



Administrative Review
A-602-809
POR: 10/1/2017 – 9/30/2018
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September 30, 2020

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order: Certain Hot-Rolled Steel Flat Products from Australia; 2017-2018

I. SUMMARY

We analyzed the comments of the interested parties in the 2017-2018 administrative review of the antidumping (AD) duty order covering certain hot-rolled steel flat products (hot-rolled steel) from Australia. As a result of our analysis, we made certain changes to the margin found in the preliminary results for the sole respondent in this review, BlueScope Steel (AIS) Pty Ltd (AIS), BlueScope Steel Limited (BSL), and BlueScope Steel Distribution (BSD) (collectively, BlueScope). We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of issues in this administrative review for which we received comments from the interested parties:

Comment 1:	Reimbursement of AD Duties
Comment 2:	Partial Adverse Facts Available (AFA) for Home Market Sales with Incomplete Control Numbers (CONNUMHs)
Comment 3:	U.S. Sales of Products That Were Re-Exported
Comment 4:	Programming Error

II. BACKGROUND

On December 10, 2019, the Department of Commerce (Commerce) published the preliminary results of the 2017-2018 administrative review of the AD order on hot-rolled steel from Australia.¹ The period of review (POR) is October 1, 2017 through September 30, 2018.

¹ See *Certain Hot-Rolled Steel Flat Products from Australia: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018*, 84 FR 68876 (December 17, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).



We invited parties to comment on the *Preliminary Results*. We received case and rebuttal briefs from BlueScope and from the United States Steel Corporation, AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, Steel Dynamics, Inc, (collectively, the petitioners).²

On March 13, 2020, Commerce extended the deadline for issuing the final results of this review by 58 days, until June 12, 2020.³ On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.⁴ On July 21, 2020, Commerce tolled all deadlines in administrative reviews by an additional 60 days.⁵ The deadline for the final results of this review is now September 30, 2020.

III. SCOPE OF THE ORDER

The products covered by this order are certain hot-rolled, flat-rolled steel products, with or without patterns in relief, and whether or not annealed, painted, varnished, or coated with plastics or other non-metallic substances. The products covered do not include those that are clad, plated, or coated with metal. The products covered include coils that have a width or other lateral measurement (width) of 12.7 mm or greater, regardless of thickness, and regardless of form of coil (*e.g.*, in successively superimposed layers, spirally oscillating, *etc.*). The products covered also include products not in coils (*e.g.*, in straight lengths) of a thickness of less than 4.75 mm and a width that is 12.7 mm or greater and that measures at least 10 times the thickness. The products described above may be rectangular, square, circular, or other shape and include products of either rectangular or non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges). For purposes of the width and thickness requirements referenced above:

(1) where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the resulting measurement makes the product covered by the

² See BlueScope’s Case Brief, “Case Brief of BlueScope Steel. Ltd: Certain Hot-Rolled Steel Products from Australia,” dated March 11, 2020 (BlueScope’s Case Brief; Petitioners’ Case Brief, “Hot-Rolled Steel Flat Products from Australia: Petitioners’ Case Brief,” dated March 11, 2020 (Petitioners’ Case Brief); BlueScope’s Rebuttal Brief, “Rebuttal Brief of BlueScope Steel Ltd: Certain Hot-Rolled Steel Products from Australia,” dated March 18, 2020 (BlueScope’s Rebuttal Brief); and Petitioners’ Rebuttal Brief, “Hot-Rolled Steel Flat Products from Australia: Petitioners’ Rebuttal Brief,” dated March 18, 2020 (Petitioners’ Rebuttal Brief).

³ See Memorandum, “Certain Hot Rolled Steel Flat Products from Australia: Extension of Deadline for Final Results of Antidumping Duty Administrative Review, 2017-2018,” dated March 13, 2020.

⁴ See Memorandum, “Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID-19,” dated April 24, 2020.

⁵ See Memorandum, “Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,” dated July 21, 2020.

existing antidumping⁶ or countervailing duty⁷ orders on Certain Cut-To-Length Carbon-Quality Steel Plate Products from the Republic of Korea (A-580-836; C-580-837), and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 2.50 percent of manganese, or
- 3.30 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 2.00 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium, or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium.

Unless specifically excluded, products are included in this scope regardless of levels of boron and titanium.

For example, specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, the substrate for motor lamination steels, Advanced High Strength Steels (AHSS), and Ultra High Strength Steels (UHSS). IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum. AHSS and UHSS are considered high tensile strength and high elongation steels, although AHSS and UHSS are covered whether or not they are high tensile strength or high elongation steels.

⁶ See Notice of Amendment of Final Determinations of Sales at Less Than Fair Value and Antidumping Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate Products from France, India, Indonesia, Italy, Japan and the Republic of Korea, 65 FR 6585 (February 10, 2000).

⁷ See Notice of Amended Final Determinations: Certain Cut-to-Length Carbon-Quality Steel Plate from India and the Republic of Korea; and Notice of Countervailing Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate from France, India, Indonesia, Italy, and the Republic of Korea, 65 FR 6587 (February 10, 2000).

Subject merchandise includes hot-rolled steel that has been further processed in a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the hot-rolled steel.

All products that meet the written physical description, and in which the chemistry quantities do not exceed any one of the noted element levels listed above, are within the scope of this order unless specifically excluded. The following products are outside of and/or specifically excluded from the scope of this order:

- Universal mill plates (*i.e.*, hot-rolled, flat-rolled products not in coils that have been rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, of a thickness not less than 4.0 mm, and without patterns in relief);
- Products that have been cold-rolled (cold-reduced) after hot-rolling;⁸
- Ball bearing steels;⁹
- Tool steels;¹⁰ and
- Silico-manganese steels;¹¹

The products subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7208.10.1500, 7208.10.3000, 7208.10.6000, 7208.25.3000, 7208.25.6000, 7208.26.0030, 7208.26.0060, 7208.27.0030, 7208.27.0060, 7208.36.0030, 7208.36.0060, 7208.37.0030, 7208.37.0060, 7208.38.0015, 7208.38.0030, 7208.38.0090, 7208.39.0015, 7208.39.0030, 7208.39.0090, 7208.40.6030, 7208.40.6060, 7208.53.0000, 7208.54.0000, 7208.90.0000, 7210.70.3000, 7211.14.0030, 7211.14.0090, 7211.19.1500, 7211.19.2000, 7211.19.3000, 7211.19.4500, 7211.19.6000, 7211.19.7530, 7211.19.7560, 7211.19.7590, 7225.11.0000, 7225.19.0000, 7225.30.3050, 7225.30.7000, 7225.40.7000, 7225.99.0090, 7226.11.1000, 7226.11.9030, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.5000, 7226.91.7000, and 7226.91.8000. The products subject to the

⁸ For purposes of this scope exclusion, rolling operations such as a skin pass, levelling, temper rolling or other minor rolling operations after the hot-rolling process for purposes of surface finish, flatness, shape control, or gauge control do not constitute cold-rolling sufficient to meet this exclusion.

⁹ Ball bearing steels are defined as steels which contain, in addition to iron, each of the following elements by weight in the amount specified: (i) not less than 0.95 nor more than 1.13 percent of carbon; (ii) not less than 0.22 nor more than 0.48 percent of manganese; (iii) none, or not more than 0.03 percent of sulfur; (iv) none, or not more than 0.03 percent of phosphorus; (v) not less than 0.18 nor more than 0.37 percent of silicon; (vi) not less than 1.25 nor more than 1.65 percent of chromium; (vii) none, or not more than 0.28 percent of nickel; (viii) none, or not more than 0.38 percent of copper; and (ix) none, or not more than 0.09 percent of molybdenum.

¹⁰ Tool steels are defined as steels which contain the following combinations of elements in the quantity by weight respectively indicated: (i) more than 1.2 percent carbon and more than 10.5 percent chromium; or (ii) not less than 0.3 percent carbon and 1.25 percent or more but less than 10.5 percent chromium; or (iii) not less than 0.85 percent carbon and 1 percent to 1.8 percent, inclusive, manganese; or (iv) 0.9 percent to 1.2 percent, inclusive, chromium and 0.9 percent to 1.4 percent, inclusive, molybdenum; or (v) not less than 0.5 percent carbon and not less than 3.5 percent molybdenum; or (vi) not less than 0.5 percent carbon and not less than 5.5 percent tungsten.

¹¹ Silico-manganese steel is defined as steels containing by weight: (i) not more than 0.7 percent of carbon; (ii) 0.5 percent or more but not more than 1.9 percent of manganese, and (iii) 0.6 percent or more but not more than 2.3 percent of silicon.

order may also enter under the following HTSUS numbers: 7210.90.9000, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7214.99.0060, 7214.99.0075, 7214.99.0090, 7215.90.5000, 7226.99.0180, and 7228.60.6000.

The HTSUS subheadings above are provided for convenience and U.S. Customs purposes only. The written description of the scope of the order is dispositive.

IV. CHANGES TO THE *PRELIMINARY RESULTS*

We calculated constructed export price (CEP), normal value, and cost of production using the same methodology as stated in the *Preliminary Results*,¹² except as follows:¹³

- We are no longer applying partial AFA to BlueScope's home market sales reported with incomplete CONNUMs. Instead, we removed these sales from the margin analysis. *See* Comment 2.
- We removed from BlueScope's U.S. sales database sales of products that were re-exported to Mexico. *See* Comment 3.
- We modified the arm's-length test to use the consolidated customer code (CCUSCODH), rather than the unconsolidated customer code (CUSCODH). *See* Comment 4.

Based on our analysis of the comments received, as well as of BlueScope's post-preliminary questionnaire response, we revised our calculations of the weighted-average dumping margin for BlueScope.¹⁴

V. DISCUSSION OF THE ISSUES

Comment 1: Reimbursement of AD Duties

BSL is the parent company of both AIS and BlueScope Steel Americas (BSA).¹⁵ During the POR, AIS was the producer and exporter of BlueScope's subject merchandise to the United States, while BSA was the U.S. importer.¹⁶ BSA sold almost all of its imported subject merchandise to Steelscape, LLC (Steelscape), an affiliated U.S. further manufacturer.¹⁷ Finally, Steelscape sold that subject merchandise after further manufacturing it to unaffiliated U.S.

¹² *See* Memorandum, "Preliminary Results Analysis Memorandum for BlueScope Steel (AIS) Pty Ltd, BlueScope Steel Limited, and BlueScope Steel Distribution," dated December 10, 2019 (Preliminary Analysis Memorandum).

¹³ *See* Memorandum, "Final Results Analysis Memorandum for BlueScope Steel (AIS) Pty Ltd, BlueScope Steel Limited, and BlueScope Steel Distribution," dated concurrently with this memorandum (Final Analysis Memorandum).

¹⁴ *See* BlueScope's February 18, 2020 post-preliminary results questionnaire response (BlueScope February 18 PPQR).

¹⁵ *See* BlueScope's February 11, 2019 section A questionnaire response (BlueScope February 11 AQR) at Exhibit A-2.

¹⁶ *Id.* at 7.

¹⁷ *Id.*

customers.¹⁸ In the *Preliminary Results*, Commerce found that the record did not demonstrate that BlueScope reimbursed BSA's AD duties.¹⁹

*Petitioners' Argument*²⁰

- AIS deducted AD duties from its transfer price to BSA.²¹ By lowering the transfer price between BSA and AIS, BlueScope forewent revenue and effectively reimbursed BSA for the AD duties it paid.²²
- Direct payment from the respondent to the importer for AD duties is not required for Commerce to find reimbursement. In *AFBs*, Commerce stated that evidence of reimbursement includes when "the exporter lowered the amount invoiced to the importer."²³ BlueScope's sales to BSA satisfy this condition.
- In *CTVs from Korea* and *POS Cookware from Mexico*, Commerce acknowledged that the reimbursement of AD duties defeats the remedial effect of the AD law, and, as such, Commerce may reduce the U.S. price by the amount of the duty reimbursed by the producer.²⁴ Accordingly, Commerce should make a deduction to BlueScope's export price (EP).
- BlueScope confuses deducting AD duties to calculate entered value with deducting AD duties from transfer price. While U.S. Customs and Border Protection (CBP) permits importers to deduct AD duties from the invoice price to arrive at an entered value, this is different from invoicing BSA at a lower price.²⁵
- Commerce has a practice of finding reimbursement when an exporter lowers the amount invoiced to its affiliated importer by the AD amount.²⁶

*BlueScope's Argument*²⁷

- Estimated dumping duties are paid by BSA and collected by CBP on the entered value of the merchandise, which is the transfer price of the merchandise, ex-port of embarkation.
- BSA paid estimated duties on entered value, as required by CBP and by U.S. law. BSA was not reimbursed by BlueScope for these duties, and the petitioners acknowledge that BlueScope did not pay BSA for AD duties.²⁸

¹⁸ *Id.*

¹⁹ See Preliminary Analysis Memorandum at 7.

²⁰ See Petitioners' Case Brief at 4-9.

²¹ The petitioners treat this argument as business proprietary; however, BlueScope publicly discusses its deduction of duties in order to calculate "the entered value of the merchandise, which is the transaction price of the merchandise ..." See BlueScope's Rebuttal Brief at 3.

²² See Petitioners' Case Brief at 9.

²³ *Id.* at 1 (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom*; *Final Results of Antidumping Duty Administrative Reviews*, 62 FR 54043, 54077 (October 17, 1997) (*AFBs*)).

²⁴ *Id.* at 7 (citing *Color Televisions Receivers from the Republic of Korea*; *Final Results of Antidumping Duty Administrative Reviews*, 61 FR 4408, 4410-11 (February 6, 1996) (*CTVs from Korea*), and *Porcelain-on-Steel Cookware from Mexico*; *Final Results of Antidumping Duty Administrative Review*, 65 FR 30068 (May 10, 2000) (*POS Cookware from Mexico*), and accompanying Issues and Decision Memorandum (IDM) at Comment 1a).

²⁵ *Id.* at 8.

²⁶ *Id.* at 9.

²⁷ See BlueScope's Rebuttal Brief at 2-5.

²⁸ *Id.* (citing Petitioners' Case Brief at 7).

- According to 19 CFR 351.402(f)(1)(i), Commerce deducts AD duties from EP or CEP, when the “exporter or producer” either pays the AD duties or reimburses the importer for those duties.²⁹ Neither BSA nor Steelscape was the exporter or producer of subject merchandise. Therefore, payments from Steelscape to BSA cannot meet the regulatory definition of reimbursement.
- The reimbursement regulation was written with the intent to ensure that the payment of AD duties is felt in the United States.³⁰ Steelscape is a U.S. company and the price it paid reflected AD duty deposits made by BSA.
- In order to be a reimbursement, the company making a payment must be a separate entity from the company receiving the payment, regardless of affiliation.³¹
- According to the *Preamble*, Commerce does not assume that reimbursement occurs just because there were payments made between affiliated parties; instead, Commerce requires importers to certify that they have not been reimbursed. BSA filed this certificate.³²

Commerce’s Position: We continue to find that AIS did not reimburse BSA for AD duties deposited during the POR. According to 19 CFR 351.402(f)(1):

{i}n calculating the export price (or the constructed export price), {Commerce} will deduct the amount of any antidumping duty or countervailing duty which the exporter or producer: (A) {p}aid directly on behalf of the importer; or (B) {r}eimbursed to the importer.

The *Preamble* further clarifies that “paragraph (f) applies to affiliated importers, and it requires that they certify that they have not been reimbursed by the exporter. Should an affiliated importer fail to make this certification, {Commerce} would deduct the appropriate amount of antidumping duties or countervailing duties to establish the EP or the CEP, just as it would in the case of an unaffiliated importer.”³³ 19 CFR 351.401(f)(3) provides that Commerce may presume from an importer’s failure to file the required certificate that the exporter or producer paid or reimbursed the relevant duties.

Record evidence shows that BSA filed the requisite certifications when it imported subject merchandise purchased from AIS,³⁴ and there is no record evidence to contradict BSA’s statements in these certifications. In contrast, BlueScope submitted record evidence which supports these statements. Additionally, this information demonstrated that BSA paid the requisite cash deposit of AD duties.³⁵

²⁹ *Id.* at 4 (citing 19 CFR 351.402(f)(1)(i)).

³⁰ *Id.* (citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27355 (May 19, 1997) (*Preamble*)).

³¹ *Id.* at 5 n. 5.

³² *Id.* at 5.

³³ *See Preamble*, 62 FR at 27355.

³⁴ *See* BlueScope February 11 AQR at Exhibit A-9.

³⁵ *See* BlueScope’s April 8, 2019 supplemental section A questionnaire response (BlueScope April 8 SAQR) at Exhibits SA-12 and SA-13.

In its initial questionnaire response, BlueScope discussed how it established the transfer prices between BSA (the importer of the subject merchandise) and Steelscape (BSA's affiliated U.S. customer).³⁶ This information showed that these parties have a long-standing supply agreement which set the transfer prices of subject merchandise to Steelscape according to a formula.³⁷ BlueScope provided this supply agreement,³⁸ and it demonstrated its methodology for calculating these transfer prices, as well as the transfer prices between AIS (the producer/exporter) and BSA.³⁹ In the Final Analysis Memorandum, we discuss BlueScope's transfer price methodology, and we find that this methodology provides no evidence that AIS reimbursed BSA for AD duties.⁴⁰

We disagree with the petitioners that record evidence establishes that AIS deducted AD duties when setting the price to BSA. Rather, the information provided by BlueScope demonstrates that BSA paid AD duties on its imports of subject merchandise, and it passed these duties on to Steelscape as part of the transfer price charged to it.⁴¹ Despite the petitioners' claim, this information does *not* show that AIS deducted AD duties from the price that it charged to BSA; to the contrary, it simply shows the calculation of the transfer price to the U.S. customer, albeit an affiliated one.

In *Torrington*, the Court of International Trade (CIT) agreed with Commerce that it was appropriate not to adjust EP or CEP for alleged reimbursement based on pricing levels between affiliated parties.⁴² In that case, the petitioner (Torrington) argued that a below-cost transfer price is evidence of reimbursement of AD duties. As sustained by the CIT, Commerce found that:

“{e}vidence of below-cost transfer pricing between related parties is not in itself evidence of reimbursement of antidumping duties. Torrington has failed to establish a link between alleged below-cost transfer pricing and the payment of antidumping duties ... The antidumping law does not require related parties to set up their internal transactions at arm's length, nor does it prohibit them from transferring money from one another ... The antidumping statute and regulations make no distinction in the calculation of {U.S. Price} between costs incurred by a foreign parent company and those incurred by its U.S. subsidiary. Therefore, {Commerce} does not make adjustments to U.S. price based upon intracompany transfers of any kind. Indeed, {Commerce} has a long-standing practice of denying adjustments for intracorporate payments on the grounds that, because affiliated companies are a single entity for the purposes of the antidumping law, payments from a parent company to its subsidiary are not expenses to the consolidated corporation as a whole.”⁴³

³⁶ See BlueScope February 11 AQR at 21.

³⁷ See BlueScope February 11 AQR at 21.

³⁸ See BlueScope April 8 SAQR at Exhibit SA-11.

³⁹ *Id.* at Exhibit SA-12; see also BlueScope February 18 PPQR at 4-6 and Exhibit SA2-6.

⁴⁰ See Final Analysis Memorandum. Because BlueScope has claimed business proprietary treatment for the details of this methodology, we are unable to discuss the specifics of the agreement here.

⁴¹ See BlueScope April 8 SAQR at Exhibits SA-12 and SA-13. We discuss the sale terms between AIS and BSA in the Final Analysis Memorandum.

⁴² See *Torrington Co. v. United States*, 881 F. Supp. 622, 632 (CIT 1995) (*Torrington*).

⁴³ *Id.* at 631-632.

As noted above, there is no evidence that AIS deducted the AD duties paid by BSA from the transfer price charged to BSA or otherwise reimbursed BSA for those duties.⁴⁴ Therefore, consistent with *Torrington*, for these final results, we find that there is no basis to conclude that reimbursement of AD duties occurred in this segment of the proceeding.

Finally, we disagree that the cases cited by the petitioners are on point. In both *CTVs from Korea* and *POS Cookware from Mexico*, Commerce found that AD duties increase prices of subject merchandise to importers, leveling the playing field for injured U.S. industries; Commerce also found that reimbursement of AD duties relieves the importer of its obligation to pay those duties, which undermines the remedial effect of the AD law.⁴⁵ In this case, however, BSA paid the AD duty deposits on each importation of subject merchandise during the POR, and it included those duties in the downstream price to its U.S. customer. Therefore, we find that both *CTVs from Korea* and *POS Cookware from Mexico* support our finding here, rather than contradict it.

Similarly, in *AFBs*, Commerce stated that “there must be evidence that the parent has reimbursed (e.g., the exporter directly paid the duties for the importer or the exporter lowered the amount invoiced to the importer) its subsidiary for antidumping duties to be assessed.”⁴⁶ However, there, Commerce still found that low transfer prices between the exporter/producer and the CEP entity were not sufficient, in and of themselves, to support a finding that the exporter reimbursed an affiliated importer for AD duties. To support its determination, Commerce relied on its analysis in *CTVs from Korea*, wherein Commerce stated that “reimbursement, within the meaning of the regulation, takes place between affiliated parties if the evidence demonstrates that the exporter directly pays antidumping duties for the affiliated importer or reimburses the importer for such duties.”⁴⁷ This finding is consistent with a previous CIT decision, which was also upheld by the Court of Appeals for the Federal Circuit (Federal Circuit).⁴⁸

Accordingly, for these final results, we continue to find that there is no record evidence to support a finding that AIS reimbursed AD duties to BSA. The petitioners do not refute this finding, and indeed the evidence indicates that BSA not only paid AD duties, but it also passed these duties on to its U.S. customer.⁴⁹ Thus, consistent with *Torrington* and our past practice, we find that AIS did not reimburse BSA for AD duties within the meaning of 19 CFR 351.402(f)(1).

Comment 2: Partial AFA for Home Market Sales with Incomplete CONNUMHs

In the *Preliminary Results*, Commerce found that BlueScope did not act to the best of its ability in this administrative review because it failed to report various product characteristics for certain

⁴⁴ In essence, the petitioners’ argument appears to be that AIS should have charged BSA the same price that BSA itself charged Steelscape. However, that argument fails because AIS was not the importer of record (and thus, it would be unreasonable to require it to charge BSA a price which is inclusive of AD duties which AIS did not incur).

⁴⁵ See *CTVs from Korea*, 61 FR at 4410-11; see also *POS Cookware from Mexico* IDM at Comment 1a.

⁴⁶ See *AFBs* IDM at Section 13, Comment 1.

⁴⁷ *Id.*

⁴⁸ See *Torrington*, 881 F. Supp. 622, 632; see also *Torrington Co. v. United States*, 127 F.3d 1077 (Fed. Cir. 1997).

⁴⁹ See Preliminary Analysis Memorandum at 7; see also Petitioners’ Case Brief at 7.

home market sales made by BSD.⁵⁰ To account for the unreported information, as partial AFA, we assigned control numbers (CONNUMs) and prices to the relevant sales using various adverse inferences.⁵¹

*BlueScope's Arguments*⁵²

- In accordance with section 782(e) of the Tariff Act of 1930, as amended (the Act), Commerce must “consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements.”⁵³
- BlueScope’s questionnaire response demonstrates that BlueScope undertook extraordinary efforts to obtain the missing product characteristic information, including manually examining its records and hiring an outside consultant to seek the missing information.⁵⁴ As a result of these efforts, BlueScope was able to report complete product characteristic information for almost all of BSD’s sales.
- The missing product characteristics did not exist. Therefore, BlueScope’s inability to report them did not result from BlueScope’s failure to act to the best of its ability. The CIT and Federal Circuit have held that it is wrong to apply adverse inference when a company fails to provide non-existent information.⁵⁵
- Commerce never asked BlueScope to provide the missing information,⁵⁶ but, instead, only asked BlueScope to “confirm” that it could not obtain the missing characteristics.⁵⁷
- Commerce does not penalize respondents for not providing information when that information represents a small portion of the reported information.⁵⁸
- Commerce asserted that, because this was BlueScope’s second administrative review, BlueScope should have made a greater effort to obtain the missing information. This suggests that BlueScope must either modify or create new information systems in order to collect information not normally collected in the ordinary course of business.
- Section 782(d) of the Act requires that Commerce rely on BlueScope’s books and records as they exist.

⁵⁰ See PDM at 15-16.

⁵¹ *Id.* at 16.

⁵² See BlueScope’s Case Brief at 6-14; *see also* BlueScope’s Rebuttal Brief at 6-8.

⁵³ See BlueScope’s Case Brief at 7.

⁵⁴ *Id.* at 8 (citing BlueScope’s July 30, 2019 supplemental section B questionnaire response (BlueScope July 30 SBQR) at 10).

⁵⁵ *Id.* (citing *AK Steel Corp. v. United States*, 21 CIT 1204, 1223 (CIT 1997) (*AK Steel*); *Bowe Passat v. United States*, 951 F. Supp. 231 (CIT 1996); and *Olympic Adhesives v. United States*, 899 F.2d 1565, 1572-1573 (Fed. Cir. 1990)).

⁵⁶ *Id.* at 9 (citing section 782(d) of the Act).

⁵⁷ *Id.* (citing BlueScope July 30 SBQR at question 7d).

⁵⁸ *Id.* at 10 (citing *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada: Preliminary Results of Antidumping Duty Administrative Review*, 60 FR 42511 (August 16, 1995) (*Steel from Canada*), and accompanying PDM; *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 2013-2014, 81 FR 17435 (March 29, 2016), and accompanying IDM; and *First Administrative Review of Certain Activated Carbon from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 57995 (November 10, 2009), and accompanying IDM).

- The petitioners' suggestion (*see below*) that Commerce follow *HRS from Thailand*⁵⁹ is flawed because it would require Commerce to use information from CONNUMs have no significant characteristics in common with the CONNUMs with missing characteristics.
- If Commerce continues to use in its analysis the small quantity of sales reported with unavailable CONNUM characteristics, Commerce should only replace the missing information.
- Disregarding BSD's sales with missing characteristics would be consistent with Commerce's past practice.⁶⁰

*Petitioners' Arguments*⁶¹

- Commerce correctly applied AFA and found that BlueScope did not act to the best of its ability by failing to report complete CONNUM characteristics for certain home market sales.
- BlueScope participated in both the underlying investigation and first administrative review; therefore, it was familiar with Commerce's reporting requirements, but still failed to create or maintain business records to document all product characteristics.
- Commerce's practice is to consider respondents' prior experience when determining whether a respondent failed to act to the best of its ability.⁶²
- BlueScope's inability to report complete CONNUMH for certain of BSD's sales was the result of its failure to take reasonable steps to keep and maintain full and complete records.
- Commerce provided BlueScope with an opportunity to correct its reporting, but BlueScope failed to do so.⁶³
- BlueScope's justification that "it simply has no business reason to track" the product characteristics⁶⁴ is at odds with the Federal Circuit's finding that respondents must "take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce."⁶⁵
- In *CDMT from Korea*, Commerce explained that, "{w}ithout accurate reporting of physical characteristics and matching CONNUMs in {the respondent's} databases, Commerce does not have the primary components to perform an accurate, reliable calculation{.}"⁶⁶

⁵⁹ See Petitioners' Case Brief at 11-12 (citing *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 33396 (June 12, 2008) (*HRS from Thailand*), and accompanying IDM at Comment 1).

⁶⁰ *Id.* at 14 (citing *e.g.*, *Steel from Canada*).

⁶¹ See Petitioners' Case Brief at 10-11; *see also* Petitioners' Rebuttal Brief at 1-4.

⁶² See Petitioners' Rebuttal Brief at 2 (quoting *Stainless Steel Bar from India: Final Results of Administrative Review of the Antidumping Order; 2017-2018*, 84 FR 56179 (October 21, 2019), and accompanying IDM at Comment 2).

⁶³ See Petitioners' Case Brief at 2-3 (citing BlueScope July 30 SBQR at 10).

⁶⁴ *Id.* at 3 (quoting BlueScope's BSD February 26, 2019 section B questionnaire response (BlueScope February 26 BSD BQR) at 10).

⁶⁵ *Id.* at 3 (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1372 (Fed. Cir. 2003) (*Nippon Steel*)).

⁶⁶ See Petitioners' Rebuttal Brief at 5 n.17 (quoting *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value, Final Affirmative Determination of Critical Circumstances*, 83 FR 16319 (April 16, 2018) (*CDMT from Korea*), and accompanying IDM at Comment 2).

- If Commerce modifies its partial AFA methodology for the final results, it should mirror the methodology used in *HRS from Thailand*.⁶⁷ In that case, Commerce found that it could not calculate an average margin without correct CONNUMs because errors in CONNUMs affect the arm's length, difference-in-merchandise, and cost tests.

Commerce's Position: For these final results, we are no longer applying partial AFA to BlueScope's sales of merchandise reported without complete product characteristic information, based on a reexamination of the information on the record of this review.

In this case, record evidence demonstrates that BlueScope was unable to provide complete product characteristic information for only a very small percentage of its reported home market sales.⁶⁸ The record also shows that, even under the most conservative assumptions for the missing information, all but one of the CONNUMs at issue would never serve as an exact, or most similar, match to any U.S. CONNUM.⁶⁹ With respect to the one remaining home market CONNUM that could potentially be a match, the sales quantity of this product represents an amount so small that it could have no impact on Commerce's dumping analysis.⁷⁰ Accordingly, and based on the specific record and circumstances of this review, we find that it is not necessary under section 776(a)(1) of the Act for Commerce to reach a determination on the application of facts otherwise available in this review.

The petitioners cite to *CDMT from Korea* to suggest that the application of partial AFA is necessary when a respondent reports inaccurate physical characteristics.⁷¹ However, the underlying facts of the *CDMT from Korea* investigation differ from those of the instant case. Specifically, in *CDMT from Korea* the respondent misreported the CONNUMs of almost all of its reported sales, in both the U.S. and home market sales databases.⁷² By contrast, here, the sales at issue either would never serve as a match or are otherwise so small that they would have no impact on our analysis.

The CIT in *AK Steel* sustained Commerce's decision not to apply "best information available" (BIA) based on similar facts, stating, "Commerce may consider both the degree of cooperation by the respondent and the size of the omission in reaching its decision to either apply {AFA} or accept the available information."⁷³ Consistent with *AK Steel*, we find that the missing CONNUM information is so insignificant that the application of facts otherwise available, let alone AFA, is not warranted.⁷⁴

⁶⁷ See Petitioners' Case Brief at 11-12 (citing *HRS from Thailand* IDM at Comment (1)).

⁶⁸ See Final Analysis Memorandum at III.A. and Attachment 1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Petitioners' Case Brief at 5 n.17.

⁷² See *CDMT from Korea* IDM at Comment 1 ("The Verification Report makes clear that almost all of Yulchon's merchandise is produced with heat treatments either before or after cold drawing, but it reported heat treatment for only few of its CONNUMs in its home market and U.S. sales databases").

⁷³ See *AK Steel*, 21 CIT at 1223 (citing *AL Tech Specialty Steel v. United States*, 947 F.Supp. 510, 523 (CIT 1996)).

⁷⁴ *Id.* at 1223.

Because Commerce finds that the application of AFA is no longer warranted, all comments regarding an alternative AFA methodology are moot.

Comment 3: U.S. Sales That Were Re-Exported

In a supplemental questionnaire response, BlueScope stated that it mistakenly reported certain sales made to an unaffiliated customer in Mexico in its U.S. sales database.⁷⁵ BlueScope added a field in its U.S. sales database to identify each sale that had been mistakenly reported. In the *Preliminary Results*, Commerce did not exclude these sales from the margin calculation, but explained that it would continue to request information regarding these sales because the record lacked sufficient information to warrant the exclusion of these sales from the U.S. sales database at that time.⁷⁶

*BlueScope's Argument*⁷⁷

- Commerce should remove these export sales from its calculation of BlueScope's dumping margin.
- Section 772(b) of the Act is clear in that CEP is "the price at which the subject merchandise is first sold in ... in the United States ... to an unaffiliated purchaser in the United States."
- In response to Commerce's supplemental questionnaires, BlueScope provided extensive documentation to support the fact that the sales at issue were sold through U.S. affiliates to the ultimate customer in Mexico.⁷⁸

The petitioners did not comment on this issue.

Commerce's Position: Commerce is excluding the re-exported sales from BlueScope's U.S. sales database for these final results. In BlueScope's supplemental response, it clearly demonstrated that BlueScope made certain sales included in the *Preliminary Results* to Mexico, and not to the United States, and that it delivered the merchandise to Mexico. Specifically, BlueScope provided sales invoices, freight documentation, packing lists, mill reports, CBP 7501 forms, email communications, and payment documentation, all supporting its assertion that these were sales to a customer outside of the United States.⁷⁹

Section 772(b) of the Act defines CEPs used in Commerce's margin calculation as "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 ..." to a purchaser not affiliated with the producer or exporter.⁸⁰ For the sales identified by BlueScope as having been re-exported to Mexico, all documentation on

⁷⁵ See BlueScope's October 9 supplemental section C questionnaire response (BlueScope October 9 SCQR) at 22-23.

⁷⁶ See Preliminary Analysis Memorandum at 2.

⁷⁷ See BlueScope's Case Brief at 3-5.

⁷⁸ *Id.* at 4-5 (citing BlueScope October 9 SCQR at Exhibit SC1-32; and BlueScope February 18 PPQR at 21 and Exhibits SC2-1 and SC2-2).

⁷⁹ See BlueScope February 18 PPQR at Exhibits SC2-1 and SC2-2.

⁸⁰ See section 772(b) of the Act.

the record indicates that the first unaffiliated customer was in Mexico.⁸¹ Accordingly, because the first unaffiliated customer was not in the United States, these sales do not meet the statutory criteria for CEP transactions. Additionally, it is Commerce's practice to exclude sales that have been re-exported to a country outside of the United States for consumption by an unaffiliated customer.⁸² Accordingly, for these final results, we are excluding sales exported to Mexico from our margin calculations.

Comment 4: Programming Error

In the *Preliminary Results*, Commerce used the unconsolidated customer code (CUSCODH) to conduct the arm's length test.

*Petitioners' Argument*⁸³

- Commerce incorrectly used the unconsolidated customer code (CUSTCODH) for the home market arm's length test. For the *Final Results*, Commerce should use the consolidated customer code (CCUSCODH) in conducting the home market arm's length test.
- Commerce has corrected this error in the past.⁸⁴

No other party commented on this issue.

Commerce's Position: In the *Preliminary Results*, Commerce inadvertently used the unconsolidated customer code for the arm's length test. For these final results, Commerce revised the arm's length test to use the consolidated customer code. As a result of this revision to the arm's length test, a certain number of sales that passed the arm's length test in the preliminary analysis failed the arm's length test in the final analysis.⁸⁵

⁸¹ See BlueScope February 18 PPQR at Exhibits SC2-1 and SC2-2.

⁸² See *Certain Oil Country Tubular Goods from Ukraine: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 79 FR 41969 (July 18, 2014), and accompanying IDM at 7 (“{T}he first unaffiliated sale took place outside the United States and as such, we determined not to include these sales in the U.S. sales database”).

⁸³ See Petitioners' Case Brief at 13.

⁸⁴ *Id.* (citing *Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Final Results of Antidumping Administrative Review; 2015-2016*, 82 FR 57715 (December 7, 2017), and accompanying IDM at Comment 3).

⁸⁵ See Final Analysis Memorandum at III.C.

VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these positions are accepted, we will publish the final results of this administrative review in the *Federal Register*.



Agree

Disagree
9/30/2020

X



Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance