A-570-908
Investigation
Public Document
AD/CVD9: ECB

DATE: January 28, 2008

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination of Sales at Less than Fair Value: Sodium Hexametaphosphate from the People's Republic of China

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SUMMARY

We have analyzed the case brief of Petitioners[1] in the investigation of sales at less than fair value of sodium hexametaphosphate ("SHMP") from the People's Republic of China ("PRC"). No other party submitted case or rebuttal briefs in this proceeding. The period of investigation ("POI") is July 1, 2006, through December 31, 2006. On September 14, 2007, the Department published the preliminary determination of sales at less than fair value of SHMP from the PRC. See Preliminary Determination of Sales at Less Than Fair Value: Sodium Hexametaphosphate from the People's Republic of China, 72 FR 52544 (September 14, 2007). We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is a complete list of issues for which we have received comments:

Comments:
Comment 1: Scope Revision
Comment 2: Basis for the Final Determination

Discussion of Issues:

Comment 1: Scope Language

Petitioners state that SHMP blends have historically included a mixture of SHMP and other sodium phosphates, such as sodium tripolyphoshpate, sodium acid pyrophosphate, and

[1] ICL Performance Products, LP and Innophos, Inc.

tetrasodium pyrophosphate, where SHMP accounts for less than fifty percent by volume of the blend. Petitioners argue that the language in the scope of the investigation in the initiation and preliminary determination covering blends, where blends in which SHMP accounted for fifty percent or less were excluded, referred to known blends where the function of the product was different than that of SHMP. Petitioners state that the exclusion was written to draw a distinction based on physical characteristics and the end-use associated with the SHMP blend, and that known SHMP blends with other sodium phosphates where SHMP accounts for less than fifty percent are not substitutes for SHMP in terms of end-use or physical characteristics. Petitioners argue that new SHMP blends may be devised to evade or circumvent the antidumping order, and therefore petitioners request that the scope language covering blends limit the "less than fifty percent" exclusion language specifically to mixtures of SHMP and other sodium phosphates. Petitioners argue that blends of SHMP with materials other than sodium phosphates such as an inert or inactive material should not be excluded from the order where the SHMP content is less than fifty percent. Petitioners contend that in the Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 FR 9508 (March 2, 2007) ("Activated Carbon Final") and accompanying Issues and Decision Memorandum at Comment 1, the Department clarified the scope language regarding carbon mixtures to apply only to mixtures of activated carbons and not to mixtures of activated carbon with other materials, and therefore, the Department should make a similar revision to the scope language for SHMP blends.

Additionally, petitioners argue that a blend including SHMP and other sodium phosphates sold in the United States prior to the petition should be subject to the fifty-percent test, but that a newly created blend of SHMP and other sodium phosphates where SHMP accounts for less than fifty percent should be analyzed for possible circumvention of the order, if that product has the same physical characteristics, and is sold to the same purchasers for the same ultimate use as SHMP.

Petitioners further argue that SHMP sold in liquid form, whether water or another solvent is added to SHMP to form a solution, should not be considered a "blend" of sodium phosphates and thus should not be subject to the fifty-percent exclusion test. Specifically, petitioners argue that SHMP is highly soluble, and stated in their February 16, 2007, submission that SHMP "dissolved in water, dissolved in another solvent for safety or transport, or mixed with an added stablizer, anticaking agent, antidusting agent, or coloring substance" was intended to be covered by the scope. Petitioners argue that prior to filing the petition, SHMP imports consisted of sheet, crushed, or powder form, but could exist in liquid form too, and the scope language should be clarified to avoid potential confusion.

Specifically, petitioners request that the following revisions be made to the scope:

> The product covered by this investigation includes SHMP in all grades, whether food grade or technical grade. The product covered by this investigation includes SHMP without regard to chain length i.e., whether regular or long chain. The product covered by this investigation includes SHMP without regard to physical form, whether glass, sheet,

crushed, granule, powder, fines, or other form, and whether or not in solution.

However, the product covered by this investigation does not include SHMP when imported in a blend with other sodium phosphates ~~materials~~ in which the SHMP accounts for less than 50 percent by volume of sodium phosphates ~~the finished product~~. This exclusion language regarding blended material applies only to mixtures of SHMP and other sodium phosphates. SHMP in liquid solution is not covered by this exclusion unless the solution includes a blend of SHMP and another sodium phosphate in which the SHMP accounts for less than 50 percent by volume of the total volume of sodium phosphates. Moreover, to the extent that later-developed blends of SHMP and other sodium phosphates are imported, such blends will be considered pursuant to 19 U.S.C. § 1677j.

Department's Position:

We disagree with petitioners, in part. Amending the scope language to exclude only blends of SHMP and other sodium phosphates, where SHMP accounts for less than fifty percent of the total volume would, in effect, serve to expand the current scope of subject merchandise that was subject to this investigation at too late a stage in this proceeding. In order for the Department to consider expanding the scope of this proceeding to include products which are explicitly not covered by the current scope, the petitioners would need to file an amendment to the petition with both the Department and the International Trade Commission ("ITC"), in accordance with section 732(b) of the Act. Because section 732(b)(1) of the Act requires simultaneous filing of petition amendments with both agencies, we are unable to accept the Petitioners' request as a proper amendment on our own. Moreover, such an action would be inappropriate at this point in the proceeding, given the Department's practice, as upheld by the Courts, of not accepting petitioners' proposed amendments to the scope after the date of the preliminary determination. See Allegheny Bradford Corp. v. United States, 342 F. Supp. 2d 1172, (CIT 2004) at 1188-89 (the Court of International Trade ("CIT") reiterated that the Department may not expand the scope of an investigation in the latter stages of a proceeding because of due process concerns); see also Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil, 71 FR 2183 (January 13, 2006) and accompanying Issues and Decision memorandum at Comment 2.

We disagree with the petitioners' current assertion that their original intent was to exclude only blends of SHMP and other sodium phosphates where SHMP accounted for less than fifty percent. Petitioners were afforded several opportunities to amend the scope prior to initiation of the investigation in the two rounds of supplemental questionnaires, and also had the opportunity to amend the scope within the deadline set forth in Initiation of Antidumping Duty Investigation: Sodium Hexametaphosphate From the People's Republic of China, 72 FR 9926 (March 6, 2007) ("Initiation Notice"):

> During our review of the petition, we discussed the scope with Petitioners to ensure that it accurately reflects the product for which the domestic industry is seeking relief.

> Moreover, as discussed in the preamble to the Department's regulations, we are setting aside a period for interested parties to raise issues regarding product coverage. See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27323 (May 19, 1997). The Department encourages all interested parties to submit such comments within 20 calendar days of publication of this initiation notice.
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> See Initiation Notice at 9926.

The petitioners subsequently failed to amend the petition to remedy this alleged deficiency despite opportunities to do so early in this proceeding. Thus, we find the petitioners' arguments to amend the scope at this stage to be untimely.

We also disagree with Petitioners' assertion that their revision to the scope language is similar to that in Activated Carbon Final. The additional scope language added at the final determination in that case was a clarification of language already in the scope. The original scope exclusion language was specific to "a blend of steam and chemically activated carbons," and at the final determination, the Department added a statement to clarify that the exclusion applied " *only* to mixtures of steam and chemically activated carbons. " Specifically, the scope language set forth in Initiation of Antidumping Duty Investigation: Certain Activated Carbon From the People's Republic of China, 71 FR 16757 (April 4, 2006) ("Activated Carbon Initiation") stated:

> To the extent that an imported activated carbon product is a blend of steam and chemically activated carbons, products containing 50 percent or more steam (or CO[2] gas) activated carbons are within this scope, and those containing more than 50 percent chemically activated carbons are outside this scope.
>
> See Activated Carbon Initiation 71 FR at 16757.

The revised scope for the final determination read:

> To the extent that an imported activated carbon product is a blend of steam and chemically activated carbons, products containing 50 percent or more steam (or CO[2] gas) activated carbons are within this scope, and those containing more than 50 percent chemically activated carbons are outside this scope. This exclusion language regarding blended material applies *only* to mixtures of steam and chemically activated carbons.
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> See Activated Carbon Final 72 FR at 9509.

In this proceeding, the scope language as it reads applies to all blends of SHMP and "other materials," in which products where SHMP accounts for less than 50 percent by volume of the finished product would be excluded. The petitioners want to revise the scope so that the exclusion would only apply to blends of SHMP and other sodium phosphates, where SHMP accounts for less than 50 percent by volume of the total sodium phosphates. This is not simply a

clarification of the scope akin to Activated Carbon Final but an expansion of the scope because the language as proposed by petitioners serves to narrow the exclusion as it is currently written. Petitioners' proposal is not merely a "clarification," but rather, a change to the chemical composition of the types of products that they originally requested be excluded. The scope as written excludes all products that include less than fifty percent by volume of SHMP, whereas the petitioners' amendment would only exclude blends exclusively of SHMP and other sodium phosphates, that include less than fifty percent by volume of SHMP. It is further unclear how petitioners' proposed expansion of the scope would have impacted the analysis of industry support at the initiation stage of the proceeding. The Department therefore finds that it would be inappropriate to amend the scope at this stage in the proceeding, and thus, we have not incorporated this change into the scope language.

However, the Department finds that it is appropriate for the scope language be clarified to include imports of SHMP in solution/liquid form in the statement regarding the types of physical forms in which SHMP can consist. The current language in the scope already provides for SHMP in liquid solution, as it states that, "SHMP is typically sold as a white powder or granule (crushed) and may also be sold in the form of sheets (glass) or as a liquid solution." Therefore, the Department will amend the scope to read, "{t}he product covered by this investigation includes SHMP without regard to physical form, whether glass, sheet, crushed, granule, powder, fines, or other form, and whether or not in solution," (emphasis added). Because liquid SHMP is already included in the scope, the Department finds that adding a statement to the types of physical form in which SHMP can be sold to be a clarification to the scope, not an expansion.

Comment 2: Basis for the Final Determination

Petitioners argue that because Hubei Xingfa Chemicals Group Co., Ltd., ("Hubei Xingfa") withdrew from the investigation and refused to allow the Department to verify its questionnaire responses, the Department should use an adverse inference for purposes of the final determination, citing section 776(b) of the Tariff Act of 1930, as amended ("the Act"). Petitioners state that the Department utilized a conservative methodology in its notice of initiation, and found that based on the petition, dumping margins ranged between 76.69 percent and 103.62 percent, based on whether normal value was for an integrated or a non-integrated facility. Petitioners contend that the Department should use the calculated rate for Hubei Xingfa established in the preliminary determination as facts available for the company, as it is the highest margin on the record and reasonably accurate. Petitioners argue that consistent with Notice of Final Determination of Sales at Less Than Fair Value: Foam Extruded PVC and Polystyrene Framing Stock From the United Kingdom, 61 FR 51411 (October 2, 1996), the Department should not use a dumping margin from the initiation or the petition that is lower than the rate established in the preliminary determination, as that would reward the respondent for withdrawing from the investigation. In addition, petitioners cite F.lli De Cecco Di Filippo Fara S. Martino v. United States, 216 F. 3d 1027, 1032 (Fed. Cir. 2000), where the Court has found that margins based on adverse facts available should include "some built-in increase intended as a deterrent to non-compliance."

Additionally, petitioners argue that Hubei Xingfa's factor consumption data was not verified, and the Department did not have an opportunity to consider the use of Hubei Xingfa's self-generated electricity factors in the dumping calculation. However, petitioners argue that for purposes of the final determination, this rate should be used as adverse facts available for Hubei Xingfa, pursuant to section 776(b) of the Act, but the methodology used to calculate Hubei Xingfa's factor values for the preliminary determination should not be binding on future administrative reviews or investigations.

Moreover, petitioners argue that based on information in the petition, the estimated dumping margins for non-integrated producers of SHMP are higher than for integrated producers, such as Hubei Xingfa. Therefore, petitioners argue that a lower rate than Hubei Xingfa's margin should not be applicable to those companies receiving a separate rate, because a lower rate would not account for differences in production processes.

Department's Position:
Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Because Hubei Xingfa ceased participation in the instant investigation, the Department was not able to conduct verification of Hubei Xingfa's responses. Verification is integral to the Department's analysis because it allows the Department to satisfy itself that it is relying upon accurate information and calculating dumping margins as accurately as possible. By failing to participate in verification, Hubei Xingfa prevented the Department from verifying its reported information, including separate rates information, and significantly impeded the proceeding. Moreover, by not permitting verification, Hubei Xingfa failed to demonstrate that it operates free of government control and is entitled to a separate rate. Therefore, we find that, in accordance with sections 776(a)(2)(C) and (D) of the Act, the use of facts available for Hubei Xingfa is appropriate for this final determination.

We further agree with petitioners that Hubei Xingfa did not cooperate to the best of its ability when it withdrew from the investigation prior to verification. Section 776(b) of the Act authorizes the Department to apply an adverse inference with respect to an interested party if the Department finds that the party failed to cooperate by not acting to the best of its ability to comply with a request for information. We find that Hubei Xingfa's late withdrawal from participation and refusal to participate in verification constitutes a failure to cooperate by not acting to the best of its ability to comply with a request from the Department. Therefore, we find that when selecting from among the facts available, an adverse interest is warranted.

When the Department applies adverse facts available because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the

Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. See also 19 CFR 351.308(c) and the SAA at 870. In selecting from among the facts available, section 776(b) of the Act authorizes the Department to use an inference that is adverse to a party if the Department finds that the party has failed to cooperate by not acting to the best of its ability to comply with requests for information. See SAA 870. To examine whether the respondent "cooperated" by "acting to the best of its ability" under section 776(b) of the Act, the Department considers, inter alia, the accuracy and completeness of submitted information and whether the respondent has hindered the calculation of accurate dumping margins. See, e.g., Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808 (October 16, 1997). In this case, Hubei Xingfa has hindered the calculation of an accurate margin by withdrawing from verification. As AFA, due to its failure to demonstrate separateness, we have, as AFA, treated Hubei Xingfa as part of the PRC-wide entity. Accordingly, Hubei Xingfa will receive the rate assigned to the PRC-wide entity, which is 188.05 percent. See "The PRC-Wide Rate" section in the Final Determination of Sales at Less Than Fair Value: Sodium Hexametaphosphate from the People's Republic of China ("SHMP Final Determination").

In selecting the AFA rate for the PRC-wide entity, we did not use the petition rates because we have an alternative that we find to be sufficiently adverse to effectuate the purpose of the AFA provision of the statute. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Brazil, 69 FR 76910, 76912 (December 23, 2004). See also, Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Moldova, 67 FR 55790 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 2 and Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Venezuela, 67 FR 62119 (October 3, 2002) at 62120. We assigned the rate of 188.05 percent, which was based on information submitted by Hubei Xingfa in its questionnaire responses and database submissions, and remains on the record of this investigation. Because this information was provided to us by a respondent to this investigation, it is not considered to be secondary information, and therefore, needs not be corroborated. We conclude that this data, although unverified, continues to be the best information reasonably available to us to effectuate the purpose of AFA.

However, we disagree with petitioners' assertion that the Department should not assign a separate rate to the companies that have demonstrated separateness from the government that is lower than the rate assigned to Hubei Xingfa because the rate should take into consideration differences in production processes. As stated above, we find that Hubei Xingfa did not cooperate to the best of its ability in this investigation and, as AFA, we find them to be part of the PRC-wide entity. The rate assigned to Hubei Xingfa, as part of the PRC-wide entity, bears no relation to Hubei Xingfa's reported status as an integrated producer. In selecting a rate that was adverse, the rate calculated based on Hubei Xingfa's reported information is the highest rate on the record of this investigation, and thus the most appropriate for use as AFA pursuant to section 776(b) of the Act. We find that applying a rate that is based on AFA to a cooperative separate rate respondent to be inappropriate. In the absence of a rate calculated based on the

mandatory respondents, the Department may use any reasonable method to assign the separate rate. We find that applying an average of the petition rates, which are based on the experience of integrated and non-integrated producers to be both reasonable and reliable for purposes of establishing a separate rate. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Glycine from Japan, 72 FR 67271 (November 28, 2007) (citing Notice of Final Determinations of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Argentina, Japan and Thailand, 65 FR 5520, 5527-28 (February 4, 2000) and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coil from Canada, 64 FR 15457 (March 31, 1999)). For further information, see the "Separate Rates" section in SHMP Final Determination.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation programs accordingly. If accepted, we will publish the final results of the review and the final weighted-average dumping margins in the Federal Register.

AGREE_____ DISAGREE_____

_____
David M. Spooner
Assistant Secretary
for Import Administration

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Date