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MEMORANDUM: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
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SUBJECT: Issues and Decision Memorandum for the 2001-2002 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review

Summary

We have analyzed the case and rebuttal briefs of interested parties in the 2001-2002 administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products (hot-rolled steel) from the Netherlands (A-421-807). As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments and rebuttal comments by parties:

1. Conventional Hot-Rolled Material vs. Direct Sheet Product
2. Quality Code
3. Treatment of Section 201 Tariffs
4. Treatment of Non-dumped Sales
5. Gap Period Entries
6. Cost of Manufacturing
7. General Expense Ratio
8. Variable Cost of Manufacturing
9. CEP Profit Rate
10. Use of Sale Date vs. Entry Date to Identify EP Sales
11. Reporting Period for U.S. Sales

Background

On December 8, 2003, we published in the Federal Register the preliminary results of this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands;

Preliminary Results of Antidumping Duty Administrative Review, 68 FR 68341 (December 8, 2003) (Preliminary Results). The period of review (POR) is May 3, 2001 through October 31, 2002.

This review covers sales of certain hot-rolled carbon steel flat products made by one manufacturer/exporter, Corus Staal BV (Corus). We invited parties to comment on our preliminary results. We received case briefs from Corus and petitioners (United States Steel Corporation (USSC) and Nucor Corporation (Nucor)) on January 14, 2004. We received rebuttal briefs from the same parties on January 23, 2004.

Discussion of the Issues

Comment 1. Conventional Hot-Rolled Material vs. Direct Sheet Product

Noting the Department removed the distinction between conventional hot-rolled mill and direct sheet plant (DSP) products for the preliminary results, Corus contends the Department should treat DSP material and conventional hot-rolled mill products separately for purposes of sales comparisons and the cost of production analysis. Corus argues the Department erroneously eliminated the distinction between conventional hot-rolled mill and DSP products on the grounds that the type of production facility used was not one of the model match criteria. Corus asserts conventional hot-rolled mill and DSP products should be treated differently due to the fundamental differences in the products, not the type of facility used to produce them. According to Corus, the DSP facility "combines DSP technology, wedding continuous thin slab casting and rolling, with the planned ability to produce hot-rolled steel at cold-rolled gauges." Corus' Case Brief at 3. Corus maintains the processes encompassing the DSP operation result in steel with unique properties and states the Department confirmed this at verification, citing the Cost Verification Report[1] at 12. As a result, Corus claims, DSP material handles differently in operation, has a more limited use than conventional hot-rolled material, and is not appropriate for all applications. In addition, Corus argues, its customers demand that DSP material be identified clearly on the invoice.

Corus contends identical merchandise must be defined in order to achieve fair comparisons between U.S. price (USP) and normal value (NV). Corus argues the Department is not required to make control number (CONNUM)-specific comparisons, stating that in Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to- Length

[1] See Memorandum from Laurens van Houten, Accountant to Neal M. Halper, Director, Office of Accounting, Re: Verification Report of the Cost of Production and Constructed Value Data Submitted by Corus Staal BV, dated October 2, 2003.

Carbon Steel Plate From Korea, 58 FR 37176, 37186 (July 9, 1993), the Department utilized company-specific model numbers because it would have been distortive to rely on CONNUMs in that case.

Corus insists it is not proposing the Department ignore the CONNUMs and its established model match hierarchy, but rather that the different characteristics displayed by the DSP material, "recognized as such by Corus' customers, similarly be recognized by the Department as a significant enough qualitative difference to be reflected in Field Number 3.2, QUALITYH/U." Corus' Case Brief at 4. According to Corus, the Department's product characteristics reflect minor differences designed to distinguish commercially different products, while ignoring others. Corus argues that since DSP and conventional hot-rolled products do not have identical physical characteristics, in accordance with the Department's questionnaire, they should not be assigned identical CONNUMs.

In response, USSC argues it is the Department's established practice not to modify its model-match methodology from one segment of the proceeding to the next. Furthermore, USSC maintains, there is no support in the Department's cost verification report for the assertion that the Department was able to verify any differences in physical characteristics between merchandise produced at the two facilities. USSC claims the only reference in the verification report to this issue is in the "startup" section, in which the Department noted that "'[c]ompany officials stated their DSP line has many unique features... which will enable them to produce products with unique properties.'" USSC's Rebuttal Brief at 4, citing the Cost Verification Report at 12 (emphasis USSC's). USSC asserts any reference to the "unique properties" of DSP merchandise by Corus personnel was based on "a prediction for planned future – not current – production." USSC's Rebuttal Brief at 4.

Nucor contends Corus did not provide any documentation comparing the alleged differences in physical characteristics between DSP and conventional hot-rolled mill products. Moreover, Nucor argues, the CONNUMs have built into them any differences in physical characteristics such that these differences would be reflected in the CONNUMs. Nucor claims that if a product produced by the DSP process has the same physical characteristics as a product manufactured by another process, then both should have the same CONNUM.

Department's Position: We disagree with Corus. At B-12 of its March 4, 2003 questionnaire response, Corus stated that with respect to DSP production, "the process involved ... has resulted in a quality of steel with unique properties." Corus then identified one such property.[2] We note that during the original less-than-fair value investigation of hot-rolled carbon steel flat products from the

[2] Since this property is proprietary in nature, it cannot be disclosed in this memorandum. For further information, see the Department's Final Analysis Memorandum, dated June 7, 2004.

Netherlands, no party to that proceeding suggested that the Department add this particular property to its model match hierarchy. See Notice of Preliminary Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 22146 (May 3, 2001). In the instant review, despite Corus' claim that merchandise produced on the DSP line and conventional mill differed with respect to this property, the information on the record fails to establish any such differences or to demonstrate that the addition of this property would result in more appropriate product matches, as contemplated by section 771(16) of the Tariff Act.

The Department has broad authority to determine model matching criteria and necessarily selects criteria on a case-by-case basis. The selection of appropriate matching criteria to define identical merchandise under section 771(16)(A) of the Tariff Act is based on meaningful physical characteristics and interested parties' comments. The Department does not attempt to account for every conceivable physical characteristic and may rely upon product standards when selecting matching criteria. Moreover, the criteria selection process allows the Department to draw reasonable distinctions between products for matching purposes, without attempting to account for every possible difference inherent in the merchandise. In this process, the Department matches products as "identical," consistent with section 771(16)(A) of the Tariff Act, even though they may contain minor physical differences. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadiene Rubber from Mexico, 64 FR 14872, 14875 (March 29, 1999); see also Notice of Final Determination of Sales at Less Than Fair Value: Steel Wire Rod from Canada, 63 FR 9182, 9197 (February 24, 1998) and Certain Cold-Rolled Carbon Steel Flat Products from Germany; Final Results of Antidumping Duty Administrative Review, 60 FR 65264, 65271 (December 19, 1995).

Other than the property identified in its March 4, 2003 questionnaire response at B-12, Corus did not describe any other potential differences in physical characteristics in subsequent submissions. Although Corus did indicate the DSP line is projected to produce hot-rolled steel at cold-rolled gauges, i.e., at a thinner gauge (see Corus' May 19, 2003 supplemental questionnaire response at 9), we note thickness is already accounted for in our model match hierarchy.

Because the information on the record does not establish sufficient differences in physical characteristics between conventional hot-rolled mill and DSP products, we have not made any changes to our model match criteria for these final results.

Comment 2. Quality Code

Corus states the Department's model matching hierarchy assigns only one digit to the product characteristic "quality," even though Corus reported the data in that field using two digits. According to Corus, this results in the product characteristic "quality" being disregarded in the model matching hierarchy. Corus urges the Department to correct this error for the final results.

Petitioners did not comment on this issue.

Department's Position: We agree with Corus. Because Corus reported data in the quality field using two digits, we have modified the weighting factor for the quality field in our model match hierarchy so that it consists of two digits rather than one. We note this change does not affect our treatment of conventional hot-rolled mill and DSP products as the same product (see Comment 1 of this memorandum). For more information regarding the implementation of this change, see the Department's Final Analysis Memorandum, dated June 7, 2004.

Comment 3. Treatment of Section 201 Duties

Corus states the Department did not deduct Section 201 duties (201 duties) from USP for the preliminary results in light of its request for public comments in Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 FR 53104 (September 9, 2003) (Treatment of Section 201 Duties). Corus argues the Department should continue to not deduct 201 duties from USP for the final results.

Corus contends the Department has consistently found the deduction of remedial duties under section 772(c)(2)(A) or 772(d) of the Tariff Act to be an impermissible interpretation of the statute. In addition, Corus claims, the U.S. Court of International Trade (the Court) has upheld the Department's established practice of not treating antidumping (AD) and countervailing (CVD) duties as United States import duties for purposes of calculating USP. Citing various cases, including AK Steel Corp. V. United States, 998 F. Supp. 594, 607-608 (CIT 1997), Corus maintains the Court has determined that the deduction of duties imposed for import relief purposes from USP would result in "double-counting." Corus asserts the Department has found that AD and CVD duties do not constitute "United States import duties" under the meaning of section 772(c)(2)(A) of the Tariff Act, citing Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404, 18421 (April 15, 1997). Corus argues that if AD duties are "special duties" rather than "United States import duties," then so are 201 duties, since 201 duties are applied only against imports of merchandise subject to a determination by the U.S. International Trade Commission (ITC) that the domestic industry is seriously injured or threatened with serious injury. According to Corus, these "special duties" are easily distinguishable from ordinary U.S. duties and entry fees (e.g., harbor maintenance and merchandise processing fees) that are routinely collected by U.S. Customs and Border Protection (CBP) and which the Department routinely deducts from USP. Likewise, Corus asserts, the Court has upheld the notion that remedial duties cannot be treated as costs for purposes of calculating USP, as such treatment would also create the same issue of double-counting.

Finally, Corus claims the deduction of 201 duties from USP would violate the WTO Agreement on Antidumping (WTO Antidumping Agreement), the Agreement on Safeguards, and other U.S. statutory provisions. Corus maintains that Article 2.4, note 7 of the WTO Antidumping Agreement cautions administering authorities against double-counting adjustments in computing dumping margins. According to Corus, the higher dumping margins that would result from deducting 201 duties would be contrary to the letter and spirit of section 773 of the Tariff Act and the WTO Antidumping Agreement, which both require a fair comparison between export price (EP) and NV. Corus also contends that deducting 201 duties from USP would constitute a violation of Article 9.3 of the WTO Antidumping Agreement, which specifies that the antidumping duty shall not exceed the margin of dumping. Further, Corus argues, deducting 201 duties would be a violation of the Section 201 statute and the WTO Safeguards Agreement, both of which specify that the safeguard remedy not be greater than the amount necessary to prevent or remedy the serious injury. Stating the WTO has already found the 201 duties to be in violation of the international obligations of the United States, Corus argues that deducting 201 duties would be "additionally objectionable on the grounds that it would constitute a direct violation of this country's obligations to bring its laws into conformity with a binding interpretation of the WTO." Corus' Case Brief at 11.

Both USSC and Nucor argue the Department should deduct 201 duties from USP for the final results for the reasons stated in their letters filed in response to the Department's request for comments in Treatment of Section 201 Duties.

Department's Position: As explained below, the Department has determined not to deduct 201 duties from U.S. prices under Section 772(c)(2)(A) of the Tariff Act in calculating dumping margins, either as "United States import duties" or as selling expenses. This discussion addresses the comments submitted by interested parties in response to Treatment of Section 201 Duties. For a summary of interested parties' comments, see Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 69 FR 19153 (April 12, 2004).

Although the AD law does not define the term "United States import duties," the Senate Report that accompanied the Antidumping Act of 1921 (the 1921 Act) contrasts antidumping duties (which it refers to as "special dumping duties") with normal customs duties (which it refers to as "United States import duties"). S. Rep. No. 67-16, at 4 (1921). Moreover, Section 211 of the 1921 Act provides that, for the limited purpose of duty drawback, "the special dumping dut[ies] . . . shall be treated in all respects as regular Customs duties." The 1921 Act, 42 Stat. 15. If "special dumping duties" normally were considered to be just one type of "United States import duty," this special provision would have served no purpose.

That "special dumping duties" were considered to be distinct from normal customs duties is also indicated by the fact that Section 202(a) of the 1921 Act provides that "special dumping duties" may be applied to “duty- free” merchandise. The 1921 Act, 42 Stat. 11. In this context, “duty-free” must mean “free from normal Customs duties.” If “duty-free” had meant “free from any import duties,” that would have included antidumping duties, so that special dumping duties would have been applied to merchandise exempt from special dumping duties. Plainly, “duty-free” was understood to mean “free from normal Customs duties.”

Thus, Congress has long recognized that at least some duties implementing trade remedies - - including at least antidumping duties - - are special duties that should be distinguished from ordinary customs duties. Accordingly, Commerce consistently has treated AD duties as special duties not subject to the requirement to deduct “United States import duties” (normal customs duties) from U.S. prices in calculating dumping margins.[3] The Court has upheld this position on six occasions. See, e.g., Hoogovens Staal v. United States, 4 F. Supp. 2d 1213, 1220 (CIT 1998); Bethlehem Steel v. United States, 27 F. Supp. 2d 201, 208 (CIT 1998); U.S. Steel Group v. United States, 15 F. Supp. 2d 892, 898-900 (CIT 1998); AK Steel Corp. v. United States, 988 F. Supp. 594 (CIT 1997); Federal Mogul Corp. v. United States, 813 F. Supp. 856, 872 (CIT 1993); PQ Corp. v. United States, 652 F. Supp. 724, 737 (CIT 1987). Moreover, Congress specifically endorsed this position in the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act when, in explaining the consideration of duty absorption in administrative reviews, it stated “[t]his new provision of law is not intended to provide for the treatment of antidumping duties as a cost.” Uruguay Round Agreements Act, SAA, H.R. Doc. No. 103-316, Vol. 1, at p. 885 (1994).

Like AD duties, 201 duties are special remedial duties. Section 201 duties represent the amount the President determines is needed to provide “temporary relief for an industry suffering from serious injury...”. S. Rep. No. 93-1298 at 119 (1974). This is not to say that 201 duties are identical to AD duties. Section 201 duties do not embody dumping margins, so that deducting them from U.S. prices in calculating dumping duties would not involve the circular logic that would be inherent in deducting AD duties. Nevertheless, 201 duties are special remedial measures. Although they are not identical to AD duties, they are more like them in purpose and function than they are like ordinary customs duties. The ITC has recognized the extraordinary nature of 201 duties, similarly referring to them as “special duties.” See Stainless Steel Plate from Sweden, TC Pub. No. 573, Inv. No. AA1921-114 (1973), cited in Avestra AB v. United States, 724 F. Supp. 974 (CIT 1989).

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[3] In addition to being different from normal customs duties because they implement a trade remedy, AD duties also embody dumping margins. Thus, to deduct the dumping duty from the U.S. price in calculating the dumping margin essentially would be to deduct the dumping margin itself from the U.S. price in calculating the margin - - a circular calculation. The Department explained its reasons for not deducting antidumping duties from U.S. prices in Certain Cold-Rolled Carbon Steel Flat Products from Korea; Final Results of Antidumping Duty Administrative Review, 63 FR 781, 786 (Jan. 7, 1998).

The fact that 201 duties are recorded in the Harmonized Tariff Schedule of the United States (HTSUS) does not establish that they are normal customs duties. Unlike normal customs duties, 201 duties are imposed only following a finding of serious injury to the industry in question by the ITC. That 201 duties are contained in the HTSUS proves only that this is a pragmatic way of implementing their collection along with other import duties. In any event, although 201 duties are set out in the HTSUS, they are contained in Chapter 99, which is reserved for special or temporary duties.

The Senate Report to the Trade Act of 1974 recognized not only that 201 duties and AD duties were similar, but the two remedial duties were, in fact, complementary:

> Furthermore, the Commission would be required, whenever . . . it has reason to believe that the increased imports are attributable in part to circumstances which come within the purview of the Antidumping Act . . . or other remedial provisions of law, to notify promptly the appropriate agency so that such action may be taken as is otherwise authorized by such provisions of law. Action under one of those provisions when appropriate is to be preferred over action under this chapter.

S. Rep. No. 93-1298 at 123 (1974).

Congress again confirmed this point in 1994, in the SAA accompanying the Uruguay Round Agreements Act:

> In determining whether to provide [Section 201] relief and, if so, in what amount, the President will continue the practice of taking into account relief provided under other provisions of law, such as the antidumping . . . law[] which may alter the amount of relief necessary under section 203.

SAA at 964.

In other words, the injury to the U.S. industry which is the subject of an inquiry under Section 201 may be remediable (at least to some extent) under the AD law. To some extent, 201 duties are interchangeable with special AD duties. It follows that 201 duties are more appropriately regarded as a type of special remedial duty, rather than ordinary customs duties.

As for the argument that 201 duties must be deducted from U.S. prices because they are included in the term “any costs, charges, or expenses” of bringing the merchandise into the United States, the better argument takes account of the fact that the statute refers to any additional “costs, charges, expenses and United States import duties. . . .” This indicates that import duties are considered to be independent of other costs, charges, and expenses. While 201 duties are a special type of import duty, they are nevertheless a species of import duty, and are thus covered, if at all, by the phrase "United States import duties." Thus, the Department interprets the statute as providing for the subtraction from initial U.S. prices of any "additional costs, charges, or expenses and ***normal*** United States import duties. . . ", but not other import duties. The correctness of this interpretation may be seen from the fact that interpreting "U.S. import duties" broadly would require the Department to deduct AD duties as U.S. import duties. It is well established that this is not required, and the Department's longstanding practice is not to make such a deduction.

The argument that 201 duties should be deducted from U.S. prices in calculating dumping margins rests on the premise that the Department must restore the dumping margin that would have been found absent any 201 duty. This premise is in error. Even to the extent that 201 duties may reduce dumping margins, this is not a distortion to the margin that must be eliminated, but a partial elimination of dumping. Section 201 duties are not directed at any type of unfair trade practice that Congress has defined as independent from dumping.[4] Quite the contrary, Congress has stated the remedies provided by the two statutes complement one another and may, in fact, be substituted for one another. Consequently, to the extent that 201 duties may lower the dumping margin, this is a legitimate remedy for dumping.

Where there is a pre-existing dumping margin, deducting 201 duties from U.S. prices effectively would collect the 201 duties twice - - first as 201 duties, and a second time as an increase in that dumping margin. Where there was no pre-existing dumping margin, the deduction of 201 duties from U.S. prices in an AD proceeding could create a margin. Nothing in the legislative history of section 201 or the AD law indicates Congress intended such results. Moreover, nothing in section 201 indicates Congress believed that 201 duties must have any particular effect on prices in the United States in order to provide an effective remedy for serious injury. If Congress had intended such a requirement, it presumably would have provided some mechanism for measuring the effect of 201 duties on U.S. prices and adjusting those duties if they did not have the intended effect. Congress provided no such mechanism.

Finally, the SAA language quoted above makes plain that any adjustment for the potential overlap between 201 and AD remedies is to be made by the President in setting the level of the 201 duties. Once the President has struck this balance, it is not Commerce's place to upset that balance by subtracting the 201 duties from U.S. prices in calculating dumping margins, providing relief beyond what the President approved. There is absolutely no indication in the Presidential Proclamation No. 7529, 67 FR 10553 (March 5, 2002) (Presidential Proclamation) placing 201 duties on certain imports

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[4] AD duties remedy "material injury." 19 U.S.C. § 1673. Section 201 is aimed at providing temporary relief from imports to an industry suffering from "serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition." S. Rep. No. 93-1298, at 121 (1974).

of steel that the President believed that Commerce effectively would increase those duties by taking them into account in calculating subsequent dumping margins.

The suggestion on the part of some commenters that many of our major trading partners deduct all import taxes, including safeguard duties, from reported prices in calculating dumping margins is without foundation. None of these commenters provided the Department with any evidence that any of our trading partners actually has made such an adjustment. For example, European Union law gives the EC Commission discretion to apply both AD duties and safeguard duties against the same products in some instances. This by no means establishes, however, that the European Union (EU) ever has deducted safeguard duties from EU prices when calculating dumping margins. Quite the contrary, the EU regulation gives the Commission the discretion to repeal existing AD measures to avoid excessive remedies where safeguard measures are applied to the same imports. See EC Reg. No. 452/20032, Official Journal L 69 at 8 (March 13, 2003). In the one instance of which we are aware in which the EU faced the possibility that AD duties and safeguard duties would be applied to the same imports, the Council adopted a regulation to prevent this result, except to the extent that the AD duty exceeded the safeguard duty. See EC Reg. No. 778/2003, Official Journal L 114 at 2 (May 8, 2003). Thus, deducting safeguard duties from EU prices in calculating AD margins, so as to collect both the entire safeguard duty and an AD duty increased by the amount of the safeguard duty would appear to conflict with the EU's actual practice. Similarly, while there is some indication Canadian law might permit safeguard duties to be taken into account, we have no evidence Canada has ever deducted safeguard duties from reported prices in Canada in calculating dumping margins. In any event, the fact that a particular methodology may be employed by another country would not be relevant to the question of what is permissible or appropriate under U.S. law.

Any inconsistencies between the treatment of 201 duties by the Department and the CBP in calculating the values to which ad valorem duty rates are applied are immaterial. It is well-established that the agencies' respective determinations are governed by different statutory provisions and regulations with distinct purposes.[5] In any event, any such differences occur only with respect to the collection of estimated antidumping duty deposits. Actual antidumping duties (as opposed to deposits of estimated antidumping duties) are the absolute difference between normal value and export price. These duties are aggregated, and then expressed as an amount per unit or a percentage of entered value that CBP applies for collection purposes. When the latter approach is employed, the percentage rate is calibrated so as to collect the correct total of absolute antidumping duties.

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[5] CBP valuation methodology is governed by Section 1401a of the Trade Agreements Act of 1979. See Koyo Seiko Co., Ltd. v. United States, 955 F. Supp. 1532, 1541 (CIT 1993) ("[C]lassification under the antidumping law need not match the Customs classification, as the Customs valuation statute and antidumping statute are substantially different in both purpose and operation); see also Royal Business Machines v. United States, 507 F. Supp. 1007, 1014 n.18 (CIT 1980), aff'd 69 C.C.P.A. 61, 669 F.2d 692 (C.C.P.A. 1982) ("[Customs] may not independently modify, directly or indirectly the [antidumping law] determinations, their underlying facts, or their enforcement.").

The Department's 1986 determination in Notice of Final Determination of Sales at Less Than Fair Value: Fuel Ethanol from Brazil, 51 FR 5572 (February14, 1986) (Fuel Ethanol from Brazil) is not relevant to the issue of the treatment of 201 duties. In that determination, the Department deducted special tariffs on imported fuel ethanol from the initial U.S. prices. The tariffs in question were not 201 duties. In fact, they were not remedial duties under *any* trade remedy law. Rather, they were tariffs added to the HTSUS by Congress to offset a tax subsidy that producers received for fuel-grade ethanol. A contemporary investigation by the ITC did not find injury to a U.S. industry. See Certain Ethyl Alcohol from Brazil, Inv. No. 731-TA-248, USITC Pub. 1818 (Final) (March 1986). Consequently, Fuel Ethanol from Brazil is not relevant to the issue of whether 201 duties should be subtracted from U.S. prices in calculating dumping margins.

Similarly, the Department's 2002 determination in Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002) and the accompanying Issues and Decision memorandum at Comment 9 is not relevant to the issue of the treatment of 201 duties. That proceeding involved imports of lumber that had been subject to a quota-based fee under the U.S. - Canada Softwood Lumber Agreement. The export fees applied only to exports of lumber from Canada above 14.7 billion board feet. The Department deducted these fees from initial U.S. prices, noting that they did not qualify for the exemption from such deductions for export payments specifically intended to offset countervailable subsidies. Because that determination involved export fees rather than import duties, and similarly did not address the purpose of 201 duties or account for the legislative history discussed above, it does not apply to the issue of whether 201 duties should be deducted.

In conclusion, Commerce will not deduct 201 duties from U.S. prices in calculating dumping margins because 201 duties are not "United States import duties" within the meaning of the statute, and to make such a deduction effectively would collect the 201 duties a second time. Our examination of the safeguards and antidumping statutes and their legislative histories indicates Congress plainly considered the two remedies to be complementary and, to some extent, interchangeable. Accordingly, to the extent that 201 duties may reduce dumping margins, this is not a distortion of any margin to be eliminated, but a legitimate reduction in the level of dumping.

Comment 4. Treatment of Non-dumped Sales

Corus argues that in calculating the overall weighted-average dumping margin, the Department unlawfully eliminated sales where the USP exceeds NV. By "zeroing" negative margins, Corus contends, the Department computed a weighted-average dumping margin where no margin otherwise exists.

Corus asserts the Court has consistently held that the statute does not require "zeroing" in either investigations or administrative reviews. Citing Corus Staal BV v. United States, 259 F. Supp. 2d 1253, 1261 (CIT 2003) (Corus Staal), Corus claims the Court found the statute neither requires nor prohibits the Department from considering non-dumped sales. Although the Department presumably no longer relies on the position that the statute requires "zeroing," Corus argues, the Department will likely continue to rely on sections 771(35)(A) and (B) of the statute as it did in the investigation of certain hot-rolled carbon steel flat products from the Netherlands.[6] Corus maintains neither of these provisions mentions "zeroing" nor requires negative dumping margins to be set automatically to zero. Stating that section 771(35)(A) defines the term "dumping margin" as the amount by which the normal value exceeds the USP of subject merchandise, Corus holds the term "amount" is a mathematical concept that can signify either a positive or negative value. To this end, Corus cites Floral Trade Council v. United States, 41 F. Supp. 2d 319, 332 (CIT 1999) (Floral Trade Council), in which the Court determined that section 773(e)(2)(B)(iii) of the Tariff Act did not require the amount for constructed value profit to be positive. Therefore, Corus contends, the term "amount" in section 771(35)(A) of the Tariff Act "cannot mandate the creation of only positive results." Corus' Case Brief at 14. As for section 771(35)(B) of the Tariff Act, which defines the term "weighted average dumping margin," Corus states this provision requires that the individual margins calculated under section 771(35)(A) of the Tariff Act are aggregated for each exporter/producer, and then divided by the aggregate USPs for each exporter/producer, in order to derive the weighted-average dumping margin. Corus maintains the word "aggregate" in section 771(35)(B) of the Tariff Act "cannot be used to define only positive margin transactions in the numerator and all transactions in the denominator." Id.

Additionally, Corus contends, the Department's "zeroing" methodology violates the WTO Antidumping Agreement. Corus refers to European Communities – Antidumping Duties on Imports of Cotton-Type Linen from India, WT/DS141/AB/R(March 1, 2001) (EC - Bed Linen), in which the WTO Appellate Body found the EC's methodology violated the WTO Antidumping Agreement because it failed to consider "'all transactions involving all models or types of the product under investigation'" and because it did not result in a fair comparison between EP and NV. Corus' Case Brief at 15, quoting EC - Bed Linen at para. 55 (emphasis respondent's). Corus also cites United States - Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan, US - Corrosion-Resistant, WT/DS244/AB/R (December 15, 2003) (US - Corrosion-Resistant), in which the WTO Appellate Body determined the reasoning in EC - Bed Linen also applied to other types of antidumping proceedings (i.e., reviews). Therefore, Corus maintains, the Department's "zeroing" methodology in the instant review is not consistent with the WTO Antidumping Agreement for the same reasons noted in EC - Bed Linen. Corus argues the Court noted it would only uphold the "zeroing" methodology until it became clear this practice is impermissible, citing Timken Co. v. United States, 240 F. Supp 2d

[6] Corus notes it has appealed to the Court of Appeals for the Federal Circuit the Court's decision in Corus Staal, 259 F. Supp. 2d at 1264-65 that the Department's "zeroing" methodology is not an unreasonable application of the statute.

1228, 1243 (CIT 2002) (Timken). According to Corus, the Court was reluctant to prohibit the "zeroing" practice in Timken because the EC - Bed Linen decision involved an EU practice and an antidumping investigation, and also because administrative reviews are governed by Article 9.3.1 of the WTO Antidumping Agreement whereas the Appellate Body in EC - Bed Linen limited its analysis to Article 2.4.2 of the WTO Antidumping Agreement. However, Corus contends, since the WTO Appellate Body in US - Corrosion-Resistant involved U.S. practice and determined that Article 2 is relevant to antidumping reviews, the reservations expressed by the Court in Timken are nullified. Corus argues that under Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (Charming Betsy), U.S. law should be interpreted so as to avoid violating international obligations. Therefore, Corus maintains, since sections 771(35)(A) and (B) of the Tariff Act do not require "zeroing" and the Court has held that U.S. law does not require "zeroing," the Department should amend its practice to eliminate the "zeroing" methodology in order to be consistent with WTO Antidumping Agreement and the WTO Appellate Body's decisions in EC - Bed Linen and US - Corrosion-Resistant.

In rebuttal, USSC cites Timken Co. v. United States, 354 F. 2d 1334 (Fed. Cir. 2004) (Timken CAFC), arguing the Court of Appeals for the Federal Circuit (Federal Circuit) found the Department's "zeroing" methodology to be a reasonable interpretation of the statute despite the EC - Bed Linen case.

Nucor responds the Department's "zeroing" methodology is required by the statute. Nucor argues the Department recently affirmed this requirement in Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People's Republic of China, 67 FR 6482 (February 12, 2002) and the accompanying Issues and Decision Memorandum at Comment 34, Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002) and the accompanying Issues and Decision Memorandum at Comment 12, and Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Luxembourg, 67 FR 35488 (May 20, 2002) and the accompanying Issues and Decision Memorandum at Comment 13. Nucor maintains that based on sections 771(35)(A) and 771(35)(B) of the Tariff Act, "the Department by statute may not calculate a negative 'dumping margin,' nor may it include a negative margin in its calculation of the 'weighted average dumping margin.'" Nucor's Rebuttal Brief at 5. In response to Corus' argument that it is logically and mathematically possible for NV to exceed USP by a negative amount, Nucor states that if NV is less than USP, NV cannot exceed USP. Nucor claims the key word in section 771(35)(A) of the statute is not "amount," but rather "exceed."

Finally, Nucor contends that as the Department has noted previously, the EC - Bed Linen decision has no impact on U.S. law or Departmental practice. Citing the SAA, Nucor argues the Department cannot change its practice based on a decision made by a WTO Dispute Settlement Body or Appellate Body. In addition, Nucor claims, the EC - Bed Linen decision applies only to the EC, as the EC's and United States antidumping laws are very different. Thus, Nucor asserts, a WTO decision applying to the EC should not be interpreted to apply to the United States as well.

Department's Position: We agree with petitioners and have not changed our calculation of the weighted-average dumping margin as suggested by Corus for these final results. The Court has upheld the Department's treatment of non-dumped sales in Timken; Corus Engineering Steels, Ltd. v. United States, Slip Op. 03-110 (CIT August 27, 2003); and Bowe Passat Reiningungs-und Waschereitcechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996). Furthermore, the Federal Circuit has affirmed the Department's methodology as a reasonable interpretation of the statute in Timken CAFC.

With regard to Corus' argument that the WTO Appellate Body ruling in the EC- Bed Linen case renders the U.S. interpretation of its statute as inconsistent with its international obligations, the Federal Circuit has addressed and rejected this contention in Timken CAFC. The Appellate Body's decision in EC - Bed Linen is not binding on the United States. Corus' contention that the United States should change its methodology in response to a WTO dispute to which the United States was not even a party is not consistent with U.S. law. (See, e.g., 19 U.S.C. 3533(g), which states that an agency may not change a regulation or practice pursuant to a WTO decision unless and until certain criteria are met.)

Finally, Corus's reliance on the WTO Appellate Body ruling in US - Corrosion-Resistant is unpersuasive. U.S. - Corrosion-Resistant involved an examination of the Department's sunset review determination. However, because it could not determine that the methodology used by the United States in the administrative reviews was the same as the one used in EC - Bed Linen, the Appellate Body concluded that it could not find that the United States had violated Article 2.4 on the basis of its methodology of not offsetting for non-dumped sales. Therefore, the discussion of U.S. practice in US - Corrosion-Resistant is dictum, and does not constitute any decision on the merits of the Department's practice in that case.

Comment 5. Gap Period Entries

Citing the Preliminary Results at 68 FR 68348, Corus states the Department did not assess duties on merchandise that entered between October 30, 2001 and November 28, 2001, inclusive ("gap period"), as a result of the Court's decisions in Corus Staal BV, et al v. United States, 279 F. Supp. 2d 1363 (CIT 2003) (Corus Staal II) and Corus Staal BV, et al v. United States, 283 F. Supp. 2d 1357 (CIT 2003) (Corus Staal III). Corus argues that in light of the Court's ruling, the Department should have excluded gap period entries from the margin calculation. By including these transactions in the margin calculation, Corus contends the Department has effectively assessed dumping duties on gap period entries, thereby violating the Court's decisions, the statute, the Department's regulations, and the express language of the amended antidumping duty order (Notice of Amended Antidumping Duty Order; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands, 68 FR 74214 (December 23, 2003) (Amended Antidumping Duty Order).

Citing section 736(b)(1) of the Tariff Act, Corus asserts that since the gap period entries are not subject to suspension of liquidation, those entries cannot be subject to the imposition of antidumping duties, i.e., assessment. However, Corus explains, for the preliminary results the Department calculated dumping margins for gap period entries and included the resultant antidumping duties in the "Potential Uncollected Dumping Duties" (PUDD), which it then allocated over all non-gap period entries. In doing so, Corus argues, the Department has calculated a PUDD for gap period entries and then simply shifted the assessment of that amount from the gap period entries to the POR entries that are subject to assessment, thereby amounting "to an assessment even though the Department states that no dumping duties will be 'assessed' on gap period entries." Corus' Case Brief at 21. Corus argues the Department correctly excluded gap period entries from the denominator of the assessment rate, but did not explain why it included gap period entries in the numerator. Corus asserts that in accordance with 19 C.F.R. § 351.212(b)(1), the Department must remove the PUDD associated with the gap period entries from the numerator of the assessment rate. However, Corus claims, "if the Department includes gap period entries, it must do so in both the numerator and denominator of the equation. Including gap period entries in one but not the other is an impermissible distortion of the dumping margin and violates the Department's own regulatory provisions as set forth in 19 C.F.R. § 351.212(b)(1)." Id. at 23.

Furthermore, Corus argues, the gap period entries should not be included in the margin calculation. Corus claims the statute "specifies that the determination under the review 'shall be the basis for the assessment of ... antidumping duties on entries of merchandise covered by the determination....'" Corus' Case Brief at 23, citing section 751(a)(2)(C) of the Tariff Act (emphasis respondent's). Since the gap period entries are to be liquidated without regard to antidumping duties, Corus contends these transactions are ineligible for the assessment of dumping duties and therefore are outside the scope of this review. Thus, Corus asserts, these transactions should not be included in either the numerator and denominator of the dumping margin calculation.

In rebuttal, USSC argues that while the Department did not assess duties on gap entries, there is no basis on which to exclude such sales from the margin calculations. USSC asserts that Corus' claim that entries for which no duties are assessed fall outside the scope of the review is incorrect because Corus "does not deny that the gap entries (i) entered during the period of review, and (ii) consisted of merchandise falling squarely within the scope of the order on hot-rolled steel from the Netherlands." USSC's Rebuttal Brief at 7. USSC maintains the Department regularly includes in the margin calculation sales that are not subject to the assessment of antidumping duties. For example, USSC states, constructed export price (CEP) sales which entered before the beginning of the POR but were sold during the POR are included in the margin calculation although the entries are not subject to assessment for that review. USSC argues the Federal Circuit upheld this methodology in noting that "the statute 'does not require the same method of calculation for assessment rates and cash deposit rates. Nor does it specify a particular divisor when calculating either assessment rates or cash deposit rates.'" Id. at 7-8, citing Torrington Co. v. United States, 44 F.3d 1572,1578 (Fed Cir. 1995). Thus, USSC urges the Department to continue to include the gap sales in the numerator and denominator of the margin calculation for these final results.

Department's Position: We agree with Corus that the gap period entries should be excluded from the margin calculation. In accordance with the Court's decisions in Corus Staal II and Corus Staal III, the Department amended the antidumping duty order on hot-rolled steel from the Netherlands to lift suspension of liquidation 180 days from the date of publication of the preliminary determination in the Federal Register until the date of publication of the antidumping duty order. Since the preliminary determination was published on May 3, 2001 (see Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 22146 (May 3, 2001)), and the antidumping duty order was published on November 29, 2001 (see Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, 66 FR 59565 (November 29, 2001)), the Department stated in the Amended Antidumping Duty Order that it would issue instructions to CBP to terminate suspension of liquidation of all entries of subject merchandise made between October 30, 2001, and November 28, 2001, inclusive, without regard to antidumping duties (i.e., to release all bonds and refund all cash deposits). See Amended Antidumping Duty Order, 68 FR at 74215-16.

In Allegheny Ludlum Corporation v. United States, 276 F. Supp. 2d 1344 (CIT 2003) (Allegheny), the Court upheld the Department's determination to rescind an administrative review based on its determination that there were no entries of subject merchandise during the POR. In affirming the Department's determination, the Court explained that the definition of "subject merchandise" in section 771(25) of the Tariff Act

> makes clear that subject merchandise is limited by both physical characteristics and time. Commerce's policy of reviewing and assessing duties only on merchandise that entered the U.S. after suspension of liquidation is consistent with the statute, as entries proceeding [sic] suspension of liquidation are not subject merchandise. Thus, Commerce's refusal to use pre-suspension entries to calculate or update cash deposit rates is in accordance with law.

See Allegheny, 276 F. Supp. at 1356. In the instant review, the gap period entries occurred during a period when suspension of liquidation was lifted. Because suspension of liquidation was lifted on these entries, we have not imposed antidumping duties on these entries. Since no duties have been assessed on these entries, it follows that it is improper to include sales of merchandise which entered during the gap period in the calculation of the dumping margin.

Regarding petitioners' argument that the Department includes in the margin calculation CEP sales which entered before the beginning of the POR but were sold during the POR, a clear distinction can be drawn between such entries and the gap period entries in the instant review. In the CEP sales situation noted by petitioners, the entries are eventually subject to assessment at some point in time, whereas in the case at hand, the gap period entries are never subject to assessment. Based on the foregoing, we have excluded the gap period entries from the margin calculation for the final results.

We also agree with Corus that the gap period entries should not be included in the numerator of the assessment rate. In keeping with the Court's rulings in Corus Staal II and Corus Staal III, we already excluded these entries from the denominator (i.e., customs value) of the assessment rate for the preliminary results. However, 19 C.F.R. § 351.212(b)(1) instructs the Department to calculate the assessment rate "by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise." Since we have not included the gap period entries in the margin calculation, we have thereby removed the gap period entries from the numerator of the assessment rate for these final results.[7]

For more information regarding the implementation of these changes to the margin calculation program, see the Department's Final Analysis Memorandum, dated June 7, 2004.

Comment 6. Cost of Manufacturing

Corus argues the Department should not adjust its total cost of manufacture (TCOM) to reflect the unexplained difference found in its cost reconciliation at the cost verification. According to Corus, in the Final Results and Rescission, in Part, of Antidumping Duty Administrative Review: Top-of-the-Stove Stainless Steel Cooking Ware from the Republic of Korea, 68 FR 7503 (February 14, 2003), (Cook Ware from Korea) and accompanying Issues and Decision Memorandum at Comment 3, the Department refused to adjust the reported cost due to a small difference between the reported costs and the company's accounting records:

> We agree with Daelim and have not adjusted its reported costs. We reviewed the reconciliation of Daelim's total reported costs to its audited financial statements, noting a minor difference (less than one percent). We noted that minor differences between reported and financial costs are not unusual. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Italy, 67 FR 3155 (January 23, 2002), and accompanying Issues and Decision Memorandum, at Comment 15.

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[7] We note that by virtue of excluding the gap period entries from the margin calculation, we have also not included these entries in the denominator of the assessment rate. As a result, for the final results we did not need to utilize the programming language we had used in the preliminary results to eliminate the gap period entries from the denominator of the assessment rate.

According to Corus, the fact that there was a small difference identified at verification does not lead to the conclusion that it understated its costs. Corus argues the Department has fully verified every element of its reported cost reconciliation, the accuracy of its standard costs, production quantities and the total variances. Thus, Corus argues there is no reason to conclude that its reported costs are understated or need correction.

USSC contends the Department was correct in increasing Corus' TCOM by the amount of the unexplained difference between the company's reported cost and the costs reflected in the normal books and records. According to petitioners, the Department has stated that, in instances where reported costs are understated by some unexplained amount, it will "'adjust [respondent's] reported cost of manufacturing to account for the unreconciled difference between the total cost of manufacturing in its cost accounting system and the reported cost. Our normal practice is to include such items in the calculation of COP and CV unless the respondent can identify and document why the amount does not relate to the merchandise under investigation.'" See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Italy, 67 FR 3155 (January 23, 2002) and the accompanying Issues and Decision Memorandum at Comment 50.

According to USSC, Corus argues the Department has previously treated a cost difference of "less that one percent" as a "minor difference" that does not warrant an adjustment. USSC argues that the Cook Ware from Korea case does not establish the threshold for whether an adjustment is "insignificant." The petitioners argue the threshold for determining whether any individual adjustment is "insignificant" is 0.33 percent, not 1.0 percent. According to petitioners, the Department's regulations at 19 C.F.R. § 351.413 set forth the threshold:

> Ordinarily, under section 777A(a)(2) of the Act, an "insignificant adjustment" is any individual adjustment having an ad valorem effect of less than 0.33 percent, or any group of adjustments having an ad valorem effect of less than 1.0 percent, of export price, constructed export price, or normal value, as the case may be.

According to USSC, the correction to Corus' reported cost is a single adjustment, not a "group of adjustments" as defined in the second sentence of section 351.413 of the Department's regulations. USSC argues that in the instant case, there are compelling reasons not to ignore this adjustment, including the fact that it is a very simple adjustment to make and there is no dispute the adjustment is correct. Thus, USSC argues the Department should continue to adjust Corus' reported cost by the amount of the unexplained difference between those reported costs and the costs reflected in the company's normal books and records.

Department's Position: The unexplained difference referred to by both respondents and petitioners includes a minor difference in the reconciliation of the reported cost to the total cost of manufacturing and differences due to the change in finished goods inventory. We agree with Corus that the minor difference in the reconciliation of the TCOM to the reported cost represents a minor difference. We note that based on our review of record evidence, the methodology and reconciliation methods used by Corus with respect to costs are reasonable with the exception of a reconciling item related to the change in finished goods inventory for the POR. Therefore, for the final results, we have adjusted the cost of manufacture to exclude the change in finished goods inventory as a reconciling item. On page 13 of the Cost Verification Report we noted Corus deducted the cost of its finished goods inventory from its total cost. The increase in finished goods inventory does not reduce the cost of goods manufactured. Instead, Corus should have only accounted for the change in inventory for scrap, selling plates and semi-finished goods. These costs are clearly identifiable and would have increased the cost of manufacture if they had been included in the calculation of the reported cost. Thus, for these final results we have adjusted Corus' cost of manufacture to include the change in inventory for scrap, plates and semifinished products. For further information, see the Memorandum regarding the Department's Cost of Production and Constructed Value Calculation Adjustments for the Final Results, dated June 5, 2004.

Comment 7. General Expense Ratio

Nucor argues that Corus' general expenses should include the expenses of Corus Staal BV plus the expenses of all parent companies and affiliates providing administrative services. According to Nucor, the Corus Group's 2002 financial statements show significantly more selling and general and administrative (SG&A) expenses than are accounted for in the calculations of selling, general, and financing expenses used in the preliminary results. Nucor argues the preliminary results include a calculation of general expenses that omits an amount for administrative expenses performed on Corus' behalf by one of its affiliates. Therefore, Nucor argues the Department should either recalculate general expenses based on Corus Group's financial statements or at least add the general and administrative expenses of its affiliate.

Corus argues that it fully reported its administrative expenses. Corus argues that the Department's cost verification report leaves no doubt it fully and accurately reported all G&A expenses of all parent companies and affiliates providing administrative services. According to Corus, the Cost Verification Report at 23 states:[8]

> CSBV reported its G&A expense factor as three separate calculations (CSBV, Corus Services Netherlands and Corus Group) which are then summed to arrive at the G&A factor. CSBV then added its correction for certain expenses incurred by Hogovens Steel Other and Corus Netherland

[8] We note that Corus Nederland BV was incorrectly referenced as Corus Netherland BV and Hogovens Steel Other should have been spelled Hoogovens Steel Other.

> BV (see CVE 15, pages 13 and 14) to come up with the revised G&A expense factor. For each calculation we traced the G&A and cost of sales figures to the appropriate financial statements or trial balance.

Finally, Corus argues that Cost Verification Exhibit 15 is replete with references to the G&A expenses of Corus Nederland BV (the affiliate referred to above by the petitioners) that were included in Corus' cost of production. Thus, Corus asserts there is no basis for petitioners request that the Department resort to facts available in this review.

Department's Position: We agree with Corus that it fully reported its administrative expenses including those of Corus Nederland BV. We noted on page 3 of the Cost Verification Report that Corus included certain expenses "incurred by Corus Netherland BV" as first day corrections which were shown in Cost Verification Exhibit 1. We also noted on page 23 of the Cost Verification Report that "CSBV reported its G&A expense factor as three separate calculations (CSBV, Corus Services Netherlands and Corus Group) which are then summed to arrive at the G&A factor. CSBV then added its correction for certain expenses incurred by Hogovens Steel Other and Corus Netherland BV (see CVE 15, pages 13 and 14) to calculate the revised G&A expense factor. For each calculation, we traced the G&A expenses and cost of sales figures to the appropriate financial statements or trial balance." Thus, the record shows that Corus included administrative costs incurred by Corus Nederland on behalf of Corus in the G&A expense calculation and there is basis for petitioners' argument.

Comment 8. Variable Cost of Manufacturing

USSC argues that in recalculating variable costs of manufacture (VCOMH/U), the Department failed to include the revised start up variable (RSTARTUP). USSC therefore urges the Department to include RSTARTUP in its calculation of VCOMH/U for these final results.

Corus did not comment on this issue.

Department's Position: We agree with petitioners. Startup costs were subtracted from the total cost of manufacture of each CONNUM to calculate the TCOM for each CONNUM. To calculate the VCOM for each CONNUM we must subtract all fixed costs and the startup costs and we have done so for the final results. For further information, see the Memorandum regarding the Department's Cost of Production and Constructed Value Calculation Adjustments for the Final Results, dated June 5, 2004.

Comment 9. CEP Profit Rate

In calculating the CEP profit rate, Nucor states the Department has included all home market and U.S. sales made within the review period as well as all home market sales made within the 90/60 day window. Thus, Nucor argues, the Department has incorrectly calculated the CEP profit rate by giving undue weight to Corus' home market activities relative to its U.S. market activities. Nucor requests that the Department correct this error by excluding home market sales made during the 90/60 day window from the CEP profit rate calculation.

Corus responds there is no statutory or policy support for petitioners' claim that it is distortive to use home market sales made within the extended window to calculate a profit ratio. Corus argues the Department's methodology is consistent with the calculation methodology articulated in Policy Bulletin 97.1, "Calculation of Profit for Constructed Export Price Transactions," (September 4, 1997) (Policy Bulletin 97.1).[9] Corus claims Policy Bulletin 97.1 specifies that home market revenue, expense and profit figures are to be calculated using "each observation in the home market database" and/or "all home market sales." Asserting the Department's methodology also comports with the statute, Corus cites section 772(f)(2)(C) of the Tariff Act, which defines total expenses as "{t}he expenses incurred with respect to ... the foreign like product sold in the reporting country if such expenses were requested by the administering authority for the purpose of establishing normal value...." Corus also cites the SAA at 824 in support of its position. Since the Department requested Corus to report sales made within the extended window for the purpose of calculating NV, Corus contends, the Department should continue to use these sales to calculate CEP profit.

Department's Position: We disagree with petitioners. The Department has used the home market sales during the extended window period to form the basis of its calculation of NV. Thus, in accordance with the statute and its normal practice, which is articulated in Policy Bulletin 97.1, the Department has used these expenses in the calculation of the CEP profit ratio. This methodology is identical to that employed in past cases, such as Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 68 FR 6889 (February 11, 2003) and Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review, 62 FR 18476 (April 15, 1997) (Cold-Rolled from the Netherlands). In those cases as well as in the instant review, the methodology used comports with section 772(f)(2) of the Tariff Act. Therefore, for these final results we have made no changes to our methodology for calculating CEP profit.

Comment 10. Use of Sales Date vs. Entry Date to Identify EP Sales

Citing Circular Welded Non-Alloy Pipe from the Republic of Korea; Amended Final Results of Antidumping Duty Administrative Review, 63 FR 39071, 39072 (July 21, 1998) (Welded Pipe from Korea), USSC argues the Department's normal practice is to review all CEP sales with a sale date

[9] Available at http://www.ia.ita.doc.gov/policy/index.html.

during the POR and all EP sales with an entry date during the POR. USSC states this practice corresponds with the instructions in the questionnaire issued by the Department for this review. Therefore, USSC asserts, the Department should modify the U.S. sales program to include all CEP sales with a sale date during the period May 3, 2001 through October 31, 2002 and all EP sales with an entry date during that same period. Nucor concurs the Department should make this change to the U.S. sales program.

In its rebuttal, Corus argues the use of sale date, rather than entry date, is consistent with the Department's current practice and the statute. Corus asserts petitioners have provided no legal basis for their argument. Citing 19 C.F.R. § 351.213(e)(1)(i) and (ii), Corus maintains the Department has the discretion to decide which sales are included in an administrative review. Corus claims the Department has stated neither the statute nor the WTO Antidumping Agreement stipulate whether sales or entries are to be reviewed and that "the Department's stated policy is that it 'normally must base its review on sales made during the period of review.'" Corus' Rebuttal Brief at 7, citing Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27314 (May 19, 1997) (Final Rule). Corus contends the Court has upheld the use of sales date in selecting the transactions reviewed in Hynix Semiconductor, Inc. v. United States, 248 F. Supp 2d 1297, 1304 (CIT 2003) (Hynix), Accord Ad Hoc Committee of Southern California Producers of Gray Portland Cement v. United States, 914 F. Supp. 535, 544 (CIT 1995) and NSK Ltd. v. United States, 825 F. Supp. 315, 320 (CIT 1993). Therefore, Corus asserts, the use of entry date to determine the sales subject to review is the exception rather than the rule. Corus holds that since date of sale traces to its business records, date of sale should be used to ensure that no transactions escape review and to avoid employing a hybrid methodology.

Corus refutes petitioners' claim that the language of the questionnaire upholds the use of both entry dates and sale dates to choose the transactions under review. Citing Hynix, 248 F. Supp. 2d at1304, Corus argues the Court found that nothing in the Department's regulations supports using a mix of POR sales and entries for calculating dumping margins. According to Corus, a hybrid approach could be problematic in this case since it has both CEP and EP sales and "the mechanics of those transactions differ so as to raise the very sorts of issues that a date-of-sale based approach seeks to avoid." Corus' Rebuttal Brief 8.

Corus states that even if the Department were to use a hybrid approach, since all CEP sales are defined by date of sale, the only issue before the Department is whether to define EP sales on the basis of entry or sale date. Citing the Final Rule at 62 FR 27314, Corus argues that even in cases where sales can be tied to entries, the Department has found there are other considerations which make it impractical to base a review on entries, including the possibility that merchandise entered during the POR may not be sold during the POR and thus escape review. For example, Corus holds, given the length of time between entry date and date of sale for just-in-time (JIT) inventory sales, there likely will be entries sold from JIT inventory that will not be invoiced until after the conclusion of the review period and thus too late to be reported in the appropriate review. In addition, Corus contends the use of date of sale to identify the transactions to be reviewed is consistent with its audited financial records. Because the sales reconciliation provided to the Department will largely comport with its financial records, Corus asserts using the date of sale means no beginning- and end-of-period adjustments will have to be made. Corus maintains that if date of sale is used consistently in each successive POR, "no sales will go unreported and Corus will not escape payment of any liability owed." Corus' Rebuttal Brief at 10 (emphasis Corus').

Department's Position: We agree with petitioners. In accordance with the Department's normal practice, for those sales which occurred prior to importation, we have used the date of entry to select those transactions used in our analysis. This methodology comports with the Department's standard administrative review questionnaire, which instructs respondents to report such sales of merchandise which entered for consumption during the POR. This methodology is also consistent with that used in other antidumping duty administrative reviews. See, e.g., Welded Pipe from Korea at 39072. Thus, for these final results, we have amended our margin calculation program so that for sales which occurred prior to importation, the entry date was used to define those sales used in our analysis.

Comment 11. Reporting period for U.S. sales

Corus argues the Department erroneously used the extended POR (i.e., actual POR plus the "window" months) to identify applicable U.S. sales. Thus, Corus contends the U.S. sales program should be amended to reflect the actual POR rather than the extended POR.

Both USSC and Nucor agree the Department erred in using the extended POR to identify the applicable U.S. sales and that U.S. sales program should be revised to reflect the actual, not the extended, POR.

Department's Position: We agree with both respondent and petitioners. Therefore, for these final results we have amended the U.S. sales program to identify applicable sales based on the actual POR. For more information regarding the implementation of this change, see the Department's Final Analysis Memorandum, dated June 7, 2004.

Recommendation

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

AGREE _______ DISAGREE _______

____
James J. Jochum
Assistant Secretary
for Import Administration

____
Date