

DATE: February 27, 2007

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 Second Sunset Review
of the Antidumping Duty Order on Furfuryl Alcohol from
Thailand; Final Results

Summary

We have analyzed the case brief and the rebuttal comments of interested parties in the second sunset review of the antidumping duty order covering furfuryl alcohol from Thailand. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues upon which we received case brief and rebuttal comments from interested parties:

1. Good cause for considering additional factors.
2. Rejection of Penn’s September 11, 2006, submission of additional factual information.
3. Revocation based on two years’ worth of data.

Background

On April 3, 2006, the Department of Commerce (“the Department”) published the notice of initiation of the second sunset review of the antidumping duty order on furfuryl alcohol from Thailand pursuant to section 751(c) of the Tariff Act of 1930, as amended (“the Act”).¹ On April 7, 2006, the Department received a notice of intent to participate from Penn Speciality Chemicals, Inc. (“Penn”), a domestic interested party. The submission was received within the deadline specified in section 351.218(d)(1)(i) of the Department’s regulations (“Sunset

¹ Initiation of Five-year (“Sunset”) Reviews, 71 FR 16551 (April 3, 2006).

Regulations”). The domestic interested party claimed interested party status under section 771(9)(C) of the Act, as a manufacturer of a domestic like product in the United States.

On May 2, 2006, we received a complete substantive response from the domestic interested party. This response was received within the 30-day deadline specified in 19 CFR 351.218(d)(3)(I). This response included a claim by Penn that the Department had good cause to consider factors in its determination of whether dumping would recur if the order were revoked. On May 3, 2006, we received a substantive response from the respondent interested party, Indorama Chemicals (Thailand) Ltd. (“Indorama”), a foreign producer and exporter of subject merchandise during this review. In its substantive response, Indorama claimed interested party status under section 771(9)(A) of the Act. Pursuant to 19 CFR 351.218(d)(4), on May 8, 2006, Penn filed a rebuttal in response to Indorama’s May 3, 2006, substantive response.

On May 23, 2006, we found Indorama’s response to be adequate because Indorama is the only producer and exporter of furfuryl alcohol from Thailand and, therefore, accounted for more than 50 percent of the exports by volume of subject merchandise from Thailand to the United States during the sunset review period.² We also found that Penn had adequately responded to the notice of initiation under 19 CFR 351.218(e)(1)(i)(A).³ As a result, pursuant to section 751(c)(5)(A) of the Act and 19 CFR 351.218 (e)(2)(i), the Department began conducting a full sunset review of this order.

On September 11, 2006, Penn filed additional factual information. On September 15, 2006, the Department rejected Penn’s September 11, 2006 submission.⁴

On September 25, 2006, the U.S. International Trade Commission (“ITC”) published its final determination that revocation of the antidumping duty orders on furfuryl alcohol from Thailand and China would be likely to lead to continuation or recurrence of material injury. See Furfuryl Alcohol From China and Thailand, 71 FR 55804 (September 25, 2006).

On October 26, 2006, the Department published a notice of preliminary results of the full sunset review of the antidumping duty order on furfuryl alcohol from Thailand pursuant to section 751(c) of the Act. See Furfuryl Alcohol from Thailand; Preliminary Results of the Second Sunset Review of the Antidumping Duty Order, 71 FR 62583 (October 26, 2006) (“Preliminary

² See Memorandum to Susan H. Kuhbach, Director, AD/CVD Operations, Office 1, “Adequacy Determination in Antidumping Duty Sunset Review of Furfuryl Alcohol from Thailand,” (May 23, 2006) at page 2 (“Adequacy Memo”).

³ See id.

⁴ See Letter to Mr. Christopher Wall, Counsel to Penn, from Susan H. Kuhbach, Director, AD/CVD Operations, Office 1, “2nd Sunset Review of the Antidumping Duty Order on Furfuryl Alcohol from Thailand,” (September 15, 2006) (“Rejection Letter”).

Results”). We preliminarily determined that revocation of the order would not likely lead to a continuation or recurrence of dumping. We further determined that Penn failed to submit evidence in support of its claim that there was good cause to consider other factors (beyond the antidumping margins and the volume of shipments).

The Department conducted a verification of the data provided by Indorama on December 19 and 20, 2006. The verification report was issued on January 3, 2007.

In the Preliminary Results, we provided interested parties an opportunity to comment on our preliminary results. The Department received a case brief from Penn on January 16, 2007, and a rebuttal brief from Indorama on January 22, 2007. A hearing was not held because none was requested.

Discussion of the Issues

The Department has conducted this sunset review to determine whether revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping. Consistent with section 752(c)(1) of the Act, the Department considered the weighted-average dumping margins determined in the investigation and subsequent reviews, and the volume of imports of furfuryl alcohol from Thailand for the period before, and the period after, the issuance of the antidumping duty order. Additionally, pursuant to section 752(c)(2) of the Act, the Department considered whether good cause was shown to consider other price, cost, market or economic factors.

For determinations under section 752(c), the Statement of Administrative Action (“SAA”)⁵ identifies various scenarios that may provide a basis for finding that dumping is likely to continue or recur if an order is revoked: (1) declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order; (2) a cessation of exports; and (3) the existence of dumping margins after the issuance of an order. In contrast, the SAA points to declining (or no) dumping margins accompanied by increasing imports as a possible indication that continued or resumed dumping is not likely. See SAA at 889-90.

In this case, the Department found zero and de minimis margins for the only producer/exporter, Indorama, during the second sunset review period. The Department also found steady or increasing imports when comparing the pre-order levels and the import levels for the second sunset review period. These findings are not disputed by Penn.

As noted above, Penn contended that the Department had good cause to consider other factors. We address this issue below.

⁵ Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1 (1994).

Comment 1: Good cause for considering additional factors

Penn's Argument:

Penn argues that in the Preliminary Results, the Department failed to consider factors that would be more instructive than the exporter's constrained behavior resulting from the discipline of an antidumping duty order. Penn states that in its May 2, 2006, Substantive Response it asserted that good cause exists for the Department to consider other factors in its determination of whether dumping would continue or recur if the order is revoked. Penn argues that it submitted evidence to support its claim in the Substantive Response, and that the Department's Preliminary Results are incomplete and inaccurate because the Department failed to consider Penn's information and evidence regarding good cause.

Penn points to the SAA at 890 which states that, "the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order or agreement." Penn argues that the Department must carefully examine the furfuryl alcohol market to determine what would likely occur if the discipline of the order were removed. Penn argues that the Department did not perform the full analysis required in a sunset review as it neither considered pre-order behavior nor analyzed thoroughly the market in which the exporter participates.

Penn recounts the evidence it submitted in its Substantive Response to support its claim that the Department had good cause to examine other factors:

- Furfuryl alcohol is a commodity product;
- There is world-wide overcapacity in the furfuryl alcohol market;
- The importance of price in purchasing decisions in a market with limited number of purchasers;
- The flexibility that exporters have to quickly switch export markets; and
- The considerable incentive for exporters to engage in aggressive pricing to maintain and capture market share.

Penn argues that these are classic indicators of a market where dumping would be likely to occur, and that it has provided the Department with sufficient evidence for the Department to consider other factors in making its decision.

Indorama's Rebuttal:

Indorama agrees with the Preliminary Results and notes that the Department predicated its determination on the legislative history accompanying the Uruguay Round Agreements Act ("URAA"), and specifically on language in the SAA and the House and Senate Reports to the URAA that state:

declining (or no) dumping margins, accompanied by steady or increasing imports may

indicate that foreign companies do not have to dump in order to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.

Indorama argues that Penn did not allege any error of fact or law in the Department's Preliminary Results, nor in the accompanying Issues and Decision Memorandum, nor in the verification report and related verification exhibits. Further, Indorama argues that Penn did not claim that the Department erred in its examination of the statutorily mandated factors of:

- (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and
- (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.

See section 752(c)(1) of the Act.

Rather, according to Indorama, Penn alleges the Department failed to analyze factors other than the statutory factors the Department considered in making its Preliminary Results. Indorama argues that the Department was correct in finding that Penn provided no evidence to support its good cause claims in its Substantive Response. Indorama argues that Penn only speculated and assumed which does not constitute "good cause" as contemplated under the statute.

Department Position:

In the Preliminary Results, we found that Penn had not provided evidence of other factors that would indicate a likelihood of dumping if the order were revoked. In these Final Results, we elaborate and clarify our position.

In its Substantive Response, Penn argued that "world-wide over capacity for furfuryl alcohol ensures that {Indorama} will dramatically increase its exports to the United States," and that in order to achieve this increase, Indorama "must dramatically lower its price and dump." (See Penn's Substantive Response, at 6). To support this claim, Penn cited information from the ITC's determination in the 2001 sunset review of this order. This information included findings about overcapacity, the commodity nature of the product, the importance of price in purchasers' decisions, etc.⁶

⁶ Among the citations to the 2001 ITC Report is a reference to market share and the incentive Chinese and Thai exporters have to increase market share. In this connection, Penn points to import data showing that Indorama's share of imports dropped from approximately 24 to 8 percent between 1994 and 2005. We note that the HTS category covering furfuryl alcohol also includes tetrahydrofurfuryl alcohol and, consequently, it is not clear that these statistics even measure Thailand's share furfuryl alcohol imports into the United States. Penn did not further

We continue to find that this evidence did not provide good cause to consider other factors. Moreover, even if we consider the evidence, we find that the factors cited by Penn do not, in this case, lead to the conclusion that Indorama must “lower its prices and dump.”

First, we disagree that Penn’s references to the 2001 ITC report provide good cause to consider other factors in this second sunset review. The 2001 ITC report covered the first sunset review period (1996-2000) and not this second sunset review period of 2001-05. Because Penn produces and markets furfuryl alcohol, it is in a position to provide current evidence to support its contentions. In these circumstances, reliance on outdated evidence does not provide good cause.⁷

Beyond this, the evidence cited does not support the claim that dumping is likely to continue or recur. According to Penn, over capacity in the industry and the other cited factors will lead Indorama to increase its exports and, necessarily, to dump if the antidumping order is revoked. However, even if we accepted that the conditions existing at the time of the first sunset review were appropriate to consider in this sunset review, which we do not, it is relevant to note that in the past five years, Indorama has not had to dump to increase its sales to the United States. Specifically, in this time period, Indorama’s exports to the United State increased (both in comparison to the pre-order period and in comparison to the first sunset period) and Indorama was found not to be dumping (or dumping at the de minimis level) in the two administrative reviews that were conducted. Therefore, even if over capacity and the other cited factors continue to exist today, these factors are not predictors of dumping in this case. Instead, consistent with the statutory scheme, we are relying on Indorama’s behavior of selling in the United States at non-dumped prices and at volumes that equal or exceed pre-order levels as the best predictor of whether dumping is likely to recur.

As the Department has stated, the burden is on the interested party alleging good cause to provide information in support of its claim that the other factors are relevant to the likelihood of continued or resumed dumping. See, e.g., Fresh and Chilled Atlantic Salmon From Norway: Final Results of the Full Sunset Review of Antidumping Duty Order, 70 FR 77378, December 30, 2005, and accompanying Issues and Decision Memorandum at “Discussion of Issues.” Clearly, Penn has not met this burden. As explained above, the over capacity and other cited factors are not relevant to the likelihood of dumping in this case.

elaborate on how a decrease in Indorama’s share of imports of furfuryl alcohol, if any, would be related to U.S. market share during the current sunset review period.

⁷ In its January 16, 2007, case brief, Penn refers to the ITC’s determination in this second sunset review of furfuryl alcohol, Furfuryl Alcohol from China and Thailand, Investigation Nos. 731 - TA - 703 and 705 (Second Review), U.S. International Trade Commission, Publication 3885 (September 2006) (“ITC Second Sunset Final”). Clearly, this information is untimely as the deadline for good cause claims and supporting evidence is 30 days after the initiation of the review (see Department’s response to comment 3, below).

Moreover, the arguments Penn made to support its claim that dumping is likely to continue or recur are apparently the same arguments it made to the ITC. The Department has previously dismissed arguments relevant to the likelihood of injury, but not to the likelihood of resumed dumping. See Fresh and Chilled Atlantic Salmon From Norway: Final Results of the Full Sunset Review of Antidumping Duty Order, 70 FR 77378 (December 30, 2005) and accompanying Issues and Decision Memorandum at Comment at Comment 1. (“In this case, respondents have not demonstrated the relevance of the other factors they have cited. Instead, they appear to reiterate arguments presented to the ITC to address the likelihood that injury would recur in the concurrent sunset review being conducted at that agency. Where an interested party fails to provide information sufficient to demonstrate the relevance to the Department’s likelihood analysis, the Department has no statutory obligation to consider such a factor in its likelihood determination.”).

Therefore, we have continued to limit our consideration to Indorama’s dumping margins in the second sunset review period and the volumes of exports. In this second sunset review period, two administrative reviews have been conducted with Indorama first receiving a de minimis margin, and then a zero margin. Furthermore, we verified the volume and value data submitted by Indorama in its substantive response at Indorama’s production facility in Thailand. The Department found no issues at verification that would lead us to question the volume and value data we relied upon in making our determination. As noted by Indorama, Penn has not challenged the facts we relied upon in making our determination.

According to the Uruguay Round Agreements Act, specifically the SAA at 899-90:

declining (or no) dumping margins, accompanied by steady or increasing imports may indicate that foreign companies do not have to dump in order to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.

After examining the behavior of Indorama over this five year sunset review period (with higher import volumes when compared to pre-order levels and zero or de minimis margins), we determine that Indorama has demonstrated that it can export to the United States without dumping in the future. Consequently, we continue to find that revocation of the dumping order would not likely lead to a continuation or recurrence of dumping.

Comment 2: Rejection of Penn’s September 11, 2006, submission of additional factual information

Penn’s Argument:

Penn argues that the Department’s rejection of Penn’s September 11, 2006, submission of additional factual information hindered Penn’s right to participate meaningfully in the sunset review. In doing so, Penn contends, the Department disregarded its own regulations relating to

the submission of factual information.

Penn argues that it submitted factual information to the Department in its September 11, 2006, submission, and not good cause argumentation. Penn requests that the Department reconsider its decision to reject the September 11, 2006, submission and use the information it contained in the final results.

Indorama's Rebuttal:

Indorama argues that the Department correctly rejected Penn's September 11, 2006, submission and that the Department already addressed Penn's arguments related to the consideration of other factors in the Issues and Decision Memorandum from the Preliminary Results. Indorama states that the Department should continue to reject Penn's September 11, 2006, submission.

Department Position:

The Department's regulations are clear that good cause claims and evidence to support them must be filed as part of the substantive response. Section 351.218(d)(3)(iv)(A) of the Department's regulations states that "an interested party may submit information or evidence to show good cause for the Secretary to consider other factors under...section 752(c)(2) (AD) of the Act and paragraph (e)(2)(ii) of this section. Such information or evidence must be submitted in the party's substantive response to the notice of initiation under paragraph (d)(3) of this section." Further, the Department's regulations at 351.218(d)(3)(i) state that "a complete substantive response to a notice of initiation, filed under this section, must be submitted to the Department no later than 30 days after the date of publication in the Federal Register of the notice of initiation." Accordingly, the Department's regulation requires parties to submit their good cause arguments and evidence in their substantive responses no later than 30 days after initiation of the sunset review.

The Department published the initiation notice in this case on April 3, 2006. Consequently, the period for submitting good cause allegations and evidence expired on May 3, 2006. See 19 CFR 351.218(d)(3)(iv)(A); 19 CFR 351.218(d)(3)(I).

On September 11, 2006, Penn filed a submission, which contained argument and information regarding its good cause allegations. Because Penn's September 11, 2006, submission was made more than five months after the date of publication of the notice of initiation and contained only argument and information regarding good cause, we rejected the submission in its entirety as untimely filed.⁸ See 19 CFR 351.218(d)(3)(iv)(A); 19 CFR 351.218(d)(3)(I).

We disagree that our rejection of Penn's September 11, 2006, submission hindered Penn's right

⁸ See Rejection Letter (September 15, 2006).

to participate meaningfully in the sunset review. Given that sunset reviews are initiated on a regular basis, the parties know well in advance that the review of a particular order will be coming. Also, the deadlines in the regulation are clear. Thus, the thirty days permitted after the initiation of a sunset review is ample time to make and support a good cause claim.

We further disagree that Penn's claim that its September 11, 2006, submission was not good cause argumentation. For example, the introduction (Section 1) expressly refers to the good cause argument asserted in the Substantive Response and does not refer to any other arguments. Sections 2 through 4 provide and discuss information concerning Part 3 of the Substantive Response that deals exclusively with good cause arguments. And Section 5 is the conclusion of these arguments. Therefore, the Department continues to find that Penn's September 11, 2006, submission addressed good cause and, consequently, was properly rejected as untimely.

Comment 3: Revocation based on two years' worth of data

Penn's Argument:

Penn argues that the Department should not revoke this antidumping order solely on the basis that during two years of the eleven-year life of the order an exporter did not dump when the Department has been informed by the ITC that the furfuryl alcohol market exhibits classic indicators of a market ripe for dumping, and that revoking the order will materially injure a U.S. industry.⁹ Further, Penn argues that the exporter has never requested revocation in the annual administrative review process and claims that it could not meet the Department's criteria for revocation.

Indorama's Rebuttal:

Indorama argues that adoption of Penn's argument would make a nullity of the statutory mandate that the Department conduct sunset reviews. The Department is not required to continue the order if the ITC makes a positive material injury finding or there would be no reason for the Department to conduct its own sunset review. Indorama argues that the Department should affirm its Preliminary Results and issue its final results determining that revocation of the antidumping duty order on furfuryl alcohol from Thailand is not likely to lead to a continuation or recurrence of dumping.

Department Position:

As noted above, the Department normally will determine that revocation of an antidumping duty order is likely to lead to a continuation or recurrence of dumping where (a) dumping continued at any level above de minimis after the issuance of the order, (b) imports of the subject merchandise ceased after the issuance of the order, or (c) dumping was eliminated after the issuance of the

⁹ See ITC Second Sunset Final.

order and import volumes for the subject merchandise declined significantly.¹⁴ In this case, (a) dumping did not continue at any level above de minimis, (b) imports actually increased after the issuance of the order, and (c) dumping was eliminated and import volumes actually increased. Thus, the fact pattern in this case is consistent with the scenario described in the SAA at 889-90, the House Report at 63, and the Senate Report at 52, i.e., “declining (or no) dumping margins, accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.” We believe that Congress gave thoughtful consideration to the factors that should lead to revocation in a sunset review and both the statutory factors and the record support such revocation in this case.

In essence, Penn argues that the Department should not follow the antidumping statute and its regulations. We cannot accept this argument. See Torrington Co. v. United States, 82 F.3d 1039, 1049 (Fed. Cir. 1996) (“Commerce, like other agencies, must follow its regulations.”); Paralyzed Veterans of Am. v. West, 138 F.3d 1434, 1436 (Fed. Cir. 1998) (“It is axiomatic that an agency must act in accordance with applicable statutes and its regulations.”) (citations omitted).

Concerning Penn’s comments regarding Indorama’s reasons for not requesting revocation in the course of an administrative review, we will not speculate as to why a respondent did not request such revocation. Neither the Act nor the Department’s regulations require respondents to request revocation in an administrative review in order to obtain revocation in a sunset review.

Finally, the Department is aware of the ITC’s likelihood of injury determination concerning the cumulated imports of furfuryl alcohol from China and Thailand.¹⁵ Notably, the ITC examined the effect of imports from China and Thailand combined, while we conducted independent analyses of likelihood of continuation or recurrence of dumping for each of the two countries. Furthermore, under the carefully crafted statutory scheme, the likelihood of continuation or recurrence of injury and the likelihood of continuation or recurrence of dumping are two separate and independent determinations that do not mandate the same outcome. See sections 752(a) and (c) of the Act. See also Stainless Steel Angle from Japan, the Republic of Korea, and Spain: Final Results of Sunset Reviews and Revocation of Orders, 71 FR 34599 (June 15, 2006) (the Department revoked the order without input from the ITC). See also Final Results of Full Sunset Review: Brass Sheet and Strip from France, 71 FR 10651 (March 2, 2006) (the Department revoked the order without input from the ITC). See also Revocation of Antidumping and

¹⁴ See SAA at 889 and 890, House Report, H. Rep. No. 103-826, pt. 1 (1994) (“House Report”) at 63-64, and Senate Report, S. Rep. No. 103-412 (1994) (“Senate Report”) at 52.

¹⁵ Section 751(c)(5)(D) of the Act states that in “grouped reviews” the ITC shall make its final determination no later than 120 days after the date the Department publishes notice of its final determination with respect to the last order in the group.

Countervailing Duty Order: Brass Sheet and Strip from Brazil and Canada, 71 FR 16115 (March 30, 2006) (the Department found a likelihood of continuation of dumping but the ITC found no injury and the orders were revoked). See also Revocation of Antidumping Duty Order: Certain Internal-Combustion Industrial Forklift Trucks from Japan, 71 FR 7015 (February 10, 2006) (the Department found a likelihood of continuation of dumping but the ITC found no injury and the orders were revoked). The antidumping statute establishes a highly specialized system, which recognizes and exploits each participant's area of expertise. See Nippon Steel Corp. v. United States, 458 F.3d 1345, 1350 (Fed. Cir. 2006). In the context of sunset reviews, the Department's determination concerns likelihood of continuation or recurrence of dumping, which is independent from the ITC's likelihood of injury determination. See section 751(c) of the Act. In contrast, the ITC has no statutory authority to determine the likelihood of continuation or recurrence of dumping. Accordingly, it would be contrary to the statutory scheme for the Department to abdicate a determination of the likelihood of continuation or recurrence of dumping in sunset reviews to the ITC.

Final Results of Review

We continue to find that revocation of the antidumping duty order on furfuryl alcohol from Thailand would not be likely to lead to the continuation or recurrence of dumping.

We will notify the ITC of our final results. We do not intend, however, to report a rate to the ITC as a determination by the Department that revocation of the order would not lead to a continuation or recurrence of dumping will result in revocation of the order.¹⁶ Moreover, the ITC has already ruled in this proceeding.

¹⁶ Contrary to the ITC's statement that the order on furfuryl alcohol from Thailand remains in place, the Department's sunset determination in this proceeding will, in fact, result in the order being revoked. See ITC News Release 06-093 (September 1, 2006) concerning Inv. Nos. 731-TA-703 and 705 (Second Review).

Recommendation

Based on our analysis and consideration of the case and rebuttal briefs received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review in the Federal Register.

AGREE _____

DISAGREE _____

David M. Spooner
Assistant Secretary
for Import Administration

Date