

70 FR 18366, April 11, 2005

A-421-807
POR: 11/01/2002-10/31/2003
AD/CVD Operations, Office 7/ DC
Public Document

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

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Operations, Import Administration

SUBJECT: Issues and Decision Memorandum for the 2002-2003
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 2002-2003 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. Treatment of non-dumped sales
2. Classification of JIT sales as CEP
3. Inventory period of JIT sales
4. Clerical error related to invoice currency field
5. Liquidation instructions

Background

On December 3, 2004, 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, 69 FR 70226 (December 3, 2004) (Preliminary Results). The period of review (POR) is November 1, 2002 through October 31, 2003.

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 timely case briefs from Corus and the petitioner (United States

Steel Corporation (USSC) on January 19, 2005. We received a rebuttal brief from USSC on January 28, 2005.

Discussion of the Issues

Comment 1: Treatment of non-dumped sales

Corus argues that, in calculating the overall weighted-average dumping margin, the Department unlawfully eliminated sales where the United States Price (USP) exceeds normal value (NV). By its treatment of non-dumped sales, Corus contends, the Department computed a weighted-average dumping margin that ignores certain transactions and produces margins higher than the mathematical average margin for the subject sales. See Corus' Case Brief at 2.

Corus asserts both the U.S. Court of International Trade (CIT) and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) have concluded the statute does not require the Department's current methodology for the treatment of non-dumped sales in either investigations or administrative reviews. See Corus Staal BV v. United States, 259 F. Supp. 2d 1253, 1261 (CIT 2003) (Corus), and Timken Company v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004) cert denied, Koyo Seiko Co., Ltd. v. U.S., 125 S. Ct. 412 (2004) (Timken CAFC). Additionally, Corus contends the CIT has recognized that the Department's treatment of non-dumped sales "introduces a statistical bias in the calculation of dumping margins." See Bowe Passat v. United States, 926 F. Supp. 1138, 1149 (CIT, 1996).

Corus argues that, in Timken CAFC, the courts rejected Commerce's rationale that only positive dumping margins fall within the definition of a dumping margin and that only positive margins should be used to compute the "weighted average dumping margin." Corus believes the Department cannot demonstrate the use of its methodology with respect to non-dumped sales is based on a permissible construction of the statute if it relies on the rationales it has previously articulated. See Corus' Case Brief at 5.

Corus contends that the Timken CAFC and Corus cases did not consider the breadth of the fundamental changes enacted by the Uruguay Round Agreements Act (URAA). In particular, Corus argues that what needs to be considered is the interdependence of the different provisions of the post-URAA U.S. statute. If these are not considered, Corus avers, "an interpretation of one provision of the statute can operate to thwart the language or intent of another provision, thereby defying accepted standards of statutory construction." See Corus' Case Brief at 6, citing Floral Trade Council v. United States, 41 F. Supp. 2d 319, 335 (CIT 1999).

Corus argues that the changes to the statute "tie together investigations, administrative reviews and a new procedure of sunset reviews, in an interlocking framework that did not exist prior to the URRA." See Corus' Case Brief at 7. Corus contends that internal consistency is needed to

give each provision reasonable effect and a reasonable interpretation of the statute as a whole. In particular, Corus believes that the concept of “subject merchandise” must be treated consistently. Corus believes that administrative reviews fulfill an additional and linked function between the investigation and the sunset review and that overall less-than-fair-value sales and injury are continuing in nature. Corus contends that this additional function was not considered in Timken CAFC.

Additionally, Corus contends, the Department’s methodology continues to violate the WTO Antidumping Agreement and recent decisions which found the U.S. methodology with respect to non-dumped sales to be WTO-inconsistent. Corus cites to a number of cases such as European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 12, 2001) (EC - Bed Linen) and United States – Final Determination on Softwood Lumber from Canada WT/DSD264/AB/R (WTO App. Body Aug. 31, 2004), (US-Lumber) to argue its point.

Corus maintains that Congress intended U.S. law to be consistent with the WTO Antidumping Agreement and that the WTO has rejected the Department’s methodology with respect to non-dumped sales because it is inconsistent with the requirement that determinations relate to subject merchandise as a whole. See Corus’ Case Brief at 10.

Therefore, Corus maintains, the Department should conform its practice to the Antidumping Agreement. Corus refers to the Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1 (1994) (SAA) which said it was Congressional intent to “bring U.S. law fully into compliance with U.S. obligations under these [Uruguay Round] agreements.” See Corus’ Brief at 12 citing the SAA at 669.

Citing to a number of cases, such as Federal Mogul v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995), Corus maintains that the United States obligations under the General Agreement on Tariffs and Trade (GATT) and the agreements of the WTO have been held to fall within the so-called Charming Betsy Doctrine. See Corus’ Case Brief at 12 citing Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (Charming Betsy).

In its rebuttal brief, petitioner United States Steel Corporation (USSC) argues the Department must continue to use its methodology to calculate Corus’ dumping margins in the final results. USSC maintains every court has backed the Department’s methodology as a reasonable interpretation of the provisions of calculating “dumping margin” and “weighted average dumping margin.”

USSC contends that, in Corus Staal BV v. Commerce et.al., 395 F.3d 1343 (Fed. Cir. 2005) (Corus CAFC), the Court rejected Corus’ argument and relied on its decision in Timken CAFC in holding the Department’s treatment of non-dumped sales to be reasonable. USSC insists that

in both antidumping investigations and reviews, the Court has held the Department's treatment of non-dumped sales to be in accordance with the statute as "a reasonable interpretation of the statutory language." See USSC's Rebuttal Brief at 3.

USSC also argues the WTO decisions cited by Corus have no effect on the case at hand. Such decisions were issued prior to the Federal Circuit's January 21, 2005 decision in Corus CAFC and presumably were considered by the Court in its decision. USSC maintains the WTO dispute settlement decisions such as EC-Bed Linen, and Softwood Lumber have no binding effect under U.S. law and are owed no deference. USSC states decisions of the WTO Appellate Body, even ones involving the United States, do not have a binding effect on U.S. law or the Department. USSC argues that adverse WTO dispute settlement decisions cannot be implemented by U.S. law absent specific instructions from the United States Trade Representative after consultation with Congress. Therefore, USSC believes Corus' arguments must be rejected.

Department's Position: We agree with USSC and have not changed our calculation of the weighted-average dumping margin as suggested by Corus for these final results.

As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Tariff Act of 1930, as amended (the Tariff Act). See, e.g., Notice of Final Results of Antidumping Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada, 69 FR 75921 (December 20, 2004), and accompanying Issues and Decision Memorandum at Comment 4; Final Results of Administrative Antidumping Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand, 69 FR 61649 (October 20, 2004), and accompanying Issues and Decision Memorandum at Comment 7; and Notice of Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 69 FR 68309 (November 24, 2004), and accompanying Issues and Decision Memorandum at Comment 8. The Court of International Trade has consistently upheld the Department's treatment of non-dumped sales. Furthermore, the CAFC in Timken CAFC, and most recently in Corus CAFC, has affirmed the Department's methodology as a reasonable interpretation of the statute.

Section 771(35)(A) of the Tariff Act defines dumping margin as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV value exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applying on a comparison-specific level and not on an aggregate basis. At no

stage of the process is the amount by which EP or CEP exceeds the NV on sales that did not fall below NV permitted to cancel out the dumping margins found on other sales.

This does not mean, as Corus asserts, that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that U.S. Customs and Border Protection (CBP) is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows Customs to apply this rate to all merchandise subject to review.

Corus also asserts that the WTO Appellate Body rulings in EC-Bed Linens and Softwood Lumber render the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. The CAFC in Timken CAFC found specifically that EC-Bed Linens was not only distinguishable but, more importantly, not binding. With regard to Softwood Lumber, in implementing the URAA, Congress made clear that reports issued by WTO panels or the Appellate Body “will not have any power to change U.S. law or order such a change.” SAA at 660. The SAA emphasizes that “panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . .”. *Id.* To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. *See* 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); *see also* SAA at 354 (“{ a}fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is ‘not inconsistent’ with the panel or Appellate Body recommendations. . .”).”

For the reasons mentioned above, we have not changed our calculation for these final results.

Comment 2: Classification of JIT sales as CEP

Corus disagrees with the Department's decision to classify JIT deliveries to one unaffiliated U.S. customer as CEP sales. Corus contends the Department's position is in “direct contravention of legal precedent established in the original investigation and in the first review” and that it “fails

to give full effect to the statutory phrase ‘sold (or agreed to be sold)’ before the date of importation.” See Corus’ Case Brief at 13. Corus maintains the Department erred in the preliminary determination when it based its classification on the fact that Corus’ final invoices establish the material terms of sale and that the final invoices relating to the JIT deliveries were not issued until after the goods had entered the United States.

Citing the original investigation, Corus contends the Department determined that the framework agreements between Corus and its customers were evidence of a sale or an agreement to sell and determined that Corus Staal’s reported sales should be classified as CEP sales because the merchandise was “sold (or agreed to be sold)” in the United States. Corus contends the Department “found the frame agreements - not the invoices - were controlling for purposes of determining EP versus CEP” and that the invoices were controlling for date of sale. See Corus’ Case Brief at 14.

Corus argues the only factual difference in this review is that all written confirmations of the frame agreements are executed by Corus in the Netherlands whereas in the first review, the Department classified Corus’ U.S. sales as EP transactions, noting that the frame agreements were executed “outside the United States.”

Corus contends that because there has been no material change in fact in this review, the Department is bound to classify as EP sales, those sales “where Corus Staal executes the frame agreements for U.S. sales in the Netherlands and serves as importer of record.” Citing Davilla-Bardeles v. INS, 27 F.3d 1, 5 (1st Cir. 1994), Corus contends “the law prohibits {an} agency from adopting significantly inconsistent policies that result in the creation of “conflicting lines of precedent governing the identical situation” in order to insure consistency in an agency’s administration of the statute.” See Corus’ Brief at 16.

Corus argues the Department in its regulations allows for situations where the date of sale, on which the material terms of sale are finally established, can differ from the date on which the terms of sale are “first” agreed upon. Corus cites to the Department’s regulations where the Department explained “as a matter of commercial reality, the date on which the terms of sale are first agreed is not necessarily the date on which those terms are finally established.” See Antidumping Duties; Countervailing Duties: Final Rule, 62 FR 27295, 27348 (May 19, 1997) (Antidumping Duties; Countervailing Duties: Final Rule). Thus, Corus believes the JIT sales should be classified as EP sales because the Department, in its view, recognizes the distinction between the actual date of sale, and the date upon which merchandise is first agreed to be sold. See Corus’ Brief at 17. Corus contends the Department incorrectly interpreted “export price” and did not give full effect to the statutory language in its interpretation.

Corus, citing Chevron and AK Steel Corp. v. United States, 226 F.3d 1361 (Fed. Cir. 2000) (AK Steel), argues a fundamental issue is “whether Congress fully defined the terms EP and CEP in

the statute, or expressly or implicitly made a delegation to the Department to do so.” Corus contends Congress made no such delegation; according to AK Steel, the Department must “give effect to the unambiguously expressed intent of Congress” and is not free to interpret the statute and introduce its own practice. Accordingly, Corus believes the “Department is not free to supplant the statutory phrase ‘sold (or agreed to be sold)’ with its definition of date of ‘sale’.” See Corus’s Brief at 19, 20.

In particular, Corus contends the pro forma invoices are issued by Corus in the Netherlands at the time the JIT merchandise leaves Ijumiden destined for the United States, and that this must qualify as an “agreement to sell.” Thus, because the pro forma invoices were issued by Corus “before importation” and “outside of the United States,” Corus’ JIT sales were properly classified as EP sales by Corus in its submissions. See Corus’ Case Brief at 22.

Corus also contends the Department has ignored the standards of AK Steel in its interpretation of the term “export price.” Corus believes the Department has ignored the locus and identity of the seller, which it claims AK Steel determined as being dispositive of the choice over whether sales should be classified as EP or CEP. Corus argues it issues the relevant documents outside the United States and contends the Federal Circuit has stated that “whether a sale is ‘outside’ the United States.....{C}lassification as an EP sale requires that one of the parties to the sale ‘be located outside the United States’.” See Corus’ Brief at 24 citing AK Steel.

Corus contends the Department’s Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Korea, 67 FR 3149 (January 23, 2002) (Stainless Steel Bar from Korea) does not support the reclassification of Corus’ JIT sales as CEP sales. Corus argues that, in Stainless Steel Bar from Korea, both the initial agreements and the final sales documents with the first unaffiliated U.S. purchaser were entered into by the producer’s U.S. affiliate. Corus contrasts this instant review where no sales agreements were executed in the United States by Corus’ U.S. affiliate and Corus’ affiliate neither took title of the goods nor countersigned the frame agreements.

USSC rejects Corus’ assertions that the Department has adopted a position that is in direct contravention of legal precedent and that the preliminary determination is in conflict with the Department’s regulations. See Corus’ Brief at 13 and USSC’s Rebuttal Brief at 6.

USSC contends that “according to the Federal Circuit, where the transfer of ownership, and hence the ‘sale’ of merchandise occurs in the United States, the sale must be classified as a CEP sale.” See USSC’s Rebuttal Brief at 7. USSC notes that sales between a foreign producer and a U.S. customer must be treated the same way, as long as the sale occurs in the United States. See USSC’s Rebuttal Brief at 8.

USSC maintains that for all the JIT sales the merchandise “entered and was physically present in the United States before being sold” to the JIT customer. See USSC’s Rebuttal Brief at 8. USSC argues the invoice for each JIT sale was not issued - and the title not transferred - until the merchandise was shipped from the U.S. JIT warehouse to the JIT customer. Thus, USSC maintains, the merchandise was sold in the United States after the date of importation. Thus, in USSC’s opinion the sales are properly reclassified as CEP sales.

USSC also notes that, until the time of invoicing/shipment, “Corus or the customer can change the quantity, price or the specific product to be shipped” and that “price and other changes up to the time of shipment (and sometimes later) are not infrequent.” See USSC’s Rebuttal Brief at 9. USSC further contends that Stainless Steel Bar from Korea demonstrates that the Department has previously determined that a frame agreement is “irrelevant to the analysis of whether sales should be classified as EP or CEP.” See USSC’s Rebuttal Brief at 10. USSC argues that the Department focuses on the date the material terms of sale become established, rather than the date of any prior agreement. Thus, as the material terms of sale for Corus’ JIT sales become established as of the invoice date, after the subject merchandise was imported into the United States, the sales are required to be treated as CEP sales. See USSC’s Rebuttal Brief at 11.

Regarding Corus’ argument that the Department’s CEP treatment of the JIT sales does not give full effect to the language of the statute, USSC contends the Department had not supplanted the phrase “sold” (or “agreed to be sold”) with the definition of “date of sale.” USSC argues that the Department has used Corus’ own statements to show that the invoice date is the date on which the subject merchandise is “sold (or agreed to be sold)” and that, for the JIT sales, this occurs after the subject merchandise has entered the United States. See USSC’s Rebuttal Brief at 12. USSC argues that, based on Corus’ statements in the proceeding, there was “no meeting of the minds” between Corus and the JIT customer “on the material terms of sale or even the specific product to be shipped before the issuance of the final invoice.” USSC argues that “there could not have been an agreement between the parties” and thus neither the pro forma invoice nor the framework agreement could satisfy the “agreed to be sold” language of the statute. See USSC’s Rebuttal Brief at 13.

USSC also notes that the courts have never found a distinction between the statutory terms “sold” and “agreed to be sold.” USSC also argues that such an interpretation could result in a product being “sold” in the United States after importation and “agreed to be sold” outside of the United States before importation. In so doing, such a transaction, according to USSC, would meet the criteria for both CEP (based upon the time and location of the “sale”) and EP (based upon the time and location of the “agreement to sell”), which is not intended by the statute. See USSC’s Rebuttal Brief at 14

Finally, USSC contends Corus is incorrect that the Department’s determination ignores the standards of AK Steel. USSC maintains the statute requires U.S. sales be treated as CEP sales when they are made in the United States, whether by an affiliated importer or foreign producer.

USSC believes these JIT sales meet this standard. USSC concludes by arguing that the Department's position on the classification of the JIT sales is "not only supported, but mandated, by the terms of the statute." See USSC's Rebuttal Brief at 15.

Department's Position: We agree with petitioner and have not changed our classification of the JIT sales as suggested by Corus for these final results. Instead, based on the statutory definition, we have continued to classify these sales as CEP sales.

The statute defines EP as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation." See Section 772(a) of the Act. The statutory definition of CEP is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation." See Section 772(b) of the Act.

The Federal Circuit has defined the term "sold" as requiring both a "transfer of ownership to an unrelated party and consideration." See AK Steel 226 F.3d at 1371, citing NSK Ltd. v. United States, 115 F.3d 965, 973 (Fed. Cir. 1997). Here, there is no evidence on the record that a transfer of ownership or consideration took place prior to importation.

Furthermore, in determining whether subject merchandise is sold in accordance with sections 772(a) and (b) of the Act, in this case the key element to consider is when the material terms of sale are established. The Department considers a sale as made when the material terms of sale (i.e., price and quantity) are firmly established. See Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia, 70 FR 13456 (March 21, 2005). The Department has also held that it "does not treat an initial agreement as establishing the material terms of sale between the buyer and the seller when changes to such an agreement are common, even if, for a particular sale the terms did not actually change." See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils (SSPC) from the Republic of Korea, 64 FR 15444, 15499 (March 31, 1999). In situations where an initial agreement is reached but nevertheless remains subject to change, the Department analyzes whether "changes are sufficiently common to allow [it] to conclude that initial agreements should not be considered to firmly establish the material terms of sale." See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 64 FR 56759, 5678 (October 21, 1999), quoting Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea, 64 FR 15449-50, (March 31, 1999).

We have based our decision on the responses Corus made to the questionnaires issued in this segment of the proceeding. The record establishes that "transactions during the POR were subject to revisions until invoices were issued and that the invoice reflects the time that the material terms are set." See Corus' Section A Supplemental Response, April 1, 2004 at 16. The record also shows such changes are not merely hypothetical, and "price and other changes up to the time of shipment (and sometimes later) are not infrequent." See id at 16.

Moreover, the pro forma and framework agreements cited by Corus fail to firmly establish the terms of sale. Corus itself acknowledges that the price and other selling terms are not finally determined until the invoice is issued. The Department's practice is to use the date of invoice as the presumptive date of sale because this is when the material terms of sale are usually set and the commercial reality is that the parties to the transaction consider the terms to be "fixed when the seller demands payment (i.e., when the sale is invoiced)." See Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 68 FR 69996 (Dec. 16, 2003) and accompanying Issues and Decision Memorandum at Comment 4 citing the Antidumping Duties; Countervailing Duties: Final Rule, 62 FR at 27349. Corus itself writes "there is no date other than the invoice date that better reflects the time at which the material terms of a transaction are fixed" and "it is upon invoicing that the final quantity, price and product sold are ultimately determined." See Corus' Section A Response, February 18, 2004 at C-19. Corus also states in response to a supplemental question that "there is no binding agreement as to price, quantity or even specific products to be shipped" at the time the framework agreements are executed. See Corus' Second Section A Supplemental Response, May 13, 2004 at 5. Therefore, the framework agreement cited by Corus is irrelevant to this analysis.

There was no sale between Corus and the JIT customer before importation, because there was no agreement on the material terms (i.e. price and quantity) until the final invoice was issued after importation of the subject merchandise. Here, the sale does not take place until the final invoice is issued, when the goods are in the United States. Section 772 of the Act precludes transactions from being classified as EP sales where the merchandise was sold subsequent to its importation into the United States. Here, the transfer of the goods occurs within the United States. This further militates for finding that these sales are CEP transactions in accordance with section 772 of the Act.

Because in this case the establishment of the material terms of sale took place after importation the sales are properly classified as CEP. See Section 772(b) of the Act.

We also disagree with Corus' assertion that we have ignored the standards of AK Steel because its JIT sales involve direct negotiations between a producer/exporter in the exporting country and an unaffiliated U.S. customer. See Corus' Case Brief at 23-25. Corus previously argued that the decision in AK Steel provides no indication what kind of analysis would be "warranted when there are transactions between a producer/exporter in the exporting country with an unaffiliated U.S. customer." See Corus Pre-Preliminary Comments at 6 (July 16, 2004). The Department notes that this issue was not addressed in the AK Steel decision itself. The AK Steel decision noted "the statute appears to allow for a sale made by the foreign exporter or producer to be classified as a CEP sale, if such a sale is made in the United States . . . [n]o such transaction is at issue in this appeal." See AK Steel, 226 F.3d at 1361, 1368. Here, although negotiations occurred between Corus and the JIT customer prior to importation, the material terms of sale

were not set; thus, there was neither a sale nor an agreement to sell at an agreed price and quantity until after importation. Therefore, our position is consistent with the standards set by AK Steel.

Based upon the foregoing, we have continued in these final results to classify Corus' JIT sales as CEP transactions.

Comment 3: U.S. warehousing expenses and inventory carrying costs for certain U.S. sales

In its brief, USSC contends the Department should correct the U.S. warehousing expenses and inventory carrying costs reported by Corus for its JIT sales. USSC claims Corus based its reported expenses on the order-wide average number of inventory carrying days for such transactions, but the transaction-specific number of inventory carrying days can be determined from the U.S. sales database. Therefore, USSC argues the Department should recalculate the values in the USWAREHU and INVCARU fields for those sales.

USSC contends the Department's regulations and practices demonstrate that, where available, transaction-specific values should be used in calculating the sales expenses incurred by a respondent. USSC maintains this information is available for JIT sales by deducting the entry date reported in the ENTRYDTU field from the final invoice date reported in the SALINDTU field. USSC argues the Department should use the transaction-specific number of inventory carrying days in the formula provided by Corus to calculate the values in USWAREHU and INVCARU. In its brief, USSC provides programming language to perform such recalculation. Corus did not respond to this point in a rebuttal brief.

Department's Position: As stated by USSC, the Department prefers transaction-specific expenses where such data are available. We agree with USSC that the U.S. warehousing expenses and inventory carrying costs reported by Corus for its JIT sales can be based on a transaction-specific calculation using the information submitted in the U.S. sales database. Accordingly, the Department has based its calculations on such information in the final results.

Comment 4: Clerical Error related to the Invoice Currency Field

Corus states that the Department inadvertently used the incorrect variable to report expenses incurred in euros on Corus' U.S. sales file. The Department had used the variable "EURO" rather than the field "EUR," which had been reported by Corus. As a result certain U.S. sales reported in euros were not converted to U.S. dollars. Corus states the Department should correct this error in its final determination.

In its rebuttal brief, USSC concurs with Corus that this clerical error in the U.S. sales program should be corrected in the final results.

Department's Position: The Department concurs with both Corus and USSC and will correct this error in its final results. The Department has identified one other instance in the U.S. sales

program, not identified by Corus and USSC, where this correction also needs to be made. Specifically, the recalculation of CREDITU for sales denominated in euros has also been changed in the final program. See Corus Final Analysis Program, dated April 4, 2005.

Comment 5: Draft Liquidation Instructions

USSC argues the Department should omit the last few words of paragraph 1 of the draft instructions. USSC notes the paragraph it refers to does not provide an exception to paragraph 1 of the instructions. The passage to which USSC objects reads “except if paragraph 2 is applicable.” USSC also asks the Department to correct the paragraph numbering.

Corus did not submit a rebuttal to this point.

Department’s Position: The Department will correct the liquidation instructions in the manner suggested. Furthermore, in accordance with its standard practice for liquidation instructions for a second review, we have added a section to paragraph 1 that relates to situations where shipments are produced by Corus, but imported by other importers.

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 _____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date