fully cooperated with the Department by offering to supply whatever information was necessary to avoid an adverse result.⁹ Thus, Zhangjiaba claims that there is no basis for the Department to apply adverse facts available to it.

CPC points out that Zhangjiaba itself requested the rescission, the results of which it now claims to be

⁸ One submission contains factual information which purportedly establishes that the market economy price paid by the respondent for steel was not subsidized (and thus is an appropriate value for the steel used to produce subject merchandise). The other submission contains a surrogate value for freight.

⁹ As noted in Comment 2, Zhangjiaba claims that Department officials specifically stated that it need not file anything, including a section A response in order to establish a separate rate.

adverse. With respect to cooperation, CPC claims that Zhangjiaba expressed no interest in participating in the review until it was faced with a PRC-wide rate that reflects current market conditions. Finally, CPC argues that there is no reason to apply a rate other than the PRC-wide rate to Zhangjiaba because, to the extent the company ships subject merchandise and believes it is dumping at less than the PRC-wide rate, it will have an opportunity to request an administrative review and, if appropriate, will receive a refund of any excess dumping duty deposits.

Department's Position:

The Department did not make an adverse facts available determination with respect to Zhangjiaba. Rather, because Zhangjiaba did not ship subject merchandise during the POR, the Department rescinded the review with respect to Zhangjiaba and the company continues to be subject to the PRC-wide rate. See section 351.213 (d)(3) of the Department's regulations which provides that the Department may rescind a review with respect to a particular producer if it concludes that during the period under review there were no entries or shipments of subject merchandise.

Recommendation

Based on our analysis of the comments received, we recommend adopting the positions described above. If these recommendations are accepted, we will publish the final results and the recalculated PRC-wide rate in the Federal Register.

Agree_____ Disagree_____ Let's Discuss_____

Joseph A. Spetrini
Assistant Secretary
for Import Administration

(Date)

