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

FROM: Barbara E. Tillman
Acting Deputy Assistance Secretary
For Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the Fourth Administrative Review of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from France

SUMMARY

We have analyzed the case and rebuttal briefs of the interested parties in response to the preliminary results. As a result of our analysis, we have made changes, including corrections of certain errors in the margin calculation. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is a complete list of the issues in this administrative review for which we received comments and rebuttal comments by the interested parties.

ISSUES

1. Constructed Export Price (CEP) Offset
2. Date of Sale
3. Credit Expenses
4. Application of Adverse Facts Available for Sales to Bernier
5. Offsetting Margins with Above-Normal-Value Transactions
6. Offsetting Home Market Commissions
7. Further Manufacturing Adjustments
8. Ministerial Errors: Interest Expenses, Home Market Warranty Expenses, and Commission Expenses

BACKGROUND

On August 6, 2004, the Department of Commerce ("Department") published the preliminary results of the administrative review of the antidumping duty order on

stainless steel sheet and strip in coils from France. See Notice of Preliminary Results of Antidumping Administrative Review: Stainless Steel Sheet and Strip in Coils from France ("Preliminary Results") 69 FR 47892 (August 6, 2004). The merchandise covered by the order is stainless steel sheet and strip in coils ("SSSS") as described in the "Scope of the Review" section of the Federal Register notice. The period of review ("POR") is July 1, 2002, through June 30, 2003. In accordance with 19 C.F.R. § 351.309(c)(ii), we invited parties to comment on our Preliminary Results. On September 7, 2004, Ugine & ALZ France (UA France) and Petitioners[1] filed comments. On September 13, 2004, UA France and Petitioners filed rebuttal comments.

DISCUSSION OF THE ISSUES

Comment 1: Constructed Export Price (CEP) Offset

Petitioners contend that the Department should deny UA France a CEP offset for the final determination on the grounds that UA France made sales in the home market at a less advanced level of trade to sales made in the U.S. market. Petitioners argue that UA France provided fewer selling functions and made sales at a less advanced level of trade in the home market than in the U.S. market. Consequently, UA France is not entitled to the CEP offset. See Petitioner's Brief page 3 (September 7, 2004).

Petitioner notes that in explaining its preliminary decision, the Department stated that we granted the CEP offset because in the comparison of home-market sales to CEP sales we found a different level of trade. Petitioner states that 19.U.S.C. § 1677b(a)(1)(B) directs the Department to compare U.S. CEP sales to the sales used to determine normal value at the same level of trade. In making this analysis, the Department is required to examine the stages in the marketing process and the selling functions along each channel of distribution. Petitioners note that the Department scrutinized the selling activities in the U.S market and the home market and found a single level of trade (LOT) in each market.

Having found a single level of trade in each market, Petitioners contend that the Department is required to find that UA France's sales in France must be at a more advanced level of trade than the its U.S. CEP sales to qualify for a downward CEP offset in normal value. See 19 U.S.C. § 1677b(a)(7)(B) and 19 CFR § 351.412(f)(1)(ii). Once this initial criterion has been met, the Department must then determine whether the difference in the LOT in France and the United States affected price compatibility, as evidenced by a pattern of consistent pricing differences between sales at different levels of trade in France. See 19 U.S.C. § 1677b(a)(7)(A)(ii) and 19 CFR section 351.412(d). Only in the event that the first prerequisite was satisfied but the second could not be satisfied would UA France qualify for a CEP offset in the form of a deduction from normal value by the amount of indirect selling expenses incurred by UA France on sales of the foreign like product, up to the amount of indirect selling expenses incurred by UA

[1] Allegheny Ludlum Corporation, AK Steel, Inc. North American Stainless, United Steelworkers of America, AFL-CIO/CLC, Butler Armco Independent Union, and Zanesville Armco Independent Organization are the Petitioners in the case.

France in the United States on sales of subject merchandise. See 19 U.S.C. § 1677b(a)(7)(B) and 19 CFR § 351.412(f)(2).

For the home market, the Department bases its LOT analysis on the starting price from the producer to the home market customer without adjustment. For U.S. CEP sales, the Department bases its LOT analysis on the starting price to the unaffiliated customer, adjusted downward for the expenses discussed in 19 U.S.C. § 1677a(d). Petitioners point out that the adjusted U.S. price is not exclusive of all selling expenses, but is only net of those selling expenses associated with economic activities occurring in the United States. Petitioners contend that the Department should not consider whether the party providing the U.S. selling activity is the foreign producer or U.S. subsidiary, but should examine whether the selling activities are associated with U.S. economic activities or not. According to the Petitioners, the U.S. CEP price is adjusted to reflect the same type of selling expenses associated with a U.S. EP transaction.

The home market price for the LOT analysis was UA France's price to its home market customers. According to Petitioners, this price included the following services: the extension of payment terms; early payment discounts, other payment benefits, inland freight from plant to customer, inland insurance, commission payments to affiliated parties, warranty expenses, credit insurance, indirect selling expenses, inventory carrying costs, and packing. See Petitioners' Brief page 6 (September 7, 2004).

The U.S. CEP for the LOT analysis was UA France's price to the first unaffiliated U.S. customer, as adjusted pursuant to 19 U.S.C. § 1677a(d). Petitioners contend that after adjustment, this price still included the following services: inland freight from plant to distribution warehouse, foreign warehouse expenses, inland freight from plant or warehouse to port of exportation, foreign inland insurance, freight forwarder, French containerization, ocean freight, marine insurance, French indirect selling expenses incurred in U.S. sales, UA France's inventory carrying costs for U.S. sales, UA France warranty expenses for U.S. sales, UA France extended credit terms to U.S. subsidiaries, U.S. port charges for unloading, demurrage, handling and wharfage, U.S. custom's duties, and packing expenses.

Petitioners contend that having so defined the home market and U.S. price levels, the Department is required to determine whether or not UA France's home-market sales were made at a more advanced level of trade (based on the actual performance of more services) than UA France's U.S. CEP sales. Petitioners state that because UA France performs more services associated with U.S. economic activities than with home market economic activities, the level of trade in for the U.S. CEP sales is as high, if not higher, than the level of trade for home-market sales.

In addition, Petitioners contend that the sales to affiliated home market resellers are at the same or a less advanced stage than U.S. sales. Petitioners contend the home market affiliated resellers perform all of the sales functions that UA France would otherwise perform to the downstream purchaser. Consequently, for all such affiliated purchaser

sales that pass the Department's arm's-length test, the level of trade would be less advanced than that of the U.S. sales.

In rebuttal, UA France argues that a CEP offset is appropriate in this review because the evidence on the record clearly demonstrates that UA France's home-market sales were at a more advanced level of trade than the "constructed" level of its U.S. CEP sales. UA France contends that the Department should reject Petitioners summarized analysis and find, as it has in all the previous reviews in this matter, that a CEP offset is appropriate in this case.

UA France agrees with the Petitioners that the analysis of the level of trade for home-market and U.S. CEP sales is a comparison of the selling activities performed on home-market sales (*i.e*. all selling activities) with the selling activities performed on U.S. CEP sales at the constructed level of trade (*i.e*. the selling activities not associated with U.S. economic activity). Accordingly, the selling activities performed by UA France's U.S. affiliate (Arcelor Stainless USA, which acts as a super-distributor for UA France in the US market) are not considered part of the constructed level of trade for UA France's CEP sales because Arcelor Stainless USA's selling activities are associated with U.S. economic activity.

UA France refers to the table it provided in response to the Department's section A questionnaire which shows that fewer selling activities are performed and a lower degree of selling activity is undertaken at the constructed level of trade. See Appendix A-8-C of UA France's October 14, 2004 Section A Response. UA France argues that because it is not possible to quantify a LOT adjustment in accordance with section 773(a)(7)(A) of the Act, a CEP offset is warranted. UA France notes that the Department applied a CEP offset in each of the prior segments of this case and argues that Petitioners have identified no change in the sales process or selling activities that would justify their assertion that a CEP offset is no longer warranted in the current review.

In addition, UA France refutes Petitioners' summarization of UA France's selling activities. UA France contends that Petitioners ignore the record evidence in favor of their own inaccurate summarization. UA France argues that the Department should disregard the summary because of three deficiencies. First, UA France states that the Petitioners' summary is deficient because it divides shipping into separate constituent parts which results in a greater number of selling activities for U.S. CEP sales. Second, UA France argues that the Petitioners' summary is deficient because it attributes similar levels of payment risk to the home market and the U.S. CEP sales. Third, UA France states that the Petitioners' summary is deficient because it includes certain activities as selling activities performed by UA France on U.S. CEP sales which should properly be classified as U.S. business activities because the activities are performed by UA France's U.S. affiliates, Arcelor Stainless USA and Hague.

Department's Position

We agree with UA France. We examined this issue in the previous segment of this case and concluded that UA France was entitled to a CEP offset. See Memorandum to James J. Jochum, Assistant Secretary for Import Administration from Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration Group III, Issues and Decision Memorandum for the Third Administrative Review of Stainless Steel Sheet and Strip in Coils from France: July 1, 2001 through June 30, 2002, December 5, 2003 (Issues and Decision Memo Third Review). We reached this decision because we found that home market sales were made at a more advanced LOT than U.S. sales. We verified UA France's responses and concluded that fewer selling activities and a lower degree of selling activity were undertaken at the U.S. LOT. Id. We agree with UA France, that Petitioners have identified no change in the sales process or selling activities that would justify their assertion that a CEP offset is no longer warranted.

In this segment of the proceeding, we continue to find that UA France is entitled to a CEP offset. As we noted in the preliminary results, ". . . fewer and different selling functions were performed for CEP sales than for sales at the home market LOT. For example, selling functions included in the home market LOT, but not in the CEP LOT, include some functions of strategic planning and marketing, all customer sales and contact, some functions of production planning and order evaluation, some functions of warranty claim analysis, all technical services, all sales-related administrative support, and arranging transportation to the final customer." See Preliminary Results, 69 FR 47892, 47899. As we noted in the Preliminary Results, UA France performed very few selling activities for the U.S. sales because most U.S. selling functions were performed by the U.S. affiliates. As noted by Petitioners and UA France, we do not consider these selling functions in our LOT analysis pursuant to 19 U.S.C. § 1677a(d). We note that these selling functions are not excluded because they were performed by the U.S. affiliates, but because these are selling functions associated with sales to the first unaffiliated U.S. customer, which, as we have just noted, are not included in the Department's LOT analysis.

We continue to find that a CEP offset is warranted because we are unable to quantify the LOT adjustment in accordance with § 773(a)(7)(A) of the Act. As we have in previous segments of this case, we find that the LOT in the home market matched the LOT of the CEP transactions. Therefore, we cannot calculate a LOT adjustment. We will continue to apply a CEP offset for the final results.

Comment 2: Date of Sale for Certain Sales

Petitioners argue that UA France reported the wrong date of sale for home market sales other than certain sales because the material terms of the home market sales other than certain sales are established well before the date of the invoice. Petitioners note that although the Department's regulations favor the use of invoice date as the date of sale, the regulations also permit the use of another date when the material terms of the sale are established on a date other than invoice date.

Petitioners contend that the order acknowledgement date should be used as the date of sale for sales other than certain sales because that is the date on which the material terms

of the home market sales other than certain sales are established. Petitioners cite to several factors in the record of this matter to support this contention. These are: (1) UA France produces its merchandise to order. (2) UA France does not produce finished goods in anticipation of finding a customer. UA France confirms each sale, including the essential terms of the sale, with an order acknowledgement. The order acknowledgement is the first document in which the price and quantity are established between UA France and its customers. (4) UA France will issue a subsequent order acknowledgment if changes are made to the initial order acknowledgement. Thus, despite any changes to the material terms that may occur between the initial order acknowledgement and the final order acknowledgement, it is the final order acknowledgement in which the final material terms of the sale are first established. Petitioners argue that the Department's conclusion that subsequent changes in the material terms of the sale occur that alter the quantity shipped is not supported by substantial evidence.

In rebuttal, UA France contends that the Department should reject the Petitioners' argument because the Department should not abandon the general date-of-sale methodology used in the original less-than-fair value investigation, the first, second, and third administrative reviews of this case, and the Preliminary Results. UA France notes that the Department's regulations provide that the invoice date will normally be the date of sale, and that the Department has the discretion to select a sales date other than invoice date when appropriate. UA France asserts that invoice date is the appropriate date of sale for sales other than certain sales because record evidence shows that order prices and quantities may be and frequently are changed between the date of the initial order and the date of shipment. Thus, the material terms of the sale are not fixed until the merchandise is actually shipped.

UA France notes that the Petitioners urged the Department to reject invoice date as the date of sale in the first, second, and third administrative reviews of this case for the same reasons as stated in this review. UA France notes that the Department specifically rejected Petitioners' argument in the second administrative review because we verified that UA France experienced some significant changes in the base price between the order acknowledgement date and the invoice date. See Notice of Final Results of Antidumping Administrative Review: Stainless Steel Sheet and Strip in Coils from France, 67 FR 78773 (December 26, 2002) and accompanying Issues and Decision Memorandum at Comment ____. UA France argues that Petitioners have shown no change in UA France's sales process or practices which would justify changing our prior decisions. UA France states that the record evidence in this case segment demonstrates that there were numerous changes made to home market sales other than certain sales between the order date and the invoice date.

Department's Position

We agree with UA France. We continue to find that invoice date is the proper date of sale for the sales other than certain sales because the record evidence demonstrates that the invoice date is the date on which the material terms of the sale are finally established. Although the Department did not verify the responses of UA France, we note that their

responses indicate changes to quantity between the order acknowledgement date and the invoice date. See e.g. Response of Ugine & ALZ France to the Department's December 22, Supplemental Questionnaire Exhibit 32 (February 6, 2004) and Section A Response of Ugine & ALZ France Exhibit A-9 (October 14, 2003).

As demonstrated by past Department practice, a sales date other than invoice date better reflects the date when material terms of sale are established if the party shows that the material terms of sale undergo no meaningful change and are not subject to meaningful change between the proposed date and the invoice date. See e.g. Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line an Pressure Pipe from Mexico, 65 FR 39358 (June 26, 2000) and accompanying Issues and Decision Memorandum at Comment 2. Therefore, if there is a change in price or quantity after the proposed date of sale, and there is no adequate explanation as to why such a change is not meaningful for purposes of our sales date analysis, then the Department is bound under the regulation to employ invoice date as the date of sale. See Thai Pineapple Indus. Corp., Ltd. v. United States, 24 Ct. Int'l Trade 284 (Ct. Int'l Trade 2000). The record evidence in this matter shows that changes can and do occur to the material terms of the sale after the date of order for UA France's home market sales as noted above. The court of international trade (CIT) has previously found that the presumption in favor of the invoice date is further strengthened by changes in quantity between the purchase order date and the invoice or shipment date. See e.g. Allied Tube and Conduit Corp. v. United States, 132 F.Supp. 2d 1087 (Ct. Int'l Trade 2001). Accordingly, we continue to find that invoice date better reflects the date on which the material terms of sale are established in this case. Therefore, we will continue to use invoice date as the date of sale for the home market sales other than certain home market sales.

Comment 3: Credit Expenses

Petitioners argue that the Department should recalculate credit expenses for certain sales because in the Preliminary Results the Department changed the sales date for these types of sales from the earlier of the shipment date or invoice date to the invoice date. Petitioners contend that because the Department made this change, the Department should have adjusted the credit expenses calculation to account for this change.

Petitioners state that UA France calculated home market credit expenses based on the number of days between the date of shipment and the date of payment. Petitioners contend that this calculation assumes that the extension of credit in the home market began with the date of shipment. Thus, the calculation used by the Department overstates the home market credit expenses because it improperly begins the credit period at the time of shipment rather than at the time of invoice.

UA France states that if the Department agrees with the Petitioners and decides to change the credit expenses calculation for home market sales, then it should also make the same change for the same type of sales made in the United States. UA France states that it calculated the U.S. credit expenses for the same type of sales in the United States using

the period from the date of shipment to the date of payment. UA France states that in order to remain consistent with its position in the home market sales, the Department should make the same modification in connection with the U.S. sales.

Department's Position

We also addressed this issue in the previous administrative review. See Issues and Decision Memo Third Review, page 15-16. In the Issues and Decision Memo Third Review, we wrote ". . . we have determined in other cases that because respondent is unable to sell the merchandise to any other customer while in inventory, it is a direct expense. In Certain Stainless Steel Wire Rods from France, we articulated a position which directly addresses the issue.

> 'We agree that costs incurred during the {. . . } inventory period are not inventory carrying costs, but are direct credit expenses. During the period that the merchandise remained in {. . .} inventory, the merchandise was not available for sale to any other of respondent's customers. Since it was not available for sale, we have determined that the expense incurred by respondent while it remained in its customer's inventory is a direct expense.' See Certain Stainless Steel Wire Rods from France, 58 FR at 68870 (December 29, 1993).

Moreover, in the third review we explained that the Department determined that the credit period for these home market sales began at the time the merchandise left the producing mill en route to its customer's inventory and not when the final customer was invoiced." See Issues and Decision Memo Third Review at page 16-17 (December 5, 2003).

Petitioners have not pointed to any facts in this review which would cause the Department to change this position. Changing the date of sale from the earlier of shipment date or invoice date to invoice date does not alter the fact that the credit period for the home market sales began at the time the merchandise left the producing mill. As noted above we have determined, that even though UA France retains title to this merchandise while it remains in inventory it is unable to sell this merchandise to any other customer. Accordingly, it is consistent to continue to calculate credit expenses from the date of the shipment to the date of payment. Therefore for the final results the Department did not change the credit expense calculation for UA France.

Comment 4: Application of Adverse Facts Available for Sales to Bernier

Petitioners contend that the Department should apply adverse facts available for the final results for the downstream home market sales by UA France's affiliated reseller, Bernier, instead of disregarding the sales entirely as we did in the Preliminary Results. Petitioners reiterate our findings in the Preliminary Results that we disregarded the sales to Bernier because UA France no longer had the control necessary to compel cooperation.

Petitioners contend that the record evidence does not support our conclusion because UA France could have taken steps to obtain the information needed to respond to the Department's request. Moreover, Petitioners contend that the Department essentially rejected UA France's claim that it could not produce the information when it repeatedly requested the information prior to the Preliminary Results.

Petitioner argue that the sale of Bernier is not sufficient to excuse UA France's failure to provide the downstream sales for Bernier. Petitioners note that the relationship between Bernier and UA France did not change until most of the review period had passed. Therefore, UA France should have had most of the information requested by the Department. Petitioners posit that when companies are sold, the sellers generally are permitted by contract to maintain such information because it is necessary to close the books as well as to make required tax filings. Petitioners contend that the record is devoid of particularized evidence sufficient to sustain UA France's position that it could not have acquired the information requested by the Department. Petitioners note that UA France said that the information was out of its control, difficult to collect and would not be needed for sales matching purposes. Petitioners argue that UA France did not make any real effort to obtain the requested information.

In addition, Petitioners suggest that UA France had a legal obligation to preserve access to this information for use in this administrative review because it knew that it might have to produce the information in a future segment of this case. Petitioners represent that the Court of Appeals for the Federal Circuit (CAFC) has addressed this issue. See Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F. 3d 1330 (Fed. Cir. 2002). In Ta Chen, the CAFC held that the company had a burden to preserve records for use in the administrative review because it had reason to know that these records would be necessary in the review. Petitioners say that UA France knew from previous segments that the downstream sales by Bernier were at issue. Petitioners urge the Department to find that UA France bore the burden of retaining the records in order to supply them to the Department.

As adverse facts available, Petitioners urge the Department to use the higher of the highest dumping margin found on a UA France sale or the 39.2 percent margin calculated by the Department in the notice of initiation in the original investigation. See Initiation of Antidumping Duty Investigation: Stainless Steel Sheet and Strip in Coils from France, Germany, Italy, Japan, Mexico, South Korea, Taiwan, and the United Kingdom, 63 FR 37521 (July 13, 1996).

UA France counters that it was appropriate for the Department to disregard the downstream sales to Bernier because the volume of sales amounted to a miniscule part of overall home market sales which would have no material effect on the antidumping margin. UA France urges the Department to reject Petitioners claim that the precedent established in Ta Chen should control the Department's findings in this review. UA France says that Ta Chen does not apply because the respondent in Ta Chen concealed information about U.S. sales from the Department. UA France says that it has not

mischaracterized or concealed information from the Department because it has no control over Bernier.

UA France tried to obtain the information from Bernier but was rebuffed. UA France explained that it wrote to Bernier requesting the information. Bernier declined to provide the information requested. UA France noted that the new owner of Bernier is a competitor to UA France. See Appendix SSA-d of UA France's February 10, 2004 supplemental questionnaire response.

Department's Position

We will continue to disregard the downstream sales to Bernier for the purposes of our Final Results. The Department's regulations identify the sales to be used in calculating normal value between affiliated parties. Section 351.403(d) provides that,

> . . . the Secretary normally will not calculate normal value based on the sale by an affiliated party if sales of the foreign like product by an affiliated party of the foreign like product by an exporter or producer to affiliated parties account for less than five percent of the total value (or quantity) of the exporter's or producer's sales of the foreign like product in the market in question.

19 C.F.R. § 351.403(d). As we noted in the Preliminary Results, the sales to Bernier amount to a miniscule amount of UA France's total sales. Moreover, in UA France's response to the Department's March 24 supplemental questionnaire and March 25 letter, UA France explained that it is not possible to electronically match reseller sales to the reseller's purchase from its supplier. According to UA France matching these sales would by unduly burdensome. The Department verified the difficulty in matching in the second administrative review. See Verification Report of the Second Administrative Review of Stainless Steel Sheet and Strip from France—Home Market Sales and Cost Verification Report of Ugine, S.A. (July 31, 2002) at page 26.

We disagree with Petitioners that there is no particularized evidence on the record of this matter that UA France did not try to obtain the information from Bernier. UA France contacted Bernier to obtain the information to respond to the Department's questionnaire. Bernier refused to cooperate. We are distinguishing between Bernier and PUM because UA France did make some nominal effort to contact Bernier and obtain the information. With PUM, UA France did nothing. Accordingly, we decline to apply adverse facts available to the Bernier downstream sales.

However, Petitioners correctly note that Bernier and UA France remained affiliated during most of the POR. We agree with Petitioners that UA France was under an obligation to retain the information during the time that UA France was affiliated with Bernier. See Ta Chen. Moreover, UA France has participated in four previous segments of this proceedings. In addition, this same issue arose in the second administrative review when UA France, in its former corporate guise, Ugine, S.A., ceased affiliation

with another reseller during that POR. Clearly, UA France is aware of its obligation to preserve this type of information and its burden to establish the record in this case. See Ta Chen. In addition, UA France has not fully explained why it does not have access to this sales information during the period while UA France and Bernier remained affiliated during the POR. Because the Department was unable to verify this case, we are unable to more closely examine the relationship between Bernier and UA France to determine why UA France does not have the sales information while it was affiliated with Bernier.

As noted above, the Department has the discretion to disregard downstream sales where those sales are less than five percent of the total volume or quantity of the producer's sales. Notwithstanding that application of adverse facts available might be appropriate in similar circumstances in another case, we decline to provide that remedy in this segment of this proceeding.

Comment 5: Offsetting Margins with Above-Normal-Value Transactions

UA France contends that by not offsetting margins above normal value, the Department substantially increased the dumping margin for UA France. UA France argues that the Department's methodology, although longstanding, is not required by U.S. law. See e.g. Bowe Passat Reinigungs-und Waschereitechnik GMBH v. United States, 929 F.Supp. 1138 (Ct. Int'l Trade 1996). Furthermore, UA France asserts that by not offsetting margins above normal value, the Department disregards its obligation to calculate the fairest, most accurate margin possible. See Viraj Group v. United States, 193 F.Supp. 2d 1331 (Ct. Int'l Trade 2002) citing Rhone Poulenc, Inc. v. United States, 899 F.2d 1185 (Fed. Cir. 1990).

UA France also argues that the Department's methodology is not in accordance with Article 2.4 and Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement), which states that dumping margins are established in one of two ways: 1) comparing the weighted average normal value with a weighted average of prices of all comparable export transactions; or 2) comparing normal value and export prices on a transaction-to-transaction bases.

UA France contends that the World Trade Organization (WTO) has found that calculating antidumping duties by this methodology is not consistent with the Antidumping Agreement. See European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (Bed Linen from India). UA France notes that the WTO Appellate Body stated that not offsetting for non-dumped transactions results in an inflated dumping margin and does not result in a fair comparison between export price and normal value as required by the Antidumping Agreement. UA France asserts that the Department's methodology was rejected by the WTO in the softwood lumber case from Canada. See Report of the Appellate Body: United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (December 15, 2003) (Softwood Lumber from Canada).

UA France states that one of the fundamental principles of U.S. law is that U.S. statutes should be interpreted, whenever possible, to be consistent with international law. UA France notes that U.S. courts routinely rely on this principle in interpreting U.S. statutes and it is equally applicable to federal agencies. See Weinerberg v. Rossi, 465 U.S. 25, 31, 1982, quoting Schooner Charming Betsy, 2. L. Ed. at 208, Ma v. Reno, 203 F. 3d 815, 829 (9th Cir. 2000), George E. Warren Corp. v. United States Environmental Protection Agency, 159 F. 3d 616, 624 (D.C. Cir. 1998). According to UA France, the Department should, therefore, bring its calculations into line with the requirements of international law, as expressed by the WTO's dispute settlement bodies. UA France says that the Department can bring its calculations into line with the WTO dispute settlement bodies by discontinuing its practice of not offsetting for non dumped transactions for purposes of calculating the dumping margin for UA France in this review.

Petitioners counter that UA France raised this issue in prior segments of this case and that the Department explicitly rejected it despite Bed Linen from India and the Supreme Court's ruling in Charming Betsey. See e.g. Stainless Steel Sheet and Strip in Coils From France: Final Results of Antidumping Duty Administrative Review, 68 FR 69379 (December 12, 2003) and accompanying Issues and Decision Memorandum at Comment 13. Petitioners assert that UA France is still wrong notwithstanding the Softwood Lumber from Canada WTO decision.

Petitioners urge the Department to reject UA France's contention that the Softwood Lumber from Canada case compels the Department to discontinue its methodology. Specifically, Petitioners contend that the WTO's ruling in the Softwood Lumber from Canada case only pertained to the way the Department used this methodology in determining the dumping margin in the investigation of Canadian softwood lumber, and not to the Department's overall policy of not offsetting for non-dumped transactions . See Softwood Lumber from Canada. The Department calculated weighted-average margins by not offsetting for non-dumped transactions at two different levels, one for typical softwood lumber and another for a sub-group of similar softwood lumber like products. To emphasize their point that the WTO was concerned only with the Department's methodology in that specific case, Petitioners point to the WTO Appellate Body's ruling where the Appellate Body: 1) noted that both Canada and the U.S. agreed that the issue before the Appellate Body was the consistency of this methodology as used in this specific case and not zeroing in general; 2) acknowledged that Canada's claim to the Appellate Body was limited to the consistency of this methodology when used in calculating dumping margins based on the comparison of a weighted-average normal value with a weighted average of prices of all comparable export transactions; and 3) stated this particular appeal, did not address whether or not the Department's methodology could be used as a methodology under Article 2.4.2 of the Antidumping Agreement.

Petitioners also argue that Softwood Lumber from Canada is not relevant to the Department's methodology in administrative reviews. To support this issue, Petitioners cite Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004) (Timken); Serampore Industries PVT Ltd. v. the United States, 675 F. Supp. 1353 (CIT 1987); and Bowe Passat

Reinigungs-und Waschereitechnik GmbH vs. United States, 926 F. Supp. 1138 (CIT 1996), in which the CAFC upheld the Department's policy of not offsetting non-dumped transactions as reasonable and in accordance with the law. Petitioners contend that the CAFC held in Timken that the Department was correct in its interpretation of § 771(35)(A) of the Act, which defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," as allowing for not offsetting non-dumped transactions.

Petitioners also argue that since interpreting the antidumping statute often means filling gaps that Congress has either deliberately or inadvertently left in the statute, the CAFC has given latitude to Department in the application of the statutes to the cases under review. Specifically, Petitioners cite Smith Corona Group vs. United States, 713 F.2d 1568 (Fed. Cir. 1983), where the Court stated that the Department has broad discretion in interpreting antidumping law.

Petitioners also take issue with UA France's argument that the Department must abide by WTO decisions and agreements. To support this point, Petitioners cite § 3533(g) of the Act, which states that when a dispute settlement panel or Appellate Body finds that a regulation or practice of a U.S. department or agency is inconsistent with any URAA, the regulation or practice in question cannot be amended, rescinded or modified without first getting input from the appropriate congressional committees, the agency in question, the U.S. Trade Representative, and the general public. Petitioners conclude that the WTO rulings on this methodology do not affect the Department's existing methodology nor would the Department be permitted to change its practice for this particular review without invoking the procedures required by 19 U.S.C. § 3533.

Department Position:

We agree with Petitioners. The Department's methodology is required by U.S. law. Section 771(35)(A) of the 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 export prices and constructed export prices of such exporter or producer." Taken together, these sections direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Canada, 67 FR 55782 (August 30, 2002) (Wire Rod from Canada) and accompanying Issues and Decision Memorandum, at Comment 1.

In addition, the directive to determine aggregate dumping margins in § 771(35)(B) makes clear that the singular dumping margin in § 771(35)(B) applies on a comparison-specific level, and does not itself apply on an aggregate basis. At no stage in this process is the amount by which export price or constructed export price exceeds normal value on non-dumped sales permitted to cancel out the dumping margins found on other sales. This

does not mean, however, that non-dumped sales are ignored in calculating the weighted-average rate. The weighted-average margin will reflect any "non-dumped" merchandise examined, and the value of such sales is included in the denominator of the dumping rate 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. See Notice of Final Determination of Sales at Less Than Fair Value; Certain Cold-Rolled Carbon Steel Flat Products from France, 67 FR 62114 (October 3, 2002) and accompanying Issues and Decision Memorandum at Comment 21. As the Department has discussed in prior segments of this case, including the most recently completed review of the order, its methodology is consistent with its statutory obligations under § 771(35)(B) of the Act. See Stainless Steel Sheet and Strip in Coils From France: Final Results of Antidumping Duty Administrative Review, 68 FR 69379 (December 12, 2003) and accompanying Issues and Decision Memorandum at Comment 13.

We disagree with UA France that the WTO Appellate Body's decision in Softwood Lumber from Canada compels the Department to discontinue its longstanding methodology. In the context of administrative reviews, the CAFC has affirmed the Department's statutory interpretation which underlies this methodology as reasonable. See The Timken Company v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004). In addition, 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." See 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 ("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)). Furthermore, the CAFC and the CIT have consistently found that WTO rulings with respect to this methodology are not binding on the Department. See Timken, 354 F. 3d at 1344; see also Corus Engineering Steels, Ltd. v. United States, 2003 CIT Lexis 110,3 at 28-30. Therefore, the Department will not offset non-dumped transactions in this review.

Comment 6: Offsetting Home Market Commissions

UA France contends that affiliated home market commissions should be offset with indirect selling expenses and inventory carrying costs incurred in France for U.S. sales rather than expenses associated with U.S. business activities. UA France states that in order to offset home-market commissions when the commission amount was zero, the Department used expenses associated with U.S. business activities as reflected in the variable INDEXUS. UA France argues that these expenses should not be used to offset commission in the home market, because the U.S. prices have already been reduced by

the full amount of these expenses. UA France notes in the prior administrative of this case the Department made the same error for the preliminary results and corrected this error for the final results. See Issues and Decision Memo Third Review, page 21-22. Petitioners did not comment on this issue.

Department's Position

We agree with UA France. As we wrote in the Issues and Decision Memo Third Review, where a commission is paid between affiliated parties and may not be at arm's length, it is the Department's practice to disregard that commission, and instead deduct the actual selling expenses incurred by the sales agent from the CEP, pursuant to § 772(d)(1)(C) and (D) of the Act. See Mitsubishi Heavy Industries, Ltd. v. U.S., 54 F.Supp. 2d 1183, 1193 (CIT, 1999). Accordingly, for purposes of the final results we will offset home-market commissions with the indirect selling expenses and inventory carrying cost incurred in the country of exportation on U.S. sales.

Comment 7: Further Manufacturing Adjustments

UA France contends that the Department erred in the Preliminary Results when it treated inland freight from the U.S. port of entry to the further manufacturer as a further manufacturing cost instead of a movement expense. UA France argues that this methodology is inappropriate for three reasons. These are: (1) only 15.2 percent of the volume of subject merchandise sold in the United States was further manufactured. However, because UA France reported all inland freight expenses in this field, the Department's calculation methodology creates further manufacturing expenses for sales in which further manufacturing did not occur. (2) These expenses were incurred by the affiliated importer Arcelor Stainless USA, rather than the further manufacturer (Hague). (3) Hague is a service center that keeps an inventory of merchandise which can be sold directly to the customer or further manufactured. According to UA France, the cost of shipping merchandise to Hague is more appropriately considered part of the cost of the material that Hague has available either for further manufacturing or for sale in the form it was imported. In addition, UA France says that if the department does treat the transportation costs as further manufacturing costs, then it should limit this treatment to only those sales that were, in fact, further manufactured.

In rebuttal, Petitioners urge the Department not to change its finding in the Preliminary Results that further manufacturing includes inland freight from the U.S. port of entry to Hague. Petitioners note that the Department requested that UA France move the cost of inland freight from INLFPWU to FURMANU in a supplemental questionnaire, but UA France responded that it contended that the cost was properly located in INLFPWU and that the Department could make the adjustment of its own accord.

Petitioners argue that inland freight from the port of entry to Hague is a part of the expense incurred by the Hague in order to convert the product to the further manufactured form in which it is sold. Petitioners state that this charge is no different than any other internal handling charge incident to the further processing.

Petitioners also argue that the identity of the payee of these transportation costs is irrelevant to the Department's analysis because the issue is what expenses were incurred. The Department's regulations provide that the Department "will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser , no matter where or when paid." See 19 C.F.R. § 351.402(b).

Petitioners argue that UA France's suggested changes to the margin program are meaningless because they ultimately have no effect on the dumping margin. According to Petitioners this occurs because the expense is removed from the export price in either case. Therefore, Petitioners suggest that there is no reason to modify the Department's preliminary margin program to change how we account for the sales made by Hague which were not further manufactured.

Department's Position

We agree with Petitioners. As we said in the Preliminary Results, the cost of transport from the U.S. port of entry to Hague is properly classified as a further manufacturing expense. As we noted in the Department's Section E questionnaire at section IV, question 3:

> "Report the costs incurred for direct materials used to further manufacture the subject merchandise. This should include transportation charges and other expenses normally associated with obtaining the materials that become an integral part of the finished product sold in the United States. Direct materials costs include only the costs incurred for materials added in the United States, and not the cost of the import subject merchandise. However, in addition to the cost of all direct materials added in the United States, you should include in this field the costs incurred for 1) all movement charges incurred to transport the subject merchandise from the port of entry to the company's U.S. further manufacturing facilities . . . ."

It is clear to the Department that these movement expenses are a component of further manufacturing, not transportation expenses.

Comment 8: Ministerial Errors: Interest Expenses, Home Market Warranty Expenses, and Commission Expenses

UA France argues that the Department made three calculation errors in the Preliminary Results. These are: 1) the Department incorrectly included WARRH in the below cost test twice because WARRH is included in both the formulas for DSELCOP and DIRSELH. 2) The Department incorrectly included imputed interest expenses in the total cost of production in addition to actual interest expenses. 3) The Department failed to deduct the direct selling expense, commissions, from the net price used in the arm's-length test. Petitioners did not address these issues in its rebuttal brief.

Department's Position

We agree with UA France. The Department made each of the inadvertent errors in the formulas used in the computer programs used to calculate UA France's Dumping Margins. We have adjusted the programs as suggested by UA France. See Memorandum to Sean Carey from Sebastian Wright: Analysis for Ugine & ALZ France for the Final Results of the Fourth Administrative Review of Stainless Steel Sheet and Strip in Coils from France, February 2, 2005.

RECOMMENDATION

Based on our analysis of the comments received, recommend adopting all of the above changes and positions, and adjusting the model match and margin calculation programs accordingly. If accepted, we will publish the final results of this review and the final weighted-average dumping margins for this review in the Federal Register.

AGREE_____ DISAGREE_____

_____
James J. Jochum
Assistant Secretary
For Import Administration

_____
Date