69 FR 68309, November 24, 2004

A-122-840
First Administrative Review
POR: 4/10/02 - 9/30/03
Public Document
Office 1: DEN/DCO

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeffrey May
Deputy Assistant Secretary
for Import Administration

DATE: November 17, 2004

SUBJECT: Issues and Decision Memorandum for the Final Results of the First Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada

Summary

We have analyzed the comments in the case and rebuttal briefs submitted by interested parties in the first administrative review of carbon and certain alloy steel wire rod from Canada. As a result of our analysis, we have made revisions to our margin calculation. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is a complete list of the issues in this review for which we have received comments from the parties:

Comment 1: Indirect Selling Expense Ratio

Comment 2: Warehousing Expenses

Comment 3: Purchases from Affiliate

Comment 4: Indirect Selling Expenses Incurred in Canada

Comment 5: Cash Deposit Instructions

Comment 6: Allocation of Head Office Expenses to U.S. Further Manufacturing Expenses

Comment 7: Surrogate Payment Date Applied to Unpaid Sales

Comment 8: Treatment of Negative Margins

Comment 9: Ministerial Error Allegations

Background

On July 20, 2004, the Department of Commerce (the Department) published the preliminary results of the first administrative review of carbon and certain alloy steel wire rod (steel wire rod) from Canada. The period of review (POR) is April 10, 2002, through September 30, 2003. We invited parties to comment on the preliminary results. The petitioners[1] and respondent, Ivaco Inc. and Ivaco Rolling Mills L.P. (collectively, Ivaco) submitted case and rebuttal briefs.

Discussion of the Issues

Comment 1: Indirect Selling Expense Ratio

The petitioners argue that Sivaco Georgia's indirect selling expense ratio is understated because Ivaco included sales in the denominator of its calculation that should be classified as intra-company transfers. During the POR, Sivaco Georgia was in the process of shutting down and sold subject merchandise to its affiliates Sivaco Quebec and Ivaco Rolling Mills L.P. (IRM), including wire and processed wire rod produced from IRM green rod. The petitioners contend that these transactions did not occur in the ordinary course of business as Sivaco Georgia was closing its operations, and some of the sold inventory in question was actually unprocessed IRM green rod that had originally been transferred to Sivaco Georgia for processing. Therefore, the petitioners assert that these transactions should be considered internal transfers and not sales. The petitioners also note that the sales in question involved a significant amount of merchandise and removing them from the calculation will increase the indirect selling expense ratio will increase. Therefore, the petitioners request that the Department revise the indirect selling expense ratio by subtracting the sales in question from the denominator of Sivaco Georgia's indirect selling expense ratio.[2] Finally, the petitioners state that Ivaco itself had revised its indirect selling ratio and submitted the information to the Department. However, the Department rejected the submission because it was made after the deadline for new information. The petitioners argue that "Ivaco would benefit from its failure to submit accurate information in a timely fashion."[3]

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[1] The petitioners in this proceeding are Gerdau Ameristeel US Inc., Georgetown Steel Company, Keystone Consolidated Industries, Inc. and North Star Steel Texas, Inc.

[2] See petitioners' case brief at 3.

[3] See id.

In its rebuttal comments, Ivaco contends that it did not inflate indirect selling expenses in its data submission with the inclusion of sales to Sivaco Quebec and IRM and that the Department should not adjust its indirect selling expense ratio. Ivaco states that Sivaco Georgia invoiced the indirect sales and incurred indirect selling expenses as it does for sales to unaffiliated parties. Ivaco also states that any subject merchandise returned to IRM was not recorded as sales in its submission and therefore the petitioners' claim of mischaracterized sales is unfounded. Furthermore, Ivaco argues that the Department should dismiss the petitioners' argument, which, Ivaco argues, is the same as its previous arguments, because the Department already dismissed it for the preliminary results.

Department's Position:

We do not believe it is appropriate to adjust the denominator of Ivaco's indirect selling expense calculation to deduct sales from Sivaco Georgia to IRM and Sivaco Quebec. There is no information on the record of this proceeding that indicates that the sales in question were, as the petitioners allege, merely intra-company transfers. In the ordinary course of business, there are indirect expenses involved with the selling of merchandise. These indirect expenses may be linked to sales through the costs of doing business (rent, storage, sales department overhead, etc.). As the record indicates that Sivaco Georgia made sales to IRM and Sivaco Quebec, we must take into consideration that Sivaco Georgia incurred indirect selling expenses in connection with these sales. Therefore, we will continue to use the indirect selling expenses data supplied by Ivaco as we cannot assume that Ivaco did not incur indirect selling expenses on the sales in question, as there is no information on the record that shows otherwise.

Comment 2: Warehousing Expenses

The petitioners argue that the Department should include payments for warehouse leasing expenses for two months in Sivaco Georgia's warehousing expenses calculation. The petitioners contend that Ivaco omitted the warehouse leasing expenses for the two months in its submissions and that Ivaco failed to demonstrate that neither Sivaco Quebec nor Sivaco Georgia paid any warehousing expenses for these months. The petitioners contend that Ivaco has yet to offer the Department any evidence supporting its claim that the warehousing expenses for the two months "were not vouched or accrued" although it had multiple opportunities to do so, and only submitted selected information on this issue. Furthermore, the petitioners note that when Ivaco was notified that the Department would not conduct an onsite verification and would instead rely on information on the record, Ivaco still had only "prepared to demonstrate" that Sivaco Georgia and Sivaco Quebec did not incur warehousing expenses for the two months.[4] The petitioners argue that the Department should use the information on the record as the basis for its calculations and cites 19 CFR 351.401 (1), which states that the interested party that

[4] See id.

possesses relevant information has the burden of establishing to the Secretary the amount and nature of a particular adjustment.[5]

In its rebuttal comments, Ivaco argues that all warehousing expenses were provided in its submission to the Department and no warehouse leasing expenses were incurred for the two months in question. Ivaco again states that neither Sivaco Georgia nor any affiliate paid or incurred any warehousing expenses for the months in question. Ivaco also contends that the petitioners' claim that Ivaco did not submit ample evidence to the Department is unmerited. Ivaco notes that it provided warehousing expenses incurred at Exhibit C-13 of its original Section C questionnaire response. When the Department requested further information on this issue in question 9(a) of the supplemental questionnaire, Ivaco argues that it further explained its reasons for not including warehousing expenses for the two months.

Department's Position:

We agree with the petitioners. During the POR, Ivaco entered into a warehouse leasing agreement for a period of time that included the two months in question. Evidence on the record supports the conclusion that Ivaco was responsible for payment for the two months in question and accrued expenses for the amounts. The Department's rationale for concluding that Ivaco accrued expenses for the warehousing payments involves proprietary information. For a complete discussion on the basis for adjusting payments to include these two months, see Memorandum to Constance Handley from David Neubacher and Daniel O'Brien, Re: Analysis Memorandum for Ivaco, Inc. (November 17, 2004). As Ivaco's submissions provide the Department with enough information to reasonably determine what costs Ivaco incurred on the warehousing payments for the two months in question, we have assigned these payments to Sivaco's indirect selling expenses.

Comment 3: Purchases from Affiliate

The petitioners argue that the Department should adjust Ivaco's reported scrap costs to account for what they argue are non-arm's-length purchases of scrap from an affiliated supplier. The petitioners contend that Ivaco purchased scrap metal from an affiliated supplier, which is not collapsed with Ivaco, at a price significantly below the average market price. Citing the major input rule, the petitioners argue that the Department must adjust Ivaco's transfer price to the average market price for the amount of scrap metal purchased from the affiliated supplier. The petitioners finally state, as in the indirect selling expense issue, that Ivaco submitted a recalculated adjustment factor in its June 15, 2004, submission, but the Department struck it from the record.

[5] See id.

In its rebuttal comments, Ivaco argues that it has provided the necessary information regarding its purchases of scrap from affiliates and that the transfer price should not be adjusted. Ivaco states that it addressed this issue in its June 18, 2004, submission, where it noted that it purchases varying qualities of scrap, which have different prices. Ivaco argues that it purchased different quality scrap from its affiliates and did not have a basis on which to provide a market comparison for this lower quality scrap. Furthermore, Ivaco argues that the scrap amount in question is minuscule compared to its total cost of production and, as the petitioners cite in their case brief, the adjustment requested by the petitioners would not have a significant impact on the results.[6] Given the insignificant amounts involved in Ivaco's scrap purchases from affiliates, Ivaco contends that the major input rule does not apply and the Department should continue to use its reported purchase price.

Department's Position:

We agree with the petitioners. The Department has no information on the record that suggests that Ivaco purchased different qualities of scrap metal from its affiliated supplier. Ivaco's first comments on this issue were in its rebuttal brief when it stated that the scrap metal purchases from the affiliated supplier in question were of a different quality and not comparable to scrap from unaffiliated suppliers.[7] Although the scrap metal purchases in question were not a major input, section 773(f)(2) of the Tariff Act of 1930 (the Act) allows the Department to test if affiliated party transactions are being conducted at arm's-length prices.

In its Supplemental D Questionnaire Response, Ivaco provided the Department with its scrap metal purchases from affiliated and unaffiliated suppliers. Based on this information, Ivaco purchases from the affiliated supplier were below the scrap metal price paid by Ivaco to unaffiliated suppliers. See Ivaco's Supplemental Questionnaire Response Section D at Exhibit 2 (May 7, 2004). The Department does have discretion in applying section 773(f)(2) of the Act to affiliated party transactions. However, in this case, we believe that Ivaco purchased the scrap metal below market prices and, as is our normal practice, will assign the higher of the market or transfer price. The Department's practice is in line with previous cases. See Notice of Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip Coils from Germany, 68 FR 47039 (August 7, 2003). Therefore, we have adjusted the scrap price of purchases from Ivaco's affiliate to the average market price reported by Ivaco in its Section D questionnaire response.

Comment 4: Indirect Selling Expenses Incurred in Canada

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[6] See petitioners' case brief at 6.

[7] See Ivaco's rebuttal brief at 3.

The petitioners argue that the Department inadvertently failed to deduct indirect selling expenses incurred by Ivaco in Canada (DINDIRSU) from its net price calculation for constructed export price (CEP) sales.

In its rebuttal comments, Ivaco argues that the Department properly excluded indirect selling expenses incurred in Canada from its CEP calculation because the expenses in the DINDIRSU field are not associated with economic activity in the United States or related to sales to unaffiliated customers. Expenses that are related to economic activity in the United States, Ivaco states, were properly deducted from the CEP calculation as part of the INDIRSU field.

Department's Position:

We agree with the petitioners. The Department considered this argument in the investigation. See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Canada, 67 FR 55, 782 (August 30, 2002) and Accompanying Decision Memorandum (Wire Rod from Canada Investigation) at Comment 3. Since the fact patterns relating to our decision in the investigation remain unchanged in this administrative review, we continue to affirm our decision in the investigation, namely that indirect selling expenses incurred in Canada should be deducted from certain Ivaco CEP sales, because they are related to economic activities in the United States. For sales made by Sivaco Georgia, however, we find that all of IRM's selling activities in Canada are directed at the sale to Sivaco Georgia and not at the sale from Sivaco Georgia to Sivaco Georgia's unaffiliated customers. Therefore, for these sales we are not deducting the indirect selling expenses incurred by Ivaco in Canada.

Comment 5: Cash Deposit Instructions

The petitioners argue that it is possible that subject merchandise produced by Ivaco may be entering the United States listed as merchandise of another Canadian producer. The petitioners admit that they have no evidence that this occurred and cannot establish whether Ivaco had knowledge of the final destination of all of its domestic sales. Therefore, the petitioners request that the Department add the following language in the instructions sent to U.S. Customs and Border Protection (CBP) for cash deposit requirements: "a previously reviewed or investigated company that received a zero dumping margin will not be required to post cash deposit only when the company is both the producer and exporter of the subject merchandise. A mere processing operation, e.g., heat treatment and/or coating, on the unprocessed (green) rod produced by another company subject to the order does not qualify the exporting company as the producer."[8]

Ivaco did not respond to the petitioners' request in its rebuttal brief.

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[8] See petitioners' case brief at 12.

Department's Position:

We disagree with the petitioners. The sentence in the petitioners' language, "a previously reviewed or investigated company that received a zero dumping margin will not be required to post cash deposit only when the company is both the producer and exporter of the subject merchandise," would simply be redundant as the Department has already specified that only merchandise produced and exported by the exempt company was excluded from the order. See Final Results of Antidumping Duty Changed Circumstances Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 69 FR 25560 (May 7, 2004).

With regard to the requested language on minor processing, and how the producer of the merchandise is determined, we note that the scope of the order does not address this, and we do not believe that our instructions to CBP are the proper forum for making this determination. The Department has the authority to conduct inquiries into allegations concerning an antidumping order. If the petitioners believe subject merchandise produced by Ivaco is entering the U.S. market without being subject to the appropriate cash deposit, then such concerns should be submitted to the Department.

Comment 6: Allocation of Head Office Expenses to U.S. Further Manufacturing Expenses

Ivaco argues that, in the preliminary results, the Department improperly allocated a portion of its head office expenses to general and administrative (G&A) expenses of its further manufacturers located in the United States, Ivaco Steel Processing (ISP) and Sivaco Georgia. Ivaco contends that the head office expenses incurred in Canada are unrelated to U.S. economic activity and the Department should therefore exclude these expenses from its further manufacturing expenses calculation for the final results.

Ivaco cites to the SAA to support its contention that in calculating CEP, the Department may only deduct those "expenses (and profit) associated with economic activities occurring in the United States."[9] In addition to the SAA, Ivaco cites sections 772(c) and (d) of the Act, which establish the criteria for adjustments made to CEP. Ivaco also cites 19 CFR 351.402 (b) and the Antidumping Duties, Countervailing Duties; Final Rule, 62 FR 27296 (May 19, 1997) which state that adjustments to expenses can only be made to those associated with economic activities occurring in the United States. Furthermore, Ivaco argues that the Department has always followed these regulations in calculating CEP and, in support, cites the Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany, 61 FR 38166 (July 23, 1996).

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[9] See Ivaco's case brief, at 1, Statement of Administrative Action (SAA) Accompanying the Uruguay Round Agreements Act, H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103rd Cong. 2d Session, at 823 (the SAA).

According to Ivaco, its head office expenses incurred in Canada are only properly allocated to home market sales and "the Department has previously explained that for products that were further manufactured after importation, it adjusts for all costs for further manufacturing in the United States in accordance with section 772(d)(2) of the Act."[10] In support, Ivaco cites Notice of Final Determination of Sales At Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from France, 64 FR 30820, 30822 (June 9, 1999) (Sheet and Strip from France). Finally, Ivaco states that the Department has previously determined that it would not include further manufacturing expenses of affiliates if those expenses occurred outside the United States and do not appear in the affiliate's financial statements. See Final Determination of Sales at Less Than Fair Value: Certain Stainless Wire Rods From France, 58 FR 68865 (December 29, 1993) (Wire Rod from France).

In their rebuttal comments, the petitioners argue that the Department correctly allocated a portion of Ivaco's head office expenses to ISP and Sivaco Georgia's G&A expenses. The petitioners state that it is the Department's policy "to calculate G&A expenses on a company-wide basis and to allocate a proportional share of G&A expenses of the parent company as long as that company provides services for its subsidiary."[11] The petitioners contend that G&A expenses are general in nature and not tied to one specific division, process, or production. Rather, the petitioners argue, G&A expenses are allocated for the operations of the company as a whole and provide some indirect benefit to subsidiaries of the company. Therefore, the petitioners argue that G&A expenses are appropriately applied to the company's subsidiaries. In support, the petitioners cite Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan: Final Results of Antidumping Duty Administrative Review, 66 FR 11555 (February 26, 2001) (LNPP from Japan) and accompanying Issues and Decision Memorandum at Comment 5 and Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From Taiwan 64 FR 56308, 56320 (October 19, 1999).

Moreover, the petitioners state that "according to Ivaco, 'the Corporate head office provides broad direction to members of the Ivaco Group. Services provided by the head office include Corporate Finance, Human Resources, Risk Management, Legal and Computer services.' Ivaco's January 13, 2004, Section A Response ("AQR") at 20."[12] The petitioners contend that Ivaco's head office

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[10]See Ivaco's case brief at 4.

[11]See petitioners' rebuttal at 5. In support, the petitioners cite the following cases: Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592 (April 16, 2004) and accompanying Issues and Decision Memorandum at Comment 22 and Notice of Final Results of New Shipper Review of the antidumping Duty Order on Certain Pasta From Italy, 69 FR 18869 (April 9, 2004) and accompanying Issues and Decision Memorandum at Comment 6

[12]See petitioners' rebuttal at 6.

services were rendered to all subsidiaries, including ISP and Sivaco Georgia.[13] The petitioners further argue that Ivaco stated in its questionnaire response that "headquarter expenses were allocated to all companies in the group as a percent of cost of sales and operating expenses."[14]

Morever, citing Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Japan, Singapore, Sweden, Thailand, and the United Kingdom: Final Results of Antidumping Duty Administrative Review and Partial Termination of Administrative Reviews, 61 FR 66506 (December 17, 1996), the petitioners state that "the Department has previously allocated a parent company's home market G&A expenses to U.S. subsidiaries because such expenses are incurred on behalf of all subsidiaries."[15] The petitioners argue that the Department has allocated a portion of a parent company's G&A expenses to its subsidiaries when the parent company was in the United States and the subsidiary was located in the home market as well as when the parent company was located in the home market and the subsidiaries were located in a third market in previous decisions. In support, the petitioners cite Brass Sheet and Strip From Canada: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Order in Part, 63 FR 33037 and Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592 (April 16, 2004) (Televisions from Malaysia) and accompanying Issues and Decision Memorandum at Comment 22. According to the petitioners, the Department has a clear policy of allocating head office expenses to its subsidiaries whether both are located in the same country or not.

Department's Position:

We agree with the petitioners. We continue to hold that a portion of Ivaco's head office expenses should be allocated to the G&A expenses of Ivaco's further manufacturers in the United States. The Department's method takes into account that G&A activities are related, either directly or indirectly, to the production process and cost of sales. See LNPP from Japan, Issues and Decision Memorandum at Comment 5. Furthermore in Rautaruuki Oy v. United States, 19 CIT 438(1995), the CIT stated that the Department may regard G&A expenses as relating to the activities of the company as a whole rather than to one production process. As subsidiaries, ISP and Sivaco Georgia derived certain benefits from Ivaco's head office expenses. Examining Ivaco's G&A expenses at its Supplemental D Response at 9-10 and Exhibit 7 (May 7, 2004), the information shows a wide range of expenses from which Ivaco's U.S. further manufacturers likely derived benefits. These benefits show that the head office expenses were supporting ISP and Sivaco Georgia and were directly and indirectly associated with the subsidiaries' general operations and economic activities in the United States, which reaffirms

[13]See id.

[14]See id at 7. See also Ivaco's Section D Response at 49 (February 5, 2004).

[15]See id. at 8 and the Department's actions in this case were affirmed on appeal by the Court of International Trade. See SKF USA, Inc v. United States, 77FS 2d 1335 (CIT 1999), rev'd and remanded on other grounds, 254 F 3d 1022 (Fed. Cir. 2001).

the Department's decision and normal practice. Moreover, contrary to Ivaco's claims, the location of the head office and its subsidiaries has no bearing on whether head office G&A expenses are assigned company-wide or not. Although subsidiaries may be located in the United States or a third country, the Department will still assign head office G&A expenses to the subsidiaries if it is shown that expenses are associated directly or indirectly with U.S. economic activities. See Televisions from Malaysia.

Ivaco's argument that the Department, under section 772(d)(2) of the Act, has always analyzed further manufacturing in the context of CEP is misplaced. Ivaco cites Sheet and Strip from France to explicitly state that this is the Department's practice. However, the Department has explained, as in previous cases and in the above text, that there is a direct correlation between head office expenses and its allocation over all subsidiaries and the Department has a consistent and reasonable practice of assigning whole G&A company expenses over company-wide cost of sales. Furthermore, Ivaco's argument that G&A expenses not included on a further manufacturer's financial statement cannot be assigned to G&A does not pertain to this case. In Wire Rod from France, the issue concerned specific further manufacturing costs associated with the G&A costs (plant closure costs, waste fees, and slow moving inventory) and whether or not the Department should attribute costs not recorded in the respondent's financial statements. The Department's decision in that case is inapposite because the costs in question were specific, while this case involves the allocation of general head office expenses to further manufacturers. In this case, because services provided by the head office in Canada are used by the U.S. entity engaged in further manufacturing, we consider them related to U.S. economic activities and an integral part of the cost of manufacturing. Therefore, we continue to attribute head office G&A expenses to ISP and Sivaco Georgia.

Comment 7: Surrogate Payment Date Applied to Unpaid Sales

In the preliminary results, the Department set a payment date of May 7, 2004, the date of Ivaco's latest submission, for all unpaid sales. Ivaco states that applying this date to calculate credit expenses amounts to an arbitrary use of the facts available for sales made by IRM to its affiliated customers because IRM was unable to collect payments due to Ivaco and its affiliates' bankruptcy filings. In the final results, Ivaco requests that the Department use Ivaco's submitted average payment periods in order to apply payment dates and credit expenses for customer affiliates' outstanding payments because the submitted average reasonably reflects the true commercial terms of sale and payment histories and is consistent with the Department's previous practice.

On September 16, 2003, Ivaco and its affiliates, excluding IMT Corporation, obtained an order of protection from the Ontario Superior Court of Justice under the Companies' Creditors Arrangement Act (CCAA). Under CCAA protection, Ivaco is allowed to continue to operate, and all claims against Ivaco and its subsidiaries were stayed. During the POR, IRM made several sales to Ivaco affiliates, including Infadco, Infasco Nut Company, and Ingersoll Fasteners, which are currently under bankruptcy protection. Therefore, Ivaco argues, IRM is legally prevented from collecting payment from the above-mentioned affiliates.

Ivaco states that it is the Department's practice to use weighted averages to assign payment dates and credit expenses. Ivaco further notes that the Department accepted Ivaco's weighted-average payment

periods for similar sales in the investigation. See Wire Rod from Canada Investigation. In addition to the investigation, Ivaco states that the Department, in Notice of Amendment of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea; and Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 66 FR 45279 (August 28, 2001) (Stainless Steel Plate from Korea),[16] agreed that the use of an average payment period was appropriate because it "most accurately reflects the true price of the merchandise at issue at the time of the sale." Ivaco also notes that in Notice of Amended Final Results of Antidumping Administrative Review: Stainless Steel Sheet and Strip in Coils from France, 68 FR 4171 (January 28, 2003) (Sheet and Strip in Coils from France), the Department accepted the use of weighted payments periods for unpaid sales by the respondent. Ivaco argues that although the petitioners in the Sheet and Strip in Coils from France challenged the results based on the fact that the Department did not use the last day of verification as the payment date, the challenge was ultimately rejected by the Department because the respondent applied the weighted-average methodology to all unpaid sales from the investigation through the previous reviews. Finally, Ivaco cites Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review, 67 FR 6490 (February 12, 2002), as another example that the Department accepts the above-mentioned methodology. In the administrative review of that case, Ivaco states, the Department initially used the final date of the preliminary results as the payment date for unpaid sales. However, in the final results, Ivaco states, the Department changed its methodology and used the average payment period and in doing so stated that "the Department does not find it appropriate to take into account the failure of the U.S. customer to make payment for the sales at issue."[17]

Ivaco further argues that the Department must take the intervening event (bankruptcy of IRM's affiliates) into consideration and use a methodology that "most accurately reflects the true price of the merchandise at the time of sale."[18] Ivaco states that it submitted its affiliates' payment history and notes that there is "no evidence on the record to indicate that any sales to these customers would have remained unpaid in the absence of the bankruptcy filing."[19] Ivaco contends that because of this fact, IRM would have received payments from its affiliates in a timely manner.

The petitioners argue in rebuttal that the Department's policy is to use the last date of the preliminary results or verification to assign a date of payment to unpaid sales. See Sheet and Strip in Coils from France. The petitioners argue that Ivaco's reliance on Stainless Steel Plate from Korea to support its contention is misguided because in that case, the petitioners argue, the sales were written off by the respondent. See Wire Rod from Canada Investigation. The petitioners also note that in the investigation the Department only applied average payment periods to sales that were written off. Finally, the petitioners cite Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 67 FR 466172 (July 12, 2002), to state that the Department's policy is to

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[16]See id. at 8.

[17]See id. at 9.

[18]See id. at 9.

[19]See id. at 11.

apply the last date of verification or the preliminary results or final results to unpaid sales if the respondent still expects payment and has not written off the sales.

Department's Position:

We agree with the petitioners and have continued to apply the last date of new information received from Ivaco as the payment date for Ivaco's unpaid sales. As noted by Ivaco, the Department used weighted-average payment dates in the investigation of this proceeding for Ivaco's unpaid sales. See Wire Rod from Canada Investigation. However, the Department applied the weighted average to Ivaco's sales in the investigation because the sales were written off. See id. The Department will normally include bad debt expenses from written-off sales as part of the respondent's indirect selling expenses. See, e.g. Wire Rod from Canada Investigation and Stainless Steel Plate from Korea. Ivaco has not presented evidence on the record that the particular unpaid sales in question were written off. Nor has it provided the Department with documentation to support its claims regarding bankruptcy protection. The burden is on the respondent to submit documentation for the record supporting its claims. See Reiner Brach GmbH v. United States, 206 P Supp 2d 1323, 1333 (CIT 2002). Therefore, we have continued to apply the last day that new information was submitted as the date of payment for Ivaco's unpaid sales. See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel from Germany, 67 FR 55802 (August 30, 2002).

Comment 8: Treatment of Negative Margins

Ivaco argues that the Department's continued use of zeroing in its dumping margin analysis is not supported by U.S. law and is inconsistent with international agreements and requests that the Department abandon its practice of zeroing for the final results.

Ivaco argues that when Congress enacted 19 U.S.C. § 1673 in its current form, its intention was to fulfill the "requirement of Article 2.4 of the Antidumping Agreement (ADA) that a fair comparison be made between the export price or constructed export price and normal value."[20] Furthermore, Ivaco asserts that 19 U.S.C. § 1677b, which states that a "fair comparison shall be made between the export price or constructed export price and normal value," was amended to comply with Article 2.4 of the ADA.[21] Ivaco also argues that both the CIT and the U.S. Court of Appeals for the Federal Circuit have determined that antidumping statutes do not require zeroing. Citing Bowe Passat Reinigungs und Wascheritechnik GMBI-I v. United States, 926 F. Supp. 1138 (CIT 1996) (Bowe Passat), Ivaco argues that, both prior to and after the enactment of the Uruguay Round Agreements Act (URAA), the CIT ruled that the Department did not have to zero negative margins and following URAA, the Federal Circuit reaffirmed its previous position in Timken Co. v. United States, 354 F. 3d 1334 (Fed. Cir. 2004) (Timken) that the antidumping statutes did not imply or require zeroing.

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[20] See H.R. Rep. No. 103-826, pt 1, at 82 (1994).

[21] See 19 U.S.C. § 1677b(a).

Ivaco finally contends that the Department's use of zeroing is in direct conflict with two recent World Trade Organization (WTO) decisions on zeroing. Citing European Communities Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India Report of the Appellate Body, WT/DS14I/AB/R (March 1, 2001) (EC-Bed Linen), Ivaco states that the Appellate Body ruled that the European Community's practice of zeroing was in violation of Articles 2.4 and 2.4.2 of the ADA. Ivaco also cites United States - Final Dumping Determination on Softwood Lumber from Canada, Report of the Panel, WT/DS264 (April 13, 2004) (U.S.-Softwood Lumber) to argue that the Appellate Body has ruled the Department's use of zeroing is in violation of the ADA. In its ruling, the Appellate Body stated that zeroing "does not take into account the entirety of the prices of some export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole."[22]

The petitioners argue that the Department's use of zeroing is in line with antidumping statutes, meets international obligations, and that recent WTO rulings on zeroing are not related to this review. The petitioners contend that the provisions governing the Department's antidumping methodology are in line with the United States' obligations under the URAA. The petitioners cite the SAA at 809, which lays out specific guidelines for calculating dumping margins and takes several factors into consideration that will provide a fair comparison and also instruct the Department to adjust for differences that will affect price comparability. The petitioners state that the SAA is silent on the issue of zeroing. Citing Bowe Passat, the petitioners contend that the use of zeroing is still reasonable and is backed by the court which stated, "unless and until it becomes clear that such a practice is impermissible or unreasonable...the Court must defer to Commerce's chosen methodology."[23]

The petitioners further argue that the Department's current methodology uses negative values in the calculation of the weighted-average dumping margin which aggregates all the individual dumping margins and divides this by the values, both positive and negative, of all sales. Therefore, the petitioners assert that it is a reasonable means of calculating the weighted-average and contrary to Ivaco's argument, uses all available information to make a fair comparison.

The petitioners also argue that the recent WTO decision in U.S.-Softwood Lumber has no impact on this case and other judicial rulings on zeroing as "the decision would seem to be confined to its own particular facts {application of zeroing at the sub-group level} and applies to exactly one case: the United States' Softwood Lumber from Canada investigation. While the United States is "bound" by the Appellate Body's ruling to that very limited extent, the decision is no more relevant than EC-Bed Linen to the Department's zeroing policy as applied generally, or in other contexts."[24]

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[22]See Appellate Body Report at 35.

[23]See petitioners' rebuttal brief at 17 & 18.

[24]See petitioners' rebuttal brief at 20 & 21.

As U.S.-Softwood Lumber has no impact on this proceeding, the petitioners argue that the U.S. courts have routinely sided with the Department's methodology in regard to zeroing. The U.S. Court of Appeals for the Federal Circuit in Timken upheld the use of zeroing by the Department and also reaffirmed numerous decisions of the CIT that also found zeroing to be reasonable and accordance with law.[25] The petitioners also state that the Department has been given special deference in interpreting and applying the statutes to its antidumping methodology. See Smith-Corona Group v. United States, 713 F.2d 1568 (Fed. Cir. 1983).

The petitioners finally state that the Department may not alter its methodology in this proceeding, contrary to Ivaco's argument of recent WTO rulings, because the Department does not have the authority. Citing 19 U.S.C. § 3533 and more specifically 3533 (g), the petitioners state, "'{i}n any case in which a dispute settlement or panel or the Appellate Body finds in its report that a regulation or practice if a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until there have been consultations between appropriate congressional committees, the agency involved, and the U.S. Trade Representative, and an opportunity for public comment."[26] Therefore the petitioners argue that, despite Ivaco citing WTO decisions which have no bearing on this review, the Department must continue its policy of using zeroing in its methodology and may not be permitted to change it without following procedures cited in the above-mentioned statute.

Department's Position:

We disagree with Ivaco. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. See Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 50408 (October 3, 2001), and accompanying Issues and Decision Memorandum, at Comment 1. Furthermore, the CIT has also consistently upheld the Department's treatment of non-dumped sales. See, e.g., Corus Engineering Steels, Ltd. v. United States, Slip Op. 03-110 at 18 (CIT Aug. 27, 2003); Timken; Bowe Passat. Finally, the Federal Circuit in Timken has affirmed the Department's methodology as a reasonable interpretation of the statute.

Ivaco also asserts that the WTO Appellate Body rulings in EC-Bed Linen and U.S.-Softwood Lumber render the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. However, the Court of Appeals in Timken specifically found EC-Bed Linen was not only distinguishable but, more importantly, not binding. With regard to U.S.-Softwood from Canada, 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

[25] See id.

[26] See id. at 23.

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 ("After 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..." (Emphasis added)).

Comment 9: Ministerial Error Allegations

The petitioners and Ivaco contend that the Department made certain ministerial error allegations in the preliminary results.

Department's Position:

We agree with Ivaco and the petitioners and have changed the final results to reflect the allegations. See Memorandum to Constance Handley from David Neubacher and Daniel O'Brien, Re: Analysis Memorandum for Ivaco, Inc. (November 17, 2004).

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results in the *Federal Register*.

Agree_____ Disagree_____ Let's Discuss_____

_____
James J. Jochum
Assistant Secretary
for Import Administration

_____
Date