

April 13, 2010

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2007-2008 Administrative Review of the Antidumping Duty Order
on Certain Circular Welded Non-Alloy Steel Pipe from Mexico

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2007-2008 administrative review of the antidumping duty order on certain circular welded non-alloy steel pipe from Mexico. As a result of our analysis and as discussed below, we have not made any changes to the margins assigned to respondents. 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 for which we received comment from parties:

Comment 1: Application of Total Adverse Facts Available (AFA) to Ternium
Comment 2: Application of Total AFA to Mueller
Comment 3: Rescission of Administrative Review for TUNA

Background

On December 7, 2009, the Department published the preliminary results of this review for the period November 1, 2007, to October 31, 2008. See Certain Circular Welded Non-Alloy Steel Pipe From Mexico; Preliminary Results of Antidumping Duty Administrative Review, 74 FR 64049 (December 7, 2009) (Preliminary Results). In response to the Department’s invitation to comment on the Preliminary Results, petitioner United States Steel Corporation (U.S. Steel), and respondents Ternium Mexico, S.A. de C.V. (Ternium)¹ and Mueller Comercial de Mexico, S. de

¹ Consistent with the Preliminary Results, and the Department’s changed circumstances review of this order which found Ternium the successor-in-interest to Hylsa, we continue to consider Ternium and Hylsa as a single entity. See Preliminary Results; see also Final Results of Antidumping Duty Changed Circumstances Review: Certain Circular Welded Non-Alloy Steel Pipe and Tube from Mexico, 74 FR 41681 (August 18, 2009).

R.L. (Mueller) filed their case briefs on January 6, 2010. U.S. Steel and respondent Tuberia Nacional, S.A. de C.V. (TUNA) submitted rebuttal briefs on January 14, 2010.²

Discussion of the Issues

Comment 1: Application of Total AFA to Ternium

Ternium states the Department should not have applied 48.33 percent as the dumping margin in the Preliminary Results and argues the Department should apply 32.62 percent, the highest published rate from a prior proceeding, as the dumping margin for these final results. According to Ternium, the Preliminary Results deviated from the Department's normal practice of using the highest published rate from a prior proceeding as an AFA rate. See Ternium's Case Brief at 4, footnote 4, citing, *inter alia*, Stainless Steel Bar from Spain: Final Results of Antidumping Duty Administrative Review, 72 FR 42395 (August 2, 2007) (Stainless Steel Bar from Spain). Ternium disputes three reasons which it claims the Department used in supporting its use of 48.33 percent for the Preliminary Results. First, Ternium states the Department claims 32.62 percent is not adverse because it was calculated based on information submitted by a fully cooperative respondent. Ternium objects to this rationale and states the Department has used rates from cooperative respondents that were deemed "adverse" as facts available for non-responding exporters in other cases, citing Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 70 FR 54023 (September 13, 2005) (Stainless Steel Bar from India) and accompanying Issues and Decision Memorandum at Comment 1 and Final Results of Redetermination Pursuant to Court Remand, In the Matter of Heveafil Sdn. Bhd. and Filati Lastex Sdn. Bhd. v. United States (Ct. Int'l Trade 2003) (September 4, 2003) (Heveafil and Filati Lastex v. United States.) See Ternium's Case Brief at 4 and 5. Second, Ternium disagrees with the Department's finding that because 32.62 percent is the all-others cash deposit rate assigned to companies which do not have their own rate (*i.e.*, Mueller), this rate would not serve to induce cooperation from such companies. Rather, Ternium states the Department's reliance on 32.62 percent being equal to the all-others rate is in error and that the exporter's incentive to respond is simply unaffected by the all-others cash deposit rate. In particular, Ternium argues, "an economically rational exporter deciding whether to respond to the Department's questionnaire must compare the outcome of responding against the outcome of not responding . . . the outcome of responding depends on the actual dumping margin on the exporter's sales – not the deposit rate collected at the time of entry . . . the outcome of not-responding is the facts available rate assigned by the Department." See Ternium's Case Brief at 6. Third, Ternium contests the Department's claim that 48.33 percent was similar to individual dumping margins calculated for Ternium's predecessor, Hylsa in the most recently completed administrative review of Hylsa (*i.e.*, the 1997-1998 POR.) and points out the overall dumping margin found for Hylsa in that review was 10.38 percent, which demonstrates 32.62 percent would be sufficiently adverse. *Id.* at 6 and 7.

² On January 7, 2010, U.S. Steel requested an extension of its rebuttal brief which was granted by the Department. The new deadline for all parties' rebuttal briefs was set for January 14, 2010.

Ternium adds it is the Department's fundamental objective to calculate the dumping margins as accurately as possible based on the information available. However, where information from a respondent is not available, (e.g., where a party does not respond to the questionnaire) Ternium acknowledges the Department has found it reasonable to assume the dumping margins would have been as high as the highest previously published rate (see, e.g., Rhone Poulenc v. United States, 899 F.2d 1185, 1190-91 (Fed. Cir. 1990)). Ternium disagrees with this assumption and argues the Department's "logic," in fact, overstates the actual margin by ignoring administrative costs involved with responding to the Department's questionnaire. For example, Ternium suggests a rational respondent might not respond to the Department's questionnaire in circumstances where the actual dumping margin was lower than the highest previously published rate because the costs of preparing the response could be greater than the amount of duties saved by responding and receiving an even lower rate. See Ternium's Case Brief at 7 and 8. For the instant review, Ternium contends there is no indication the exporter's actual dumping margin would have been higher than the highest previously published rate of 10.38 percent, let alone as high as a single-transaction margin calculated for a different respondent from a prior review.³ Thus, Ternium contends there is no basis to conclude the 48.33 percent rate assigned by the Department as AFA bears any relation to Ternium's actual dumping margins during the POR. Id. at 8.

Additionally, Ternium states it should not be assigned a dumping margin based on AFA in this review because its export volumes were small and remained subject to review only because one of the domestic producers requested its review.⁴ Ternium insists it also underwent a restructuring of operations during the POR and would have experienced a great burden to respond to the Department's questionnaire given it and its affiliates are involved in the entire steel production process. As such, Ternium implores the Department to modify its Preliminary Results. Yet, if the Department continues to find it appropriate to assign Ternium an AFA rate, Ternium argues the Department should at least adhere to its usual practice of applying the highest published rate from an investigation, or prior administrative review. See Ternium's Case Brief at 9.

In rebuttal, U.S. Steel highlights Magnesium Metal From the Russian Federation: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 39919 (August 10, 2009) (Magnesium Metal From Russia) as an example where the Department employed the highest transaction-specific rate as AFA from a previous administrative review after finding the highest calculated weighted-average margin was "insufficiently adverse." U.S. Steel maintains in the instant proceeding, the all-others rate is not merely insufficiently adverse, but rather is not adverse at all. See U.S. Steel's Rebuttal Brief at 4, citing Stainless Steel Bar from Spain and its accompanying Issues and Decision Memorandum at Comment 6. Further, U.S. Steel asserts the

³ Ternium notes 10.38 percent was the margin calculated for Hylsa in Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review, 65 FR 37518 (June 15, 2000). See Ternium's Case Brief at 7.

⁴ As stated in the Preliminary Results, on December 1, 2008, Ternium requested the Department to conduct an administrative review and indicated its predecessor was Hylsa. Then, on April 8, 2009, Ternium withdrew its request for review and asked the Department to extend the deadline described under 19 CFR 351.213(d)(1) to terminate the review with respect to Ternium.

Court of International Trade (CIT) upheld the Department's use of transaction-specific margins as AFA in Branco Peres Citrus v. United States, 173 F. Supp.2d 1363, 1377 (Ct. Int'l Trade 2001) (Branco Peres Citrus v. United States) and thus, the use of 48.33 percent is consistent with the Department's normal practice. As such, U.S. Steel urges the Department to continue to apply 48.33 percent as the AFA rate to Ternium for these final results.

Further, U.S. Steel contends the use of the all-others rate of 32.62 percent as AFA ignores instruction from the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (SAA) to take into account the extent to which a respondent may benefit from its own lack of cooperation. See U.S. Steel's Rebuttal Brief at 2. In particular, U.S. Steel states the Department and the courts have acknowledged the use of adverse inferences is intended to serve this statutory purpose and ensure parties who choose not to cooperate in a proceeding do not benefit from their lack of cooperation. Id. Consequently, U.S. Steel states the AFA rate must be inherently adverse, and maintains the Department has previously determined the all-others rate is not adverse. For instance, in the preliminary determination of the investigation of this case, the Department found that Industrias Monterrey, S.A. (IMSA) failed to cooperate and preliminarily assigned it an adverse rate derived from the petition. However, the Department reversed course in the final determination of that investigation and decided not to apply any adverse inferences to IMSA, and alternatively assigned it the all-others rate. U.S. Steel states that in doing so, the Department recognized the all-others rate was not adverse. Id. at 3. Similarly, U.S. Steel maintains the Department did not assign a non-cooperative respondent the all-others rate in Stainless Steel Bar from Spain, where it concluded "by definition, this rate is not based upon any adverse assumption or an adverse rate." See U.S. Steel's Rebuttal Brief at 3, citing Stainless Steel Bar from Spain and its accompanying Issues and Decision Memorandum at Comment 6. Thus, U.S. Steel states, Mueller and Ternium are incorrect in having claimed the use of 48.33 percent as an AFA rate is inconsistent with Department practice.

Department's Position: Because Ternium failed to cooperate to the best of its ability in this review by refusing to answer our questionnaire, we have applied total AFA for these final results. In doing so, we determine 48.33 percent is the appropriate dumping margin to assign Ternium as total AFA. As stated in the Preliminary Results, we reviewed potential rates from among those sources outlined in section 776(b) of the Act which provides that an adverse inference may include reliance on information derived from either (1) the petition; (2) a final determination in the investigation; (3) any previous review; or (4) any other information placed on the record. Here, the Department relied on information from a prior administrative review, namely the highest transaction-specific margin from the most recently completed review of this order (i.e., 1998-1999 POR).

First, we disagree with Ternium that our selection of the highest transaction-specific rate as AFA is inconsistent with Department practice. For example, the use of the highest transaction-specific margin has been employed in numerous cases. See e.g., Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review, 75 FR 7563 (February 22, 2010) and accompanying Issues and Decision Memorandum at Comment 1; see also Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 2511 (January 15, 2009) and accompanying

Issues and Decision Memorandum at Comment 1; Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania, 71 FR 7008 (February 10, 2006) and accompanying Issues and Decision Memorandum at Comment 1. Further, as stated in Magnesium Metal From Russia, the CIT in Branco Peres Citrus v. United States has affirmed the Department's use of the highest transaction-specific dumping margin as a respondent's AFA rate to ensure that the respondent does not obtain a more favorable rate by being uncooperative. The circumstances in this case warrant the use of the highest transaction-specific margin as AFA which is consistent with administrative precedent in Magnesium Metal From Russia and judicial precedent before the CIT.

Moreover, the Federal Circuit in Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (Ta Chen) explained that the Department has considerable discretion in selecting an AFA rate, "so long as the data {are} corroborated, Commerce acts within its discretion when choosing which sources and facts it will rely on to support an adverse inference." See Ta Chen at 1339, citing F.Lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032-34 (Fed. Cir. 2000) (De Cecco di Fillipo v. United States). Moreover, the Federal Circuit affirmed the use of a single transaction-specific margin as a basis for an AFA rate in Ta Chen. See Ta Chen at 1339. As explained more fully in Comment 2 below, the Department properly corroborated the rate, a fact that Ternium does not dispute.

Second, we disagree with Ternium that 32.62 percent as an AFA rate is sufficiently adverse to Ternium. The Federal Circuit recognized that Congress "intended for an AFA rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." See De Cecco di Fillipo v. United States at 1032; see also Ta Chen. The all-others rate of 32.62 percent, advocated by Ternium is not a sufficient deterrent in this case because it ignores the purpose of an adverse inference, *i.e.*, providing incentive for companies to cooperate in future administrative reviews. For example, Ternium's case brief suggests Ternium decided not to cooperate because it believed it would receive the highest rate published (32.62 percent) for any respondent from the original investigation or a prior review. Ternium's case brief states:

Under the Department's longstanding practice, the facts available rate for non-responding producers in an administrative review is normally based on the highest rate for any respondent published in the original investigation or in a prior review. In other words, if the Department had followed its normal practice, it would have assigned a 32.62 percent "facts available" rate to Ternium and the other non-responding Mexican exporters.

See Ternium's Case Brief at 4. Ternium further stated:

an economically rational exporter deciding whether to respond to the Department's questionnaire must compare the outcome of responding against the outcome of not responding . . . the outcome

of responding depends on the actual dumping margin on the exporter's sales – not the deposit rate collected at the time of entry . . . the outcome of not-responding is the facts available rate assigned by the Department.

See Ternium's Case Brief at 6.

We disagree with Ternium's argument that the statute and the Department's practice favors an exporter's ability to determine whether or not it is beneficial for the exporter to cooperate with the Department's request for information. The purpose of the adverse inference provision of the statute is to prevent non-responding companies from benefitting from being uncooperative.

Additionally, the all-others rate is a rate that applies to companies which were not previously reviewed and actually contains no adverse inference. Section 735(c)(5)(A) of the Act instructs that normally we are not to calculate an all-others rate using any zero margins, de minimus margins, or any margin based entirely on AFA. Accordingly, by definition, the all-others rate does not reflect any adverse inference and is not an adverse rate. Thus, it is inappropriate to assign a non-adverse all-others rate to a respondent that refused to cooperate. As such, 32.62 percent does not satisfy the objective of applying AFA in this case, which is to prevent non-responding companies from benefitting from being non-compliant by application of a rate based on adverse inferences.

Moreover, the circumstances in the instant review differ from Stainless Steel Bar from India, Stainless Steel Bar from Spain and Heveafil and Filati Lastex v. United States. In these cases the highest calculated rate for a respondent in any segment was not equal to the all-others rate, which we have established is not adverse. As such, the 48.33 percent rate meets the criteria set forth in the statute for selecting AFA. Further, with respect to Ternium's argument that there is no indication that its actual dumping margin would be higher than its previously published rate of 10.38 percent, Ternium's refusal to respond to the Department's questionnaire and provide the Department with their data makes the calculation of Ternium's actual dumping margin impossible.

With respect to Ternium's argument that it should not be subject to AFA in this review because its export volumes were small, we note that Ternium refused to report its sales, entries and exports during the POR. However, the record evidence demonstrates that Ternium was one of the three largest exporters during the POR. More importantly, section 751(a) of the Act requires the Department to review and determine the amount of any antidumping duty, if a request for review has been received. Here, the petitioner U.S. Steel requested review of Ternium on December 1, 2008 and did not withdraw that request. Furthermore, restructuring of operations is not an excuse for refusing to participate in a review; the Department has reviewed many companies that were undergoing restructuring during the POR, or over the course of a proceeding. See e.g., Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review, 74 FR 47201 (September 15, 2009) and accompanying Issues and Decision Memorandum at Comment 11; Notice of Final Determination

of Sales at Less Than Fair Value: Citric Acid and Certain Citrate Salts from Canada, 74 FR 16843 (April 13, 2009).

Comment 2: Application of Total AFA to Mueller

Mueller argues the Department's preliminary decision to use a single transaction-specific margin as AFA is based on a factual misunderstanding. In particular, Mueller disputes the Department's explanation that "as Mueller has never previously been reviewed by the Department, it is currently subject to the 32.62 percent rate." See Mueller's Case Brief at 2, citing the Department's Memorandum to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Certain Circular Welded Non-Alloy Steel Pipe from Mexico, Use of AFA and Corroboration of AFA Rate," dated November 30, 2009 (Corroboration Memorandum). Mueller clarifies that it sourced entries from TUNA and Ternium's predecessor Hylsa during the POR, and as an exporter of subject merchandise the all-others rate does not apply in these circumstances. Rather, Mueller states the all-others rate pertains to producers that do not have their own individual rates. Therefore, Mueller states the Department does not need to depart from its long-standing practice of using the highest overall rate in order to provide Mueller an incentive to cooperate. See Mueller's Case Brief at 4.

In particular, Mueller maintains the Department's preliminary decision to apply 48.33 percent as an AFA rate in this case is not in accordance with law for several reasons. First, Mueller contends the Department has not provided a valid explanation for deviating from its normal practice of assigning the highest overall rate as AFA. In particular, Mueller references various cases where the Department deemed it appropriate to use the highest rate in any segment of the proceeding as AFA. See Mueller's Case Brief at 5, footnote 7, citing, *inter alia*, Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39940 (July 11, 2008); Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 57329 (October 2, 2008). In addition, Mueller argues that in Certain Lined Paper Products From the People's Republic of China: Notice of Final Results of the Second Administrative Review of the Antidumping Duty Order, 74 FR 63387 (December 3, 2009), which published after the Preliminary Results, the Department also employed the highest overall rate as AFA to a non-responding company. See Mueller's Case Brief at 5. Mueller asserts it is only in extraordinary circumstances where the Department has not used the highest published rate assigned from a prior segment. For example, in Steel Wire Rope From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 64 FR 17995 (April 13, 1999), Mueller states the Department applied a petition rate as AFA only after a long history of non-compliance by multiple respondents and a very low AFA rate. Further, in Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta From Italy, 67 FR 300 (January 3, 2002) Mueller avers, the Department used price list data to calculate the AFA rate after the court rejected use of an uncorroborated petition rate. See Mueller's Case Brief at 5 and footnote 9. However, Mueller maintains these circumstances do not exist in the instant review. Mueller also objects to the Department's reliance on Magnesium Metal From Russia to support its AFA decision

because the non-cooperating respondent was already subject to the highest published rate (*i.e.*, 21.71 percent) for cash deposit purposes. See Mueller’s Case Brief at 6. In Magnesium Metal From Russia, Mueller states the Department used a transaction-specific rate because the non-cooperating respondent would not have otherwise suffered any adverse consequence for its failure to cooperate. In contrast, Mueller argues it is not currently subject to the highest published rate from this proceeding and applying it would, in fact, be significantly adverse to Mueller. See Mueller’s Case Brief at 6.

Second, Mueller asserts the transaction-specific margin lacks probative value. Citing De Cecco di Fillipo v. United States, Mueller states the purpose of AFA “is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins” (emphasis supplied.) See Mueller’s Case Brief at 6. Mueller states the Department is required to corroborate, to the extent practicable, secondary information used as AFA and must examine whether such information has probative value. Mueller urges the Department when relying on a transaction-specific margin as total AFA, it should consider various factors of the transaction to ensure the margin is not aberrational (*e.g.*, quantity, product type, product dimensions, price adjustments, whether or not it is prime/nonprime). In the Preliminary Results, Mueller argues the Department did not conduct such an analysis and merely provided a public version of the output results from the 1998-1999 POR listing only the margin results. Mueller maintains the Department should include the proprietary version of the margin results on the record to allow interested parties to comment on all information. Further, Mueller insists a transaction-specific margin generated by a single sale of one product does not reflect the “overall commercial activity of the industry” as claimed by the Department. For example, the highest overall margin calculated for any respondent since publication of the order in 1992 is 10.38 percent. Even the transaction-specific margin at issue does not reflect overall activity of the respondent reviewed in the 1998-1999 POR (*i.e.*, TUNA) whose weighted-average margin for that POR was 2.92 percent. Mueller contends 48.33 percent is almost 40 times higher than TUNA’s overall margin, and thus, denotes an aberration. See Mueller’s Case Brief at 8.

Again referencing De Cecco di Fillipo v. United States, Mueller argues the Department should assign separate assessment rates for entries sourced from TUNA and Hylsa (Ternium), which according to Mueller, would create an incentive for cooperation while fulfilling Congressional intent that AFA “be a reasonably accurate estimate of the respondent’s actual rate.” See Mueller’s Case Brief at 9, citing De Cecco di Fillipo v. United States at 1034. For example, Mueller proposes that subject merchandise sourced from TUNA should be assessed at the rate of 10.38 percent, which is the highest rate calculated in any prior administrative review. Meanwhile, for subject merchandise sourced from Hylsa, Mueller suggests the Department assign the highest overall rate from all segments of this proceeding, which is 32.62 percent from the investigation. With respect to cash deposits, Mueller maintains 32.62 percent would be the appropriate rate to apply to Mueller as it is sufficiently adverse given existing cash deposit rates of 2.92 percent and 10.38 percent for TUNA and Hylsa, respectively. See Mueller’s Case Brief at 9 and 10.

Finally, Mueller argues there is no requirement that an AFA rate be based on a rate that was itself calculated using AFA. Id. at 10. Rather, Mueller states the Department regularly selects

AFA rates on the basis that they were the highest rate assigned to a respondent in a segment of the proceeding regardless of whether they included adverse inferences (e.g., Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39940 (July 11, 2008); Notice of Final Results of Antidumping Duty Administrative Review of Elemental Sulphur from Canada, 65 FR 11980 (March 7, 2000)). Mueller adds the preliminary rate selected by the Department also was not based on adverse inferences, thus confirming the Department need not limit its AFA choices to margins that were themselves based on adverse inferences.

U.S. Steel disagrees with Mueller and urges the Department to continue to apply 48.33 percent as the AFA rate to Mueller for these final results. In particular, U.S. Steel challenges Mueller's characterization of which assessment rate it was subject to during the POR and cites the Department's assessment regulations involving companies such as Mueller, who source material from other manufacturers:

{i}f the Department determines in the administrative review that the producer did not know that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will not be liquidated at the assessment rate the Department determines for the producer or automatically at the rate required as a deposit at the time of entry. In that situation, the entries of merchandise from the reseller during the period of review will be liquidated at the all-others rate if there was no company-specific review of the reseller for that review period.

See U.S. Steel's Rebuttal Brief at 5.⁵ U.S. Steel also rebuts Mueller's claim that the 48.33 percent AFA rate is not corroborated and argues that Mueller ignores the volume of evidence on the record supporting the selected AFA rate. U.S. Steel notes the Department's normal practice of corroborating AFA margins by examining whether those margins fall within the range of margins on the record. Adopting that approach, U.S. Steel notes 48.33 percent is less than one percent higher than the second and third highest transaction-specific margins from the 1998-1999 POR, from which the 48.33 percent rate was derived. Compared to the prior 1997-1998 POR, the selected AFA rate is twenty one percent less than the highest margin of 61.13 percent calculated in that earlier POR. Finally, U.S. Steel contends the selected AFA rate also reflects margins from its own comparison of Mueller's average unit values (AUVs) obtained from CBP data, with Mueller's home market list prices for the instant POR. Accordingly, U.S. Steel maintains the 48.33 percent is substantially corroborated as an appropriate AFA rate. See U.S. Steel's Rebuttal Brief at 6 and 7.

⁵ U.S. Steel originally treated this passage as business proprietary information in its rebuttal brief. However, this clarification of the Department's regulation at 19 CFR 351.212(c) was originally published in the Federal Register in May 2003 and is, therefore, publically available information. See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 FR 23954 (May 6, 2003). It is, thus, appropriate to include it in this public summary of U.S. Steel's rebuttal comments.

Department's Position: Because Mueller did not cooperate in this review by refusing to respond to the Department's questionnaire, we have applied total AFA for these final results. See section 776(b) of the Act. Consistent with Department practice, we determine 48.33 percent is the appropriate dumping margin to apply as total AFA for Mueller. We have addressed specific arguments, as raised by Mueller, below.

First, contrary to Mueller's claim, we determine 48.33 percent does have probative value for use as AFA. In selecting a rate based entirely on AFA, it is the Department's practice to select the highest margin on the record of the proceeding that provides a sufficient deterrent for non-compliance and which we are able to corroborate (if such margin is secondary information) and apply it to uncooperative respondents in accordance with section 776(c) of the Act. See e.g., Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review, 73 FR 52641 (September 10, 2008), and its accompanying Issues and Decision Memorandum at Comment 8; see also Magnesium Metal From Russia and accompanying Issues and Decision Memorandum; and Stainless Steel Bar from Spain and its accompanying Issues and Decision Memorandum at Comment 6. In this case, as AFA, we have assigned a rate of 48.33 percent to Mueller on the basis of its reliability and relevance. In the Preliminary Results, the Department explained the probative value of 48.33 percent as an AFA rate because it is the highest transaction-specific margin from the most recently completed administrative review (*i.e.*, 1998-1999 POR). We therefore find 48.33 percent reliable, and because it reflects the most contemporaneous data available to the Department, we also deem it relevant for use in the instant administrative review. Although we recognize the information from the 1998-1999 POR was supplied by a separate company, TUNA (the only participating respondent for in that administrative review), it is based on actual questionnaire responses and accompanying data which were not contradicted by any record evidence during that proceeding. Additionally, the margin results of petitioner's AUV analysis of Mueller further supports our use of the selected AFA rate as it results in margins that are higher than 48.33 percent. As such, 48.33 percent is corroborated to the extent practicable pursuant to section 776(c) of the Act and 19 CFR 351.308(d). For further explanation of the Department's corroboration methodology in this review, see Corroboration Memorandum.

Second, we disagree with Mueller that the transaction-specific rate of 48.33 percent is aberrational. As noted by U.S. Steel, the second and third highest transaction-specific margins calculated in the 1998-1999 POR are 47.99 percent and 47.95 percent, which reflect only a -0.7 percent and -0.8 percent difference, respectively than the selected margin at issue.⁶ Also, when compared to the 1997-1998 POR which reviewed respondent Hylsa, 48.33 percent lies between the two highest transaction-specific margins of 37.17 percent and 61.13 percent calculated in that administrative review. See Memorandum to the File, "Certain Circular Welded Non-Alloy Steel Pipe from Mexico; Transfer of Information from the Record of 1997-1998 Administrative Review," dated November 30, 2009. Moreover, as petitioner's AUV analysis demonstrates, the margins based upon AUVs are higher than the AFA rate chosen by the Department.⁷ As such,

⁶ For calculation, see U.S. Steel's Rebuttal Brief at 6, footnote 26.

⁷ We note that no party argues the petitioner's AUV analysis is incorrect, or flawed in any respect. Petitioner originally submitted its AUV analysis in its comments to the Department, dated July 9, 2009.

48.33 percent is not an aberration, but rather is consistent with similar margins calculated from among sales of different companies over the course of separate administrative reviews. Thus, absent more recent pricing data, the selected AFA rate of 48.33 percent reflects the most contemporaneous data available to the Department and is based on an actual transaction indicative of market value. We therefore continue to find this transaction-specific margin appropriate for effectuating the purpose of section 776(b) of the Act. We also note that the Federal Circuit affirmed the use of a single transaction-specific margin as an AFA rate in Ta Chen. In Ta Chen, respondent reported its sales but failed to report a subset of sales that related to a certain affiliate. The Department applied to that subset of sales, an AFA rate of 30.95 percent, which was based on a single sale that accounted for only 0.04 percent of Ta Chen's sales. The court rejected the argument that the data was aberrant, because it reflected "some, albeit a small portion" of actual sales. See Ta Chen at 1339.

Further, we disagree with Mueller's statement it is not already subject to the all-others rate of 32.62 percent, and thus, the all-others rate is sufficiently adverse to apply as AFA. In this case Mueller was not examined in the original investigation and has never previously been reviewed by the Department. Thus, as a general matter, Mueller is, in fact, subject to the all-others rate. While we recognize Mueller's claim that its entries of subject merchandise sourced from TUNA and Ternium would be subject to those producers' individual case deposit rates, because of Mueller's failure to cooperate, we cannot determine the universe of Mueller's sales, let alone the origin of those unreported sales. Moreover, because the Department has been unable to examine Mueller's claim that it sourced subject merchandise from TUNA and Ternium, it is inappropriate to assign separate assessment rates for those entries, as advocated by Mueller.⁸ More to the point, what rate Mueller was or was not subject to at the beginning of this administrative review is moot, because the fact remains that Mueller refused to cooperate with the Department's requests for information and is now subject to AFA.

For all reasons stated above, we find the AFA rate of 48.33 percent selected in the Preliminary Results did not result from an aberrational sale, is corroborated (i.e., it has probative value), is consistent with Department practice and is sufficiently adverse to serve the purposes of AFA.

Comment 3: Rescission of Administrative Review for TUNA

U.S. Steel argues the Department should not have preliminarily rescinded TUNA based on its claim that it had no shipments of subject merchandise during the POR. Instead, for the final results U.S. Steel urges the Department to reject TUNA's no-shipment claim and apply total AFA to TUNA for its withdrawal from the instant review. Referencing Lightweight Thermal Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 57323 (October 2, 2008) (Thermal Paper from China - CVD) U.S. Steel states the Department's normal practice is to reject a respondent's no-shipment claim when it withdraws from a proceeding or refuses to submit information requested by the Department. In Thermal Paper from China - CVD, U.S. Steel states the respondent claimed it had no shipments

⁸ We also note that Ternium refused to respond to the Department's questionnaires and TUNA reported it had no entries, exports or sales of the subject merchandise to the United States during the POR.

of subject merchandise during the period of investigation, but later informed the Department it would not participate in the investigation and would not allow verification of its shipments. As a result, U.S. Steel avers the Department resorted to AFA. See U.S. Steel Case Brief at 4. U.S. Steel objects to TUNA's characterization of its participation in the instant proceeding in which TUNA states it did not withdraw, but merely did not respond to the Department's dumping questionnaire because it made no shipments of subject merchandise during the POR. In contrast, U.S. Steel cites TUNA's own letter to the Department, dated April 22, 2009 where it describes the burdens of responding:

{i}n the last administrative review in which TUNA participated (and for which TUNA had sales of subject merchandise to the United States), TUNA's Section A response alone was 1,273 pages in three volumes, and included, among other exhibits, the financial statements of sixteen affiliated companies. Given the similar amount of voluminous work that would be required to compile, prepare, and submit a Section A response in this segment of the proceeding, TUNA cannot provide such information now. TUNA also does not intend to respond to Section B and C of the questionnaire.

See U.S. Steel Case Brief at 5. U.S. Steel asserts a complete response to the antidumping questionnaire was necessary in order to confirm, or test TUNA's claim that it did not know, or have reason to know certain sales were destined to the United States. According to U.S. Steel, the Department issued the questionnaire to TUNA specifically because it found TUNA's no-shipment information up to that point in the review "insufficient," and thus, required additional support for rescission from the review. See U.S. Steel's Case Brief at 6. U.S. Steel maintains TUNA's refusal to respond impeded the review because a response to the questionnaire would have at least provided a description of TUNA's sales process. Moreover, a response from TUNA also would have established how the company determines the ultimate customer or market for products sold through resellers, or even its criteria for establishing export or home market sales. Such information, U.S. Steel argues, would have been useful to the Department in determining whether TUNA knew, or had reason to know, that sales of subject merchandise were intended for the United States. Id. at 7.

Consequently, given TUNA's failure to respond, U.S. Steel argues the Department should not rely on CBP data as a remedy to TUNA's refusal to respond to the questionnaire. Citing Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082 (November 7, 2006) (Concrete Reinforcing Bars from Turkey) and accompanying Issues and Decision Memorandum at Comment 22, U.S. Steel states the Department's position has been that "CBP data alone are not sufficient to determine whether a company had exports during the POR." See U.S. Steel's Case Brief at 7. In fact, U.S. Steel argues that certain CBP documents, of proprietary nature, actually refute TUNA's claims that the transactions in question were "co-export" sales. U.S. Steel rejects this assertion by TUNA and points out the Department previously determined "co-export" sales represent in-scope merchandise sold within the home market that are "use{d} as an input for the

processing of merchandise outside the scope of the antidumping duty order” prior to export. Id. at 8, citing Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 33041 (June 17, 1998) and accompanying Issues and Decision Memorandum at Comment 2. Thus, U.S. Steel contends TUNA’s entries as described in the instant review would not be deemed “co-export” sales.

TUNA rebuts U.S. Steel’s arguments and urges the Department to continue to find it should be rescinded from the instant review because it had no knowledge of the ultimate destination of its home-market sales at issue. TUNA outlines the Department’s “knowledge test” for purposes of determining if parties involved in importing and exporting goods are subject to antidumping laws. Citing the SAA, TUNA contends that a producer passes the knowledge test if the “producer knew or had reason to know at the time of sale that the goods were for export to the United States.” See TUNA’s Rebuttal Brief at 1. TUNA explains the Department’s “standard for the knowledge test is high,” and as established in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.: Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders Part II, 60 FR 10900 (February 28, 1995) and accompanying Issues and Decision Memorandum at Comment 14, the Department does not attribute U.S. sales to a foreign producer without the producer’s knowledge those sales are destined for the United States. See TUNA’s Rebuttal Brief at 1 and 2. TUNA details various factors which the Department has relied upon in past knowledge determinations. For instance, such factors include whether or not the relevant party prepared or signed certificates, shipping documents, contracts, or used any packaging, or labeling stating the merchandise was destined for the United States. See TUNA’s Rebuttal Brief at 2. According to TUNA, further considerations concerning knowledge have involved whether the features, brands or specifications of merchandise indicate it was destined for the United States (e.g., Certain Cut-To-Length Carbon-Quality Steel Plate Products From Italy: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 11178 (March 6, 2006), unchanged in Certain Cut-to-Length Carbon-Quality Steel Plate Products From Italy: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 39299 (July 12, 2006) and accompanying Issues and Decision Memorandum at Comment 1 and Certain Pasta From Italy: Termination of New Shipper Antidumping Duty Administrative Review, 62 FR 66602 (December 19, 1997)). Id.

TUNA asserts it is appropriate to rescind it from the administrative review because it has certified during the course of the instant review that it did not make any U.S. shipments of subject merchandise. Moreover, TUNA states the CBP data on record of this review did not contradict these assertions. See TUNA’s Rebuttal Brief at 7. TUNA contends U.S. Steel’s reference to Concrete Reinforcing Bars from Turkey is misplaced. TUNA explains the Department’s intention in Concrete Reinforcing Bars from Turkey is that because “CBP data alone” are insufficient to establish an absence of sales to the United States, the Department “will not rely on CBP data as a dispositive source of data on company exports” adding, “it is the responsibility of the respondent to report to the Department that it has not made any U.S. shipments.” See TUNA’s Rebuttal Brief at 6, citing Concrete Reinforcing Bars from Turkey and Brake Rotors From the People’s Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review, 70 FR

69937 (November 18, 2005) and accompanying Issues and Decision Memorandum at Comment 8.)

TUNA insists that despite allegations by U.S. Steel that certain CBP documents of proprietary nature demonstrate TUNA either knew, or should have known at the time of sale its merchandise would be exported to the United States, such evidence does not equate to actual knowledge. Citing Timken Co. v. United States, 166 F. Supp. 2d 608, 633-34 (Ct. Int'l Trade 2001) (Timken), TUNA states “the {knowledge} test employed by Commerce is not whether, in theory, the merchandise could have arrived in the United States,” but rather whether the supplier knew, or had reason to know of the U.S. destination. See TUNA’s Rebuttal Brief at 9, citing Timken at 633-34. For example, TUNA states in, Timken the Court determined merchandise marked with the name of a U.S. company was insufficient to establish knowledge of the U.S. destination. TUNA states that in Timken “the Court determined the presence of the markings did not mean that the manufacturer made the mental connection between the markings and the U.S. destination, and that even if the manufacturer did make such a connection, this was insufficient to create the requisite level of knowledge.” See TUNA’s Rebuttal Brief at 9, referencing Timken at 633. In the instant proceeding, TUNA maintains there is no evidence the merchandise was marked with a U.S. destination and argues no CBP data reflect any factors that might indicate knowledge. Therefore, the Department should continue to find TUNA did not know at the time of sale that any of its merchandise to a certain home-market customer was destined to the United States. See TUNA’s Rebuttal Brief at 10.

Moreover, TUNA claims U.S. Steel’s arguments have been based on mischaracterizations and select citations. For example, TUNA refutes U.S. Steel’s depiction that TUNA did not respond to the Department’s antidumping questionnaire merely because “it thought it would be too difficult.” See Rebuttal Brief at 10. TUNA avers such an accusation is inaccurate and explicitly fails to mention the primary reason for its decision not to provide a questionnaire response. Rather, TUNA insists it did not respond because TUNA had no entries, exports or sales of subject merchandise to the United States during the POR. Specifically, in making its argument, TUNA states U.S. Steel omitted language from TUNA’s April 22, 2009 letter to the Department which stated:

Having now had the opportunity to review the Department’s antidumping questionnaire carefully, TUNA reiterates that it did not have any entries, exports or sales of subject merchandise to the United States during the POR, and that it thus is not necessary for TUNA to respond to the questionnaire.

See TUNA’s Rebuttal Brief at 10.

Finally, TUNA challenges U.S. Steel’s claim that TUNA’s decision not to respond in full to the antidumping questionnaire was a “withdrawal” from the proceeding. Rather, TUNA asserts (1) it has responded correctly to the questionnaire; (2) it has never “withdrawn” from the proceeding; (3) it has never informed the Department it would not participate in the investigation, or would not allow verification; (4) it offered to provide additional information to

the Department upon request in its April 22, 2009 letter to the Department; and (5) it remains a full, cooperative, and active participant in this proceeding. See TUNA's Rebuttal Brief at 11.

Department's Position: We find the record evidence does not support a change of our decision from the Preliminary Results and are rescinding TUNA from the administrative review. We determine TUNA has acted to the best of its ability and consequently the use of AFA is not appropriate. In particular, while TUNA did not provide a response to the Department's antidumping questionnaire, in accordance with 19 CFR 351.213(d)(3), TUNA timely notified the Department that it did not have any entries, exports, or sales of subject merchandise to the United States. Then, in an unsolicited supplemental submission to the Department, dated February 9, 2009, TUNA further substantiated this claim by explaining it did not know, or have reason to know its products would be exported to the United States and provided sample sales documentation demonstrating the merchandise was sold in the home market and not the United States. TUNA issued a subsequent statement that it did not have any entries, exports or sales of subject merchandise to the United States during the POR, and consistent with instructions in the questionnaire, it was not necessary for TUNA to provide a full response.⁹

As discussed in the Preliminary Results, the Department examined customs entry documentation which did not suggest any basis for concluding TUNA had knowingly made entries of subject merchandise to the United States during the POR. See Memorandum to the File, "Certain Circular Welded Non-Alloy Steel Pipe from Mexico; Customs Package Information for 2007-2008 Period of Review," dated November 30, 2009. In particular, manufacturer certificates received as part of the entry documentation indicated sales were made to a certain home market customer, and did not specify the merchandise's final destination would be the United States. We did not receive any information from CBP or any other source that contradicted TUNA's claim of no sales, shipments, or entries of subject merchandise to the United States during the POR.

We contrast the present case with Thermal Paper from China – CVD. There, a respondent claimed no shipments of subject merchandise and then ceased participation in the proceeding by failing to provide requested information and cancelling verification. TUNA, in contrast, remained active during the instant proceeding and fully cooperated with the Department's request for information. Specifically, TUNA informed the Department that while it would not be responding to the antidumping questionnaire, it was "prepared to submit copies of relevant sales documentation and to provide further information" regarding its co-export sales. See TUNA's letter to the Department, dated April 22, 2009. Additionally, and consistent with Concrete Reinforcing Bars from Turkey, we have not solely relied on CBP entry documents to support TUNA's no-shipment claim, but have also examined TUNA's own sales documentation. These documents provided no evidence to suggest TUNA made sales to the United States, or had knowledge its merchandise would have been exported to the United States. Thus, in accordance

⁹ The Department's antidumping duty questionnaire cover letter states, "If, after examining sections A and C of the questionnaire, you conclude that your company and its affiliates did not have any U.S. sales or shipments during the review period identified above, please submit a statement to that effect." See Antidumping Duty Questionnaire cover letter at 1.

with the Department's practice in Concrete Reinforcing Bars from Turkey, we have rescinded the review with respect to TUNA because we have no grounds to believe TUNA had knowledge its merchandise was destined to the United States.

We also clarify that the Preliminary Results did not make any determination that sales made by TUNA were co-export sales. Rather, we deem the issue of whether or not TUNA's sales at issue were properly identified as "co-export" sales irrelevant to our decision to rescind TUNA from the review. We examined TUNA's sales documentation and CBP entry data to ascertain only if there were any indications TUNA knew, or should have known, the merchandise's final destination was the United States. Finding none, we accept TUNA's no shipments claim and consistent with 19 CFR 351.213(d)(3) rescind this review with respect to TUNA.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margins for all of the reviewed firms in the Federal Register.

Agree _____ Disagree _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date