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MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Antidumping Duty Administrative Review of Chlorinated Isocyanurates from Spain: Issues and Decision Memorandum for the Final Results

SUMMARY

We have analyzed the comments of the interested parties in the 2007-2008 antidumping duty administrative review of chlorinated isocyanurates (chlorinated isos) from Spain. As a result, we have made changes to the margin calculation for Aragonesas Industrias y Energía S.A. (Aragonesas or respondent). We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

On May 27, 2009 the Department of Commerce (the Department) published the preliminary results of the antidumping duty review of chlorinated isos from Spain. See Chlorinated Isocyanurates from Spain: Preliminary Results and Rescission, in Part, of Antidumping Duty Administrative Review, 74 FR 25215 (May 27, 2009) (Preliminary Results). The product covered by this review is chlorinated isos. The period of review (POR) is June 1, 2007, through May 31, 2008.

We invited parties to comment on the Preliminary Results. We received a timely filed case brief from Aragonesas and a timely filed rebuttal brief from Clearon Corporation and Occidental Chemical Corporation (collectively, petitioners). Respondent also requested a hearing, which was held by the Department at its main building on July 23, 2009. Based on our analysis of the comments received, the weighted-average margin for Aragonesas has changed from that calculated in the Preliminary Results.

LIST OF THE ISSUES

Below is the complete list of issues in this investigation for which we received comments from interested parties:

Comment 1: Whether the Department Should Eliminate from the General and Administrative (G&A) Ratio the Accrued Expenses Relating to the Asset Impairments and Restructuring Charges
Comment 2: Whether the Department was Correct to Revise Aragonesas' G&A Expense Allocation Relating to G&A Services Provided by its Parent Company
Comment 3: Whether the Department, in Calculating the G&A and the Research and Development (R&D) Amounts to be Included in Aragonesas' Costs, Should First Eliminate from TOTCOM that Portion of TOTCOM that Relates to the Major Input Rule Adjustment for Chlorine
Comment 4: Whether the Department Should Set U.S. Warranty Expenses to Zero
Comment 5: Whether There Are Clerical Errors in the Department's Program or Calculations
Comment 6: Whether the Department Should Refrain from Zeroing for the Final Results

DISCUSSION OF THE ISSUES

Comment 1: Whether the Department Should Eliminate from the G&A Ratio the Accrued Expenses Relating to the Asset Impairments and Restructuring Charges

Aragonesas argues that the Department should eliminate from the G&A expense ratio calculation the accrued expenses relating to asset impairments and restructuring charges that it added to the total G&A expenses in the preliminary results. Aragonesas contends that these expenses relate to the production of plastics products which are produced by a completely separate division than the division that produces chlorine products, and that these expenses do not in any way benefit the production of subject merchandise. Given this fact, Aragonesas argues that including such accruals in the G&A expense of subject merchandise cannot be seen as presenting a fair, reasonable or accurate representation of the true cost of producing chlorine during the current POR.

Aragonesas argues that, in its preliminary results, the Department blindly adhered to financial accounting standards that are intended for financial statement reporting rather than for the cost calculation concepts that are relevant to the dumping analysis. According to Aragonesas, the accounting rules applied by the Department in this review were not established to deal with dumping issues or the calculation of accurate dumping margins, but rather to maximize disclosure and transparency on the balance sheet and income statement. Aragonesas acknowledges that accounting rules should be applied to analyze costs, but contends that in this case there is no connection between those accounting rules and the purpose of the antidumping law. Citing Union Steel v. United States, Slip Op. 09-47 (CIT 2009), Aragonesas holds that the purpose is to calculate dumping margins as accurately as possible. By including the impairment costs and restructuring accruals in the G&A ratio calculation, Aragonesas suggests, the Department appears to have lost sight of this purpose.

Aragonesas notes that section 773(b)(3)(B) of the Tariff Act of 1930, as amended (Act) requires that, when calculating the cost of production, the Department should add "an amount for selling, general and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question." Aragonesas cites United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/R (April 13, 2004) ("Lumber WTO Panel Report") and argues that the impairment costs and restructuring charges are not general, but rather are product-specific in nature, and that the product to which they pertain is plastics, not the subject merchandise. Accordingly, Aragonesas claims, these costs do not pertain to the production and sales of subject merchandise as is required by the statute. In fact, Aragonesas reasons, adding the plastics division costs to the G&A expense for chlorine products is statutorily prohibited, as these costs are not related to the production of the subject merchandise.

According to Aragonesas, the plastics division accruals are equivalent to a one-time full depreciation of the written-down assets and one-time labor termination charges. As such, Aragonesas contends, these charges represent depreciation and labor costs, not true general expenses. Accordingly, Aragonesas maintains, there is no reason that depreciation and labor costs that are specific to plastics should be viewed as general to all products, rather than specific to the products that benefited from them. Further, Aragonesas posits, if the assets and labor had remained operational, they would have been depreciated and charged as plastics division asset depreciation and labor costs. Thus, Aragonesas concludes, even though these costs are booked as extraordinary expenses for financial accounting purposes, to consider them as general expenses rather than depreciation and labor costs related to plastics elevates form over substance, which subsequently introduces significant distortions.

Aragonesas also argues that the Department is elevating form over substance because, had the closures been of complete facilities rather than just two out of three production lines, past precedent indicates that the loss from such closure would not have been included in the reported costs. Aragonesas argues that in prior cases the Department has ruled that losses from the shut-down and closure of entire plants should not be included in the cost of production. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada, 70 FR 73437 (December 12, 2005) and accompanying Issues and Decision Memorandum ("Lumber from Canada") at Comment 8. Aragonesas contends that it is hard to reconcile the position that the closure of two production lines in a facility that has only three lines should constitute a part of G&A expense, while if the entire facility had been closed it would not have been picked up. See, e.g., Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review, 72 FR 69663 (December 10, 2007), and accompanying Issues and Decision Memorandum ("PSF from Korea") at Comment 8. A closure is a closure, according to Aragonesas, be it of production lines or of complete facilities. Further, Aragonesas avers, the written-down assets were not simply idled, but rather were scrapped assets not intended to be used again. Thus, Aragonesas reasons, even though the company has described the closure of the two production lines as asset impairments, the actual complete abandonment and scrapping of the two lines is much more akin to the closure of a facility, as was the situation in Lumber from Canada.

Further, Aragonesas argues that the impairment and restructuring charges are extraordinary expenses and therefore should not be included in the G&A expense ratio calculation. Although the Department has in the past characterized impairment and restructuring costs as frequent, recurring events and refused to exclude them as extraordinary, Aragonesas contends the Department should evaluate such costs on a case-by-case basis, taking into account the nature of the event and its magnitude. Aragonesas maintains that the scrapping of two thirds of an entire plant and the laying off of a significant portion of a division's workforce is an extraordinary event far greater in magnitude than the general type of impairment or restructuring event that the Department normally sees. Aragonesas believes that, in terms of magnitude alone, these costs should be viewed as extraordinary, as they are represented in the company's financial statements, and therefore should be excluded from the reported costs.

Aragonesas argues that, while the Department's calculations are not results oriented, an analysis of the results in this review is warranted, as it confirms the distortions and inaccuracies introduced into the dumping calculations owing to the inclusion of an excessively high G&A expense that does not pertain to the product under review. According to Aragonesas, increasing the G&A expenses in such an inappropriate manner results in nonsensical and inappropriate sales comparisons that severely distort the margin. Specifically, Aragonesas maintains that sales of bulk wholesale products in the U.S. are being compared to sales of retail products to end users in the home market, an "apples to oranges" comparison. Citing Torrington Co. v. United States, 68 F.3d 1347, 1352 (CIT 1995), Aragonesas states that the antidumping statute seeks to produce a fair "apples to apples" comparison between foreign market value and U.S. price, and that such a fair comparison has not been achieved in this review purely as a result of adding the plastics division impairment and restructuring accruals to the G&A expense ratio.

Aragonesas acknowledges that in certain past cases the Department has included impairment and restructuring costs in the G&A expense ratio calculation, but argues that those cases are distinguishable from this proceeding. In elaborating this point, Aragonesas discusses only Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From the United Kingdom, 67 FR 3146 (January 23, 2002), and accompanying Issues and Decision Memorandum ("SSB from the UK") at Comment 3. Aragonesas acknowledges that the Department's findings in SSB from the UK were upheld at the CIT in Corus Engineering Steels Ltd. v. United States, 27 CIT 1286 (CIT 2003) ("Corus v. United States")). It states that this is the only case involving impairments that has been reviewed by a U.S. court. Aragonesas notes that although the assets at issue in SSB from the UK were used to produce non-subject merchandise, they were still used to produce steel products and a steel product was the subject merchandise. Thus, Aragonesas reasons, there was no issue of different divisions or categories of completely different products incurring costs as there is in this proceeding. Moreover, Aragonesas maintains, although it is not entirely clear, it appears that the costs in SSB from the UK were actually incurred rather than accrued, as the closure occurred during the POR. In Aragonesas' case, Aragonesas notes, the costs were accrued and the closure clearly occurred outside of the POR. Finally, Aragonesas avers, it is very likely that in SSB from the UK the addition to G&A expenses did not have a significant impact on the margin.

The petitioners argue that the Department correctly determined that Aragonesas' G&A expense ratio should be revised to include the impairment losses and restructuring charges recorded in the company's 2007 audited financial statements. The petitioners contend that the impairment losses are not costs incurred in connection with the current production of plastics and that they therefore cannot be considered product costs in connection with plastics manufacturing. At the same time, the petitioners maintain, the impairment costs are real costs to the company that should be captured as general expenses and appropriately allocated across all products. The petitioners point out that Aragonesas' own financial statements treat the impairment losses as a period cost of the entire company rather than as a production cost of the plastics division. Because the impairment loss cannot be associated with the manufacture of any revenue generating product, the petitioners contend, it is recorded as a general period expense to be borne by the overall operations of the company.

The petitioners argue that the Department has developed a well-established and consistent precedent that treats impairment losses as a general expense included in the G&A expense ratio calculation. See, e.g., SSB from the UK at Comment 3, Stainless Steel Bar from France: Final Results of Antidumping Duty Administrative Review, 70 FR 46482 (August 10, 2005) and accompanying Issues and Decision Memorandum ("SSB from France") at Comment 1, Coated Free Sheet Paper from the Republic of Korea: Notice of Final Determination of Sales at Less Than Fair Value, 72 FR 60630 (October 25, 2007) and accompanying Issues and Decision Memorandum ("CFS from Korea") at Comment 7 and PSF from Korea at Comment 7. Citing Corus v. United States, the petitioners point out that the Department's practice with respect to asset impairments and write downs has been upheld by the CIT. In that case, the petitioners note, the Department included in the respondent's G&A expenses costs related to the closure of a furnace and rolling mill that had been exclusively devoted to the production of non-subject merchandise, a situation very similar to this proceeding. Upon appeal, the CIT ruled that the Department's decision to include the closure costs in the respondent's total G&A expenses was not unreasonable.

The petitioners argue that the Department properly determined that Aragonesas' restructuring costs are general expenses, rather than costs related to the plastics division. The petitioners state that the restructuring costs do not benefit the production of any specific product and thus are not product costs, but instead are costs related to the company's overall operations. The petitioners state that the Department's treatment of restructuring costs as a general expense to be included in G&A is consistent with an established practice that extends back at least ten years. See, e.g., SSB from France at Comment 3 and Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52055 (September 12, 2007) and accompanying Issues and Decision Memorandum ("Shrimp from India") at Comment 6.

According to petitioners, Aragonesas' argument that including the impairment losses and restructuring costs in the total G&A expense is inconsistent with section 773(b)(3)(B) of the Act is inaccurate. The petitioners state that the Department has recognized that the statute does not mandate a specific calculation of the G&A expense ratio, and, in lieu of a specific definition, has developed a consistent and predictable practice of calculating the G&A expense rate by dividing company-wide G&A costs by company-wide cost of sales. See, e.g., Shrimp from India at Comment 6. Citing Shrimp from India, the petitioners maintain that the Department includes in G&A expenses a diverse range of items that relate to the general operations of the company as a whole, as opposed to including only those expenses that directly relate to the production of subject merchandise. According to the petitioners, once the Department correctly recognized that the impairment losses and restructuring costs were not product costs, but were instead general expenses, it was appropriate and consistent with the statute to spread those costs proportionately across all of the merchandise produced by Aragonesas over the POR.

The petitioners disagree with Aragonesas' argument that the impairment losses and restructuring charges constitute depreciation and labor costs rather than true general expenses. According to the petitioners, an impairment loss is not a depreciation expense, as there is no economic benefit arising from the use of the asset and there is no reasonable expectation of future revenue that can be used to offset the historical value of the asset over time. The petitioners maintain that Aragonesas' impairment losses benefited neither past nor future production and thus cannot be reasonably equated with a depreciation expense. With regard to restructuring costs, the petitioners contend that it is not accurate to equate these costs to labor costs as they also do not benefit current production. With regard to both impairment losses and restructuring costs, the petitioners note that it is undisputed that Aragonesas did not capture these costs as depreciation and labor in its audited financial statements. Moreover, the petitioners state, Aragonesas has not cited a single case where the Department has treated these costs as anything other than general expenses.

Furthermore, the petitioners argue that the Department properly determined that Aragonesas' impairment losses and restructuring charges are not extraordinary expenses. According to the petitioners, the Department's clear practice is to exclude costs as extraordinary expenses only when they are shown to be both unusual in nature and infrequent in occurrence. See, e.g., SSB from France at Comment 1. In that regard, the petitioners state that the Department has consistently found that impairment losses and restructuring charges are commonly encountered events for manufacturing companies that do not warrant exclusion from G&A expenses. The petitioners contend that the Department has consistently ruled that these costs are related to general operations and are neither unusual nor infrequent for a manufacturing company. See, e.g., SSB from France and Shrimp from India at Comment 6.

The petitioners contend that the inclusion of impairment losses and personnel restructuring charges in G&A expenses was not distortive and did not lead to inappropriate sales comparisons. The petitioners opine that the increase in Aragonesas' G&A ratio as a result of including these costs was not unusual, and that Aragonesas' adjusted G&A expense ratio was clearly not unreasonable for a manufacturing company. According to the petitioners, the impact of the increase in G&A expenses on the dumping margin is as much due to Aragonesas' own pricing practices as it is to any changes in costs. Further, the petitioners maintain, Aragonesas' claim of distorted matches is meritless, as the matches result from the same physical characteristics that have been used in every segment of this proceeding, and all matches of comparable products have been constrained by the Department's difference in merchandise test. Finally, the petitioners note, the Department's level of trade analysis for this review showed that there was no consistent pattern of price differences between the two levels of trade. See Memorandum to the File from Myrna Lobo, Re: Calculation Memorandum for the Preliminary Results of Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from Spain dated May 19, 2009 ("Sales Calculation Memo").

<u>Department's Position</u>:

For these final results, the Department has continued to include, in the G&A expenses ratio calculation, the impairment losses and restructuring costs recorded in the company's 2007 audited financial statements. Contrary to Aragonesas' assertions, the impairment losses and restructuring costs are not related to the current production of any product, but rather are general expenses that must be borne by the company's general operations, a fact recognized by both Spanish Generally Accepted Accounting Principles (GAAP) and Aragonesas' own audited financial statements. Further, as discussed below, our treatment of Aragonesas' impairment losses and restructuring costs is in accordance with section 773(b)(3)(B) of the Act and a consistently applied Department practice that is supported by case precedent.

An impairment loss is an ordinary loss recognized by the company upon the determination that the recorded historical value of an asset is unrecoverable through future use (<u>i.e.</u>, the asset's productive value is impaired). <u>See</u>, <u>e.g.</u>, <u>Statement of Financial Accounting Standards 144</u>. Impairment losses cannot be matched to economic benefits in future periods. The entire loss in value can only be related to the period in which the impairment is recorded rather than systematically spread over the life of the asset. Because an impairment loss represents the loss in value incurred by assets during the current period, it is, like most general expenses, a period cost. Moreover, as the loss incurred represents the write-off of the portion of the asset's historical value that cannot be recovered through current or future production, an impairment loss, like other general expenses, does not benefit the production of any specific product, but rather is related to the general operations of the company. Accordingly, the Department's established practice with respect to impairment losses is to treat them as general expenses, and to include the total amount recorded in the respondent's financial statements in the G&A expense ratio calculation. <u>See</u>, <u>e.g.</u>, <u>SSB from France</u> at Comment 1, <u>SSB from the UK</u> at Comment 3, <u>CFS from Korea</u> at Comment 7, <u>PSF from Korea</u> at Comment 7 and <u>Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Duty Order</u>, 73 FR 18259 (April 3, 2008) and accompanying Issues and Decision Memorandum at Comment 8.

Restructuring costs are commonly incurred by companies in the production and manufacturing sector as they try to streamline operations and reduce operating costs. Companies evaluate their overall operations and change them accordingly to meet the changing needs of the general organization. Thus, similar to impairment losses, restructuring costs are period costs that relate to the general operations of the company, rather than to the production of a specific product. Accordingly, the Department also considers restructuring costs to be general expenses and has an established practice of including them in the G&A expense ratio calculation.[1] <u>See</u>, <u>e.g.</u>, <u>SSB from France</u> at Comment 3, <u>SSB from the UK</u> at Comment 4, <u>Notice of Final Results of the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part</u>, 70 FR 71464 (November 29, 2005) and accompanying Issues

[1] Unlike impairment losses, however, the Department allocates restructuring costs ratably over the period in which the restructuring will take place and includes only the current portion in the G&A expense ratio calculation. <u>See</u>, <u>e.g.</u>, <u>SSB from France</u> and <u>SSB from the UK</u>.

and Decision Memorandum ("Pasta from Italy") at Comment 11 and Lumber from Canada at Comment 8.

In regard to Aragonesas' argument that the Department was inconsistent with the statute by adding the impairment losses for equipment originally used by the plastics division and the restructuring costs to G&A expense, we disagree. Section 773(b)(3)(B) of the Act states that for purposes of calculating the cost of production (COP) the Department shall include "an amount for selling, general and administrative expenses based on actual data pertaining to the production and sales of the foreign like product by the exporter in question." Because there is no bright-line definition in the Act of what a G&A expense is or how the G&A expense ratio should be calculated, the Department has, over time, developed a consistent and predictable practice for calculating and allocating G&A expenses. This reasonable, consistent, and predictable method is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales and not on a consolidated, divisional, or product-specific basis. See, e.g., Certain Softwood Lumber Products from Canada: Notice of Final Results of First Antidumping Duty Administrative Review, 69 FR 75921 (December 20, 2004) and accompanying Issues and Decision Memorandum ("Softwood Lumber from Canada") at Comment 23.

In calculating the G&A expense ratio, the Department normally includes certain expenses and revenues that relate to the general operations of the company as a whole, as opposed to including only those expenses that directly relate to the production of the subject merchandise. The CIT has agreed with the Department that G&A expenses are those expenses which relate to the general operations of the company as a whole rather than to the production process. See U.S. Steel Group a Unit of USX Corporation, et al. v. United States, 998 F. Supp 1151, 1154 (CIT 1998) (citing Rautaruukki Oy v. United States, 19 CIT 438, 444 (1995)). In accordance with this interpretation, as noted above, the Department has consistently determined that both impairment losses and restructuring costs are related to general operations, rather than to the production of specific products, and thus are properly classified as G&A expenses. See, e.g., SSB from France and SSB from the UK.[2] With regard to impairment losses, this classification has been upheld by the CIT in Corus v. United States, where, like Aragonesas, the respondent argued that the Department's methodology was improper because the impaired assets were specifically dedicated to the production of non-subject merchandise.[3] Thus, rather than contradicting the

[2] Aragonesas refers to the Lumber WTO Panel Report as evidence that the impairment losses and restructuring costs do not fit the description of general expenses. As Aragonesas has noted, the panel found that general expenses "are costs that will normally affect all products sold by a company" and that "it is normally not possible to ascertain the precise contribution by each product to these costs." Lumber WTO Panel Report at paras. 7.263-7.264. We note, however, that contrary to Aragonesas' assertion, the panel's findings actually support the Department's position with regard to impairment losses and restructuring costs, as both of these costs cannot be attributed to any specific product, but rather can only be attributed to the general operations of the company.

[3] Aragonesas attempts to distinguish the facts in SSB from the UK from those in this proceeding by stating that although the assets at issue were used to produce non-subject merchandise, they were still used to produce steel products, and a steel product was the subject merchandise. Thus, Aragonesas reasons, there was no issue of different divisions or categories of products incurring costs as there is in Aragonesas' case. As noted above, however, the specific products produced by the assets in question are not relevant, as impairment losses are related to general operations, rather than to the production of specific products.

statute as alleged by Aragonesas, we find that the methodology followed by the Department with regard to impairment losses and restructuring costs in this proceeding derives from a consistent and predictable interpretation of the statute that is supported by a body of accumulated case precedent.

With respect to Aragonesas' argument that both impairment losses and restructuring costs recorded in its financial statements are equivalent to depreciation and labor charges, we disagree. With regard to impairment losses, the Department addressed this very issue in SSB from France at Comment 1, where it recognized that impairment losses are separate and distinct from depreciation expense. This distinction becomes apparent upon consideration of the nature of these two very different types of expense. On one hand, depreciation expense represents a systematic method of allocating the historic cost of an asset to future periods where economic benefit arises from the use of the asset. See, e.g., Statement of Financial Accounting Concepts 6. Impairment losses, on the other hand, occur when the recorded historical value of an asset is determined to be unrecoverable through future use. In contrast to depreciation expense, impairment losses cannot be matched to economic benefits in future periods. The entire loss in value can only be related to the period in which the impairment is recorded rather than systematically spread over the life of the asset. Thus, the two concepts cannot be equated. Spanish GAAP and Aragonesas, itself, recognize this fact by recording impairment losses separately from depreciation expense. Similarly, both Spanish GAAP and Aragonesas recognize that restructuring costs are not analogous to labor costs by recording them separately in the financial statements. Moreover, the Department's treatment of both impairment losses and restructuring costs as general expenses rather than depreciation or labor costs is well supported by case precedent. See, e.g., SSB from the UK and Lumber from Canada.

In regard to the petitioners' argument that Aragonesas' impairment losses and restructuring costs do not constitute extraordinary expenses that we would exclude from G&A expenses, we agree. The Department considers an expense to be extraordinary only if the event that gave rise to it is both unusual in nature and infrequent in occurrence. See, e.g., Pasta from Italy at Comment 11, Shrimp from India at Comment 6 and Floral Trade Council of Davis, CA v. United States, 16 CIT 1014, 1016 (CIT 1992) ("Floral Trade Council").[4] Restructuring costs are commonly incurred by companies in the production and manufacturing sector when they evaluate their business and try to reduce operating costs. Impairment losses are regularly recognized by companies in the normal course of business upon the recognition by management that the historical value of an asset is no longer recoverable through future use. As such, neither restructuring costs nor impairment losses can be considered unusual or infrequent, and the Department therefore routinely includes these items in the G&A expense along with other commonly recognized period costs. See, e.g., Pasta from Italy, Shrimp from India and SSB from France at Comment 1.

[4] For example, in Floral Trade Council, the water table collapsed suddenly and unexpectedly and, as a result, the well used to irrigate flowers for one respondent was unable to produce enough water for the farm. The water shortage resulted in the death of a large number of flowers and many of the flowers left were not fit for export. In addition, another respondent's plants were attacked by a devastating and rare virus previously unknown in Colombia. The CIT upheld the Department's determination that both of these situations were unique, infrequent and unusual in nature for purposes of the G&A ratio calculation. In this case, however, the restructuring costs and impairment losses are normal parts of operating a business and by no means represent unusual or infrequent events.

Concerning Aragonesas' argument that we are elevating form over substance with respect to the costs associated with the closure of complete facilities, we acknowledge that the Department's practice is to exclude the closure costs if the respondent can provide evidence that the facility no longer exists or is permanently closed.[5] As noted in Lumber from Canada, respondents are in the business of producing and selling commercial goods to customers; they are not in the business of manufacturing and selling or disposing of entire production facilities. The resulting gain or loss from the sale or disposal of an entire production facility generates non-recurring income or losses that are not part of a company's normal business operations, and are unrelated to the general operations of the company. Sales or disposal of assets, however, including production lines, are routine activities that relate to the general operations of the company as a whole because they result from activities that occurred to support on-going production operations. The Department's approach for these types of gains and losses is to allocate them over the entire operations of the producer. See, e.g., Lumber from Canada at Comment 8.

Aragonesas' attempt to equate the closure of the two production lines at its plastics facility to the closure of an entire facility is not supported by the evidence on the record. During our verification, we found that one of the production lines at the facility continued to operate and produce plastics products. See Memorandum from Robert Greger, Senior Accountant, to The File, "Verification of the Cost Response of Aragonesas Industrias y Energia, S.A. in the Antidumping Duty Administrative Review of Chlorinated Isocyanurates from Spain," dated May 18, 2009 (Cost Verification Report) at 8. Further, we verified that the impaired assets of the two lines that were closed were still in the facility and had not yet been sold or scrapped. Id. at 8. Thus, as the facility in question continues to exist and produce products for the respondent, the closure of the plastics lines does not constitute the permanent closure of a facility. Rather, it is more akin to the routine disposal of assets. Accordingly, the impairment losses and restructuring costs associated with the closures of the production lines do not qualify for exclusion from the G&A expense ratio calculation in accordance with the Department's practice.

With regard to Aragonesas' claim that the inclusion of the impairment losses and restructuring charges in the G&A ratio calculation is distortive and leads to inappropriate sales comparisons, we disagree. The increase in G&A expense did not result in nonsensical or inappropriate sales comparisons as Aragonesas alleges. Pursuant to section 771(16) of the Act and 19 CFR 351.411(b), the Department used its standard methodology in making fair comparisons to U.S. sales – first using identical merchandise in the home market as a match, and where no identical merchandise was available using similar or like merchandise. Further in accordance with section 773(a)(6)(C)(ii)) of the Act, we made an adjustment for the "difference in merchandise" (DIFMER) to normal value to account (NV) for differences in the physical characteristics of similar (i.e., non-identical) products. The DIFMER test does not allow for comparisons of sales for which the DIFMER adjustment exceeds 20 percent of the total cost of manufacture of the U.S. product, thereby preventing comparisons of U.S. products to home market products that are too dissimilar to render a meaningful comparison. In the Preliminary Results, the Department's

[5] See, e.g., Lumber from Canada at Comment 8, where the Department allowed several respondents to exclude the costs associated with the permanent closure of complete facilities. See also PSF from Korea at Comment 8 where the Department denied the respondent's claimed exclusion due to the lack of record evidence to substantiate that the shutdown was permanent.

margin program accounted for the differences in product characteristics between the products being matched through the difference in merchandise test and adjustment. Thus, any differences between the physical characteristics of the merchandise have been properly accounted for in the Department's calculations thereby assuring fair comparisons between similar products. Finally, we note that Aragonesas is not challenging the model match methodology in this case, nor is it proposing modifications thereto. Instead, Aragonesas asks the Department to treat the costs at issue in a way inconsistent with Department practice and precedent in order to avoid the resulting increase in G&A.

Accordingly, as we find that our methodology in this proceeding follows the treatment in Aragonesas' audited financial statements prepared in accordance with Spanish GAAP, is consistent with the statute and follows a well-established practice supported by ample case precedent, we have continued to adjust the G&A expense ratio to include the impairment losses and an allocated portion of the restructuring costs for the final results.

Comment 2: Whether the Department was Correct to Revise Aragonesas' G&A Expense Allocation Relating to G&A Services Provided by its Parent Company

Aragonesas argues that the Department should not have revised the G&A expense ratio calculation to include the parent company G&A expenses allocated to its basic chemicals and plastics divisions. Aragonesas contends that it correctly accounted for the direct G&A costs related to Aragonesas, as well as the parent company G&A services provided to the water treatment division. According to Aragonesas, only the parent company G&A services related to the water treatment division are relevant since those are the only parent company costs that directly relate to the merchandise under consideration. Aragonesas maintains that since it is not Ercros' G&A expense that is being calculated, but rather Aragonesas', it is only the cost of the outside services that relate directly to the merchandise under consideration that are relevant. Aragonesas argues that outside expenses related to merchandise produced by facilities that produce merchandise not under consideration should not be included in the total G&A expense for merchandise under consideration.

The petitioners argue that the Department correctly revised Aragonesas' G&A expense ratio calculation to include the total parent company G&A expenses allocated to the company as a whole. Citing Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 31961 (June 5, 2008) and accompanying Issues and Decision Memorandum ("HRS from India") at Comment 17, the petitioners contend that to include only the parent company G&A expenses allocated to the water treatment division is inconsistent with the Department's established practice of calculating G&A expenses based on the producing company as a whole and not on a divisional or product-specific basis. The petitioners note that the parent company provides extensive administrative services to all of Aragonesas' divisions, not just to the water treatment division, and that the company-wide G&A expense rate should capture all of these expenses. Moreover, the petitioners argue, the Department decided this very issue in the prior review and did in fact include all of the parent company G&A expenses allocated to Aragonesas as a whole. See Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, 73 FR 79789

(December 30, 2008) and accompanying Issues and Decision Memorandum ("Chloro Isos from Spain") at Comment 4.

Department's Position:

We agree with the petitioners that the Department correctly revised Aragonesas' G&A expense ratio to include the total parent company G&A expenses allocated to Aragonesas as a whole. As noted with respect to this very same issue in the prior review of this case, our established practice is to calculate G&A expenses based on the producing company as a whole, and not on a divisional or product-specific basis. See Chloro Isos from Spain at Comment 4. See also, HRS from India at Comment 17; Shrimp from India at Comment 6; Softwood Lumber from Canada at Comment 23. By definition, G&A expenses relate to the general operations of the company as a whole and not to specific products or divisions. In addition, G&A expenses represent period costs, not product costs, and as such they should be spread proportionately over all merchandise produced in that period.

The record evidence shows that Aragonesas' parent companies provided administrative services to all of Aragonesas' divisions, not only to the water treatment division. We verified that these services were in fact administrative in nature and related to the general operations of the company as a whole, rather than to specific products or divisions. See Cost Verification Report. Accordingly, the total cost of these services allocated to Aragonesas as a whole, and not just the amount allocated to the water treatment division, have been included in total G&A expense for these final results.

Comment 3: Whether the Department, in Calculating the G&A and the R&D Amounts to be Included in Aragonesas' Costs, Should First Eliminate from TOTCOM that Portion of TOTCOM that Relates to the Major Input Rule Adjustment for Chlorine

Aragonesas argues that the Department needs to correct the TOTCOM that was used to calculate the reported per-unit G&A and R&D expense amounts. Specifically, Aragonesas argues that the TOTCOM of each product has been adjusted upward as a result of the application of the major input rule for chlorine supplied by its parent company, which increases the cost beyond what is recorded in the company's books. Consequently, Aragonesas contends that the Department should not have applied the G&A and R&D ratios to the adjusted TOTCOM, as the ratios are not calculated on the same basis as the TOTCOM to which they are applied. Because both ratios were calculated using unadjusted denominators, Aragonesas contends, they should have been applied to an unadjusted TOTCOM. Aragonesas thus maintains that the Department should factor out the adjustment to TOTCOM and then apply the G&A and R&D expense ratios to the unadjusted amount, as it did in the two prior reviews.

Aragonesas contends that despite the argument outlined above, the Department should not include an amount for R&D expenses in the reported costs. Aragonesas argues that R&D expenses are not considered a cost under Spanish GAAP, and that they should therefore be excluded.

The petitioners did not comment on this issue.

<u>Department's Position</u>:

We agree with Aragonesas that the Department should adjust the TOTCOM that was used to calculate the reported G&A and R&D expense amounts in the <u>Preliminary Results</u>. As Aragonesas points out, the G&A and R&D expense ratios were applied in the <u>Preliminary Results</u> to a TOTCOM that had been adjusted to reflect the market value of purchases of chlorine from its parent company in accordance with section 773(f)(2) of the Act. The denominators used in the calculation of the ratios, however, are based on the amounts recorded in Aragonesas' financial statements, which do not reflect the chlorine adjustments. Thus, the denominator of the ratios and the base to which they are applied are not on the same basis. Therefore, for the final results we have adjusted the TOTCOM to which the G&A and R&D expense ratios are applied to exclude the chlorine market price adjustments and then applied the ratios to the adjusted amounts.

With regard to Aragonesas' argument that no R&D expense should be added to its reported costs, we disagree. In determining whether expenses associated with R&D activities should be included in the reported costs, our practice is to examine at whether these expenses relate specifically to individual products or are general in nature. Those expenses that can be differentiated by product are allocable to the COM of that product. <u>See</u>, <u>e.g.</u>, <u>Shrimp from India</u> at Comment 6. As noted in the <u>Cost Verification Report</u> at 25, Aragonesas records its R&D expense specifically by division. Based on this information, we were able to verify the exact amount of R&D expense related to water treatment products (<u>i.e.</u>, the merchandise under consideration). Accordingly, we allocated this amount to all water treatment products in accordance with our practice. Moreover, while Aragonesas states that R&D expense is not a cost under Spanish GAAP, we noted at verification that the total R&D recorded by Aragonesas is included in its trial balances and in its financial statements prepared in accordance with Spanish GAAP.

Issue 4: Whether the Department Should Set U.S. Warranty Expenses to Zero

Aragonesas states that for the <u>Preliminary Results</u>, the Department deducted from U.S. prices certain expenses identified as warranty expenses. Aragonesas argues that this deduction should not have been made because Aragonesas had explained previously in its questionnaire responses that it incurred no such expenses during the POR because no merchandise was returned from the United States during the POR. Aragonesas further states that it calculated a three-year average warranty expense because it was required to do so, and emphasizes that it did not have any returns from the United States during the POR and therefore no warranty expense deduction should be made from the U.S. sales price.

Petitioners state that Aragonesas is incorrect in its position that it was asked to provide three years of warranty expense data in its sales databases, as the Department's original questionnaire only asked to report warranty expenses during the POR. Petitioners further state that the questionnaire request for information on warranty costs for the three most recent fiscal years pertained only to the narrative response required of the question and Aragonesas chose to report a three-year average for warranty expenses in its sales databases. Petitioners further state that should the Department not deduct warranty expenses from U.S. sales price, it should apply the same policy uniformly.

Department's Position:

Because warranties typically extend over a period of time that is longer than the POR and complete information for the reviewed sales is not available at the time the questionnaire response is received, the Department collects both POR-specific warranty expenses in addition to warranty expenses for the three most recently completed fiscal years. This allows the Department to evaluate whether the expenses reported in the POR are in line with the company's historical experience with respect to warranty expenses. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Mexico, 70 FR 25809 (May 16, 2005) and accompanying Issues and Decision Memorandum at Comment 6. If the POR warranty expenses appear to be out of line with the company's historical experience, rather than use the POR warranty expenses, it is the Department's practice to use a three-year average of warranty expenses. In Honey from Argentina: Final Results, Partial Rescission of Antidumping Duty Administrative Review and Determination Not to Revoke In Part, 71 FR 26333 (May 4, 2006) and accompanying Issues and Decision Memorandum at Comment 1, the Department used the respondent's historical experience to gauge the representativeness of reported POR warranty expenses. In this case, Aragonesas reported that it incurred warranty expenses for the previous fiscal years, but that it incurred no warranty expenses during the POR. Because warranty expenses pertaining to the product sold during the POR may be incurred after the POR, and because the evidence on the record indicates that the zero warranty expense reported by Aragonesas is not representative of the company's historical experience, for these final results we have continued to use a three-year average of warranty expenses that Aragonesas reported, consistent with our determination in the previous review.

Comment 5: Whether There Are Clerical Errors in the Department's Program or Calculations

Aragonesas states that the Department made a clerical error in the computer program while correcting errors discovered during the sales verification with regard to freight and related movement expenses. Further, Aragonesas points that a clerical error was made in the preliminary results cost calculation memorandum with regard to G&A expenses for impairment costs.

Petitioners did not comment on this issue.

Department's Position:

We agree with Aragonesas and have corrected these errors. The details of the corrections are discussed in the Memorandum to the File from Myrna Lobo, Re: Calculation Memorandum for the Final Results of Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from Spain dated September 24, 2009 and Memorandum to Neal M. Halper, Director, Office of Accounting from Robert B. Greger, Senior Accountant, Cost of Production and Constructed Value Calculation Adjustments for the Final Results – Aragonesas Industrias y Energia S.A. also dated September 24, 2009.

Comment 6: Whether the Department Should Refrain from Zeroing for the Final Results

Aragonesas argues that when the Department makes the corrections noted above, some sales in the United States will have negative margins; for the Final Results, the Department should refrain from zeroing these negative-margin sales. Aragonesas refers to the April 2006 Appellate Body, World Trade Organization finding that zeroing in administrative reviews is inconsistent with Article 9.3 of the Antidumping Agreement. More importantly, Aragonesas states that in January 2007, the WTO Appellate Body reversed an earlier finding by a Panel in U.S.-Zeroing (Japan) that had upheld zeroing in administrative reviews as well as in other administrative proceedings. Thus, Aragonesas states that the Appellate Body has categorically determined that zeroing is a violation of U.S. WTO commitments, including zeroing in reviews.

Aragonesas points out that following the above-noted decisions, the Department announced that, effective February 22, 2007, it would no longer "zero" when making average-to-average comparisons in antidumping investigations. Further, Aragonesas argues that the Department itself has also determined that it has the discretion to change the practice of "zeroing," stating that the courts have held that the denial of offsets is not required by the Act, but rather is an interpretation of the Act and the discretion recognized by the Department clearly would apply to reviews as well since the denial of offsets is also not required in reviews. Thus, Aragonesas contends that the Department has the discretion under the law to not use its "zeroing" methodology in administrative reviews.

Moreover, Aragonesas states that, at a February 20, 2007, meeting of the WTO Dispute Settlement Body, the United States agreed to implement the DSB's decision regarding "zeroing" in administrative reviews. Further, Aragonesas states that most relevant to this matter is that the Appellate Body of the WTO, in a case brought by the European Union, again recently held that the Department cannot use zeroing in antidumping duty reviews and that it cannot do so in any matters after the deadline for compliance established by the WTO. (Appellate Body Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"); Recourse To Article 21.5 of the DSU by the European Communities, WT/DS294/AB/RW (May 14, 2009)). Therefore, Aragonesas argues that according to the WTO Appellate Body, no zeroing should be applied in the instant review and the Department should recalculate Aragonesas's margins without incorporating the practice of zeroing in the Final Results.

Petitioners rebut Aragonesas' argument, stating that Aragonesas raised and the Department rejected the same argument in the prior administrative review with respect to zeroing negative margins. Petitioners note that the Department has an established practice of zeroing negative margins in administrative reviews. Petitioners also point out that Aragonesas has identified no intervening case law, policy change, or legislative development that should cause the Department to reconsider its existing policy within the confines of this review, and therefore, the Department should not make any changes with respect to zeroing negative margins in the Final Results.

Department's Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for these final results of review.

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." Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied; 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) ("Corus I").

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

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

The Federal Circuit explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask' sales at less than fair value." Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate "masked dumping," before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d 1343; Corus Staal BV v. United States¸502 F.3d 1370, 1375 (Fed. Cir. 2007) ("Corus II"); and NSK Ltd. v. United States, 510 F.3d 1375 (Fed. Cir. 2007).

The respondent has cited WTO dispute-settlement reports ("WTO reports") finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. As an initial matter, the U.S. Court of Appeals for the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a [report] has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act ("URAA"). Corus I, 395 F.3d at 1347-49; accord Corus II,502 F.3d at 1375; NSK, 510 F.3d 1375. Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g); see, e.g., Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006) ("Zeroing Notice"). The Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Zeroing Notice. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See id. 71 FR at 77724. With regard to the denial of offsets in administrative reviews, the United States has undertaken no implementation, pursuant to the statutory procedure or otherwise, that would require the granting offset in this administrative review. Accordingly, consistent with U.S. law, none of the WTO reports cited by respondent has any bearing on the results of this administrative review.

Furthermore, a statement of the United States' intent before the WTO Dispute Settlement Body, referenced as United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/17 (Mar. 30, 2007), is not a substitute for implementation action taken pursuant to U.S. law, as the Federal Circuit recognized in Koyo Seiko Co., Ltd. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008). Thus, respondent's reference to this document provides no support for the argument that the Department is required to grant the claimed offsets.

For all these reasons, the various reports and statements issued in the context of the WTO regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions.

Recommendation

We recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results and Aragonesas' final weighted average dumping margin in the Federal Register.

Agree ________   Disagree________

____
Ronald K. Lorentzen
Acting Assistant Secretary
  for Import Administration

____
Date