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

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the Fifth Administrative Review of the Antidumping Duty Order on Stainless Steel Plate in Coils (SSPC) from Belgium

Summary

On June 3, 2005, the Department of Commerce (Department) published Stainless Steel Plate in Coils from Belgium: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 32573 (June 3, 2005) (Preliminary Results).

Since the Preliminary Results, the Department received timely case and rebuttal briefs from Ugine and ALZ, N.V. Belgium, Arcelor Stainless U.S.A., and TrefilARBED ("Respondent") and Allegheny Ludlum, AK Steel Corporation, Butler Armco Independent Union, United Steelworkers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization (collectively, "Petitioners").

In the Preliminary Results, the Department stated that it would issue a supplemental questionnaire to Respondent requesting that it clarify a difference between the volume of sales reported in its database, and the volume and value of entries observed by the Department from U.S. Customs and Border Protection (CBP) data. The Department issued three supplemental questionnaires on this issue and received responses from Respondent on July 1, 2005, to the Department's May 27, 2005 questionnaire; August 19, 2005, to the Department's August 2, 2005 questionnaire; and September 21, 2005, and September 27, 2005, (in two parts) to the Department's September 13, 2005 questionnaire. Petitioners commented on these responses on September 28, 2005, and October 11, 2005. Three of these supplemental questionnaire responses were received after the due dates for case and rebuttal briefs. As such, on October 28, 2005, we established a briefing schedule for the issues that surfaced as a result of Respondent's questionnaire responses being submitted after the Preliminary Results. On November 4, 2005, and November 9, 2005, we received briefs and rebuttal briefs for the issues raised in Respondent's supplemental questionnaire responses.

We have analyzed all comments and rebuttal comments submitted by Respondent and Petitioners since the Preliminary Results. As a result of our analysis, we have made changes to our Preliminary Results. We recommend that you approve the analyses and positions we have developed in this memorandum. Below is the complete list of the issues for which we received comments and rebuttals by parties:

1. Major Inputs
2. U.S. Warehousing Expenses
3. Offsetting Margins with Above-Normal-Value Transactions
4. Prime and Non-Prime Merchandise
5. Revised Entered Values
6. CEP Offset
7. Duty Assessment
8. Whether Sales of SSPC with a Nominal Thickness of 4.75 mm or Greater Regardless of Actual Thickness Should Have Been Reported
9. Application of Facts Available

Discussion of the Issues

Comment 1: Major Inputs

Petitioners disagree with the Department's decision that inputs purchased by Respondent from affiliated parties were not "major inputs" within the meaning of section 773(f)(3) of the Tariff Act of 1930, as amended (the Act), which resulted in the Department's decision to not adjust Respondent's reported cost of manufacturing (COM) to account for these inputs. See Memorandum to the File from Toni Page and Scott Lindsay Through Thomas Gilgunn: Analysis for Ugine & ALZ, N.V. Belgium(U&A Belgium) for the Preliminary Results of the Fifth Administrative Review of Stainless Steel Plate in Coils (SSPC) from Belgium (May 27, 2005) (Preliminary Analysis Memo).

Petitioners argue that the significance of an input should be based on the "significance of all inputs purchased from all sources." Petitioners contend that, in its Preliminary Analysis Memo, the Department measured only the value and quantity of inputs ". . . purchased from affiliated parties to determine whether the inputs were major." Petitioners hold that it is not only the value but the relative value per se of an input that makes it major. Petitioners contend that if a party pays a below market price to its affiliate for an input, the low value of said input will make the input appear minor in the Department's analysis. As such, Petitioners argue that determining whether an input purchased from an affiliated party is major based on the reported value of purchases is distortive.

Petitioners present an example of a foreign car maker who purchases brake assemblies from an affiliated company in support of its contention that the nature of an input per se, determines

whether an input is major. According to Petitioners' scenario, brakes are a major input for automobiles based on a functional, qualitative, and quantitative basis regardless of how many brakes the car maker purchased from an affiliated supplier.

Moreover, Petitioners maintain that the language in the Department's questionnaire focuses directly on the significance of the input and not on the significance of the value or volume of the purchases from affiliates with respect to total production costs during the POR. Petitioners cite the Department's August 3, 2004 questionnaire (Questionnaire) which states:

A major input is an essential component of the finished merchandise which accounts for a significant percentage of the total cost of manufacturing incurred to produce one unit of the merchandise under consideration.

Petitioners further point to the fact that the Questionnaire requires a calculation for the percentage of input represented by the cost of manufacturing based on total purchases, and not on the basis of purchases from affiliates. Based on the above, Petitioners state that the Department's analysis for the Preliminary Results is at odds with the instructions of the Questionnaire. As such, Petitioners argue that the Department incorrectly analyzed only inputs purchased from affiliated parties as a percentage of the COM instead of examining the purchases of all inputs as a percentage of the COM.

Petitioners cite to Large Newspaper Printing Presses and Components thereof, whether Assembled or Unassembled, from Japan, 61 FR 38139 (July 23, 1996) where the Department defined major inputs as ". . . inputs which represent at least two percent of the total cost of materials, labor and overhead for any one of the five press components . . .," as well as inputs that represent ". . . five percent of the LNPP total cost of production.. . . " See LNPP from Japan. Petitioners argue that the Department's decision in LNPP from Japan to define major inputs as physical inputs comprising a major portion of COM was upheld by the Courts in Mitsubishi Heavy Industries Ltd. v. United States, 15 F. Supp. 2d, 807,830 (1998) (Mitsubishi).

Petitioners further argue that in the Mitsubishi case, the Court upheld the section of the Department's major inputs rule which states that "where many different inputs can cumulatively represent a significant portion of the cost of manufacturing, major inputs should be determined as the combined cost of numerous inputs . . . the sum of which represents a significant portion of the cost of the merchandise produced." Mitsubishi, 15 F. Supp. 2d at 831.

Petitioners contend that data from Respondent's Section D response shows that Respondent purchased inputs from affiliated parties that are "major inputs" when one defines "major inputs" as physical inputs comprising a major portion of COM. Specifically, Petitioners maintain that Respondent's total purchases of Scrap 304 comprise more than five percent of its COM and that Respondent purchased a portion of its Scrap 304 from affiliated suppliers. Petitioners contend that even if Respondent is allowed to define a major input by the proportion of affiliated purchases of inputs rather than the proportion of inputs, the sum of those affiliated purchases are

larger than five percent. Petitioners argue that based on this analysis, the Department should conduct a major inputs analysis. Petitioners state that using the five percent threshold to determine a major inputs analysis is warranted since it is also the threshold for determining normal value.

Petitioners contend that even if the Department does not conduct a major input analysis it should apply the transactions-disregarded provisions of the Act. See 19 U.S.C. § 1677b(f)(2). Under this provision, Petitioners argue that the Department could adjust the reported figure for the direct materials costs of making the subject merchandise to account for affiliated-party inputs as major inputs for any affiliated purchases that were made at below-market prices. Petitioners state that under the transactions-disregarded section there is no requirement for a threshold to show the significance of inputs or transactions involved. Petitioners also contend that by bringing transfer price to market price, based on the information available as to what the amount would have been if the transactions had occurred between persons who are not affiliated, would require the Department to increase the direct materials costs ratio used in its calculations.

Respondent counters that the Department was correct in determining that none of the inputs from affiliated parties during this POR were major. Respondent argues that the comments submitted by Petitioners in their brief were identical to ones that were submitted on March 11, 2005, and notes notes that the Department addressed the issue of major inputs from affiliates before the preliminary results in supplemental questionnaires issued February 9, 2005, and April 1, 2005, and subsequently stated in the Preliminary Analysis Memo that there were no major inputs purchased from affiliated parties during the POR.

Respondent contends that its affiliates charged arm's length prices for the major inputs and therefore it is not necessary for the Department to increase the direct materials cost ratio. Respondent cites a Federal Register notice that details the Department's arm's length test criterion for sales. The notice states that the Department applies a band of two percent on either side of an unaffiliated party price and rules that prices within that two percent band are considered at arm's length. See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 62 FR 69186 (November 15, 2002). Respondent further contends that even in the instances when an affiliate charged less than fair market price for an input, the price was less than one percent below the going market rate. In addition, Respondent argues that the Petitioners' proposal to measure major inputs based on the sum of all inputs similar to the input in question would result in treating insignificant inputs as major.

Respondent concludes that the Department should apply its practice of determining major inputs on a case-by-case basis instead of adopting a set five percent benchmark. To support this argument, Respondent cites the same Mitsubishi case cited by Petitioners. Respondent contends that the CIT ruling stated that "{t}he statute does not contain a definition of 'major input.' Therefore, the Court will defer to Commerce's interpretation of the term, if the interpretation is reasonable." See Mitsubishi, 15 F. Supp. at 830. Respondent also cites a Federal Register notice where the Department stated it had not adopted a definition for "major input" and would make

such determinations on a case by case basis. See Antidumping Duties: Countervailing Duties; Final Rule, 62 FR 27295, 27362 (May 19, 1997) (Final Rule).

Department's Position:

As stated in the Preliminary Analysis Memo, rather than adopt a bright-line definition of "major input," the preamble to the Department's regulations specifically rejects a concept of a single threshold for defining an affiliated-party input as major. See Final Rule. Instead, the Department bases determinations of whether an affiliated-party input is major on case-specific facts such as: the nature of the input, the product under investigation, and the nature of the transactions and operations between the producer and its affiliated supplier. See, e.g., Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination to Revoke Order in Part, and accompanying Issues and Decisions Memorandum at Comment 26, 69 FR 55574 (September 15, 2004); see also Final Rule.

Respondent submitted an Affiliated Input Chart which provided the quantities and values of each input purchased from affiliated suppliers. See Exhibit D2 of Respondent's April 21, 2005 response. In determining whether an input is "major" in accordance with section 773(f)(3) of the Act, among other factors, we considered both the percentage of an individual input purchased from affiliated parties and the percentage each individual input represents of the product's total cost of manufacturing. Based on our analysis of all of the information on the record, we continue to determine that inputs purchased by Respondent from affiliates do not constitute major inputs in accordance with Section 773(f)(3) of the Act. See Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part, and accompanying Issues and Decisions Memorandum at Comment 32, 69 FR 6255 (February 10, 2004), and Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 and accompanying Issues and Decisions Memorandum at Comment 28 (December 23, 2004). Since much of our analysis relies on business proprietary information, it is set forth in the Memorandum to the File Through Thomas Gilgunn from Toni Page and Scott Lindsay: Analysis for Ugine & ALZ, N.V. Belgium (U&A Belgium) for the Final Results of the Fifth Administrative Review of Stainless Steel Plate in Coils (SSPC) from Belgium (November 30, 2005) (Final Analysis Memo).

However, the Department has stated that it is appropriate to adjust the direct materials cost to account for instances when prices for affiliated-party inputs were lower than the market prices (i.e., prices paid to unaffiliated parties). Therefore, pursuant to section 773(f)(2) of the Act, we have disregarded the prices of inputs paid to affiliated parties that were lower than prices of inputs paid to unaffiliated parties. In addition, we recalculated the cost of direct materials to reflect the prices of inputs paid to unaffiliated parties. See Notice of Final Determination of Sales at Less that Fair Value: Polyethylene Retail Bags from Thailand, 69 FR 34122, and accompanying Issues and Decisions Memorandum at Comment 5 (June 18, 2005). For a complete discussion of the Department's methodology, see the Final Analysis Memo.

Comment 2: U.S. Warehousing Expenses

Petitioners state that Respondent did not report U.S. warehousing expenses for certain U.S. sales made from inventory. Petitioners contend that the Department should apply adverse facts available pursuant to 19 U.S.C. §1677e(a) with respect to the U.S. warehousing expenses for the U.S. sales from inventory for which Respondent did not report. Petitioners state that the information regarding expenses associated with warehousing are necessary for the Department's dumping margin calculation, and argue that the Respondent's failure to report the warehousing information for these sales indicates that it is not cooperating to the best of its ability. Petitioners cite Nippon Steel Corp. V. United States, 337 F. 3d. 1373 (Fed. Cir. 2003) (Nippon Steel) to support their argument that the Department should use adverse facts available. In applying facts available, Petitioners argue that the Department should use the highest recorded value for stock sales and apply it to warehousing sales that do not have an accompanying warehousing fee.

Respondent maintains that it reported all warehousing expenses as requested by the Department in its questionnaire responses dated October 1, 2001, February 4, 2005, and February 21, 2005. Respondent states that it reported all the U.S. warehousing expenses that it incurred for all U.S. sales in the USWAREHU field (U.S. Warehousing) or USOTHTRU field (U.S. Other Handling) of its U.S. sales database. Respondent maintains that the record of this review shows that it reported the warehousing expense for the sales at issue in U.S. sales database in the USOTHTRU field. As such, Respondent contends there is no need for the Department to apply facts available to warehousing fees for the sales at issue.

Department's Position:

We agree with the Respondent. The Department analyzed the inventory sales with a reported warehousing expense of zero. When analyzing warehousing expenses, the Department reviewed the USWAREHU and USOTHTRU fields in the U.S. sales database. We note that, for the sales at issue, Respondent reported USOTHTRU expenses. Moreover, we note that, for the sales at issue, the expense amounts reported in USOTHTRU field were consistent with the sum of the expense amounts reported in the USWAREHU and USOTHTRU fields for other sales from inventory. Accordingly, the Department finds that there is no basis to apply adverse facts available to the sales at issue.

Comment 3: Offsetting Margins with Above-Normal-Value Transactions

Respondent contends that by using a "zeroing methodology," the Department did not accord full value to sales for which Respondent had a negative dumping margin. Respondent further argues that the Department's zeroing practice is not in accordance with 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 basis. According to Respondent, the Department's practice of assigning a zero to sales with negative dumping margins does not allow for the Department to make comparisons of all comparable export transactions.

Respondent further argues that the Department's use of zeroing is inconsistent with the fair comparison requirement of Article 2.4 of the Antidumping Agreement. Respondent cites the World Trade Organization (WTO) appellate decision in the case of European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (Bed Linen from India), where the WTO found that the European Community's (EC) use of zeroing methodology when calculating antidumping duties is not consistent with the Antidumping Agreement.

To support this argument, Respondent cites Bed Linen from India at page 16 in which the WTO Appellate Body states that zeroing 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. Respondent also cites Appellate Body Report, United States-Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, AB-2003-5, WT/DS244/AB/R (December 15, 2003) (Steel from Japan), where the WTO states that Article 2.4 of the Antidumping Agreement applies to dumping cases whether they are investigations or reviews and that the calculation of the dumping margin must conform to the tenets of Article 2.4. Respondent notes that the WTO also states that there is no other alternative for members to calculate dumping margins since to do so would result in margins that are legally flawed and inconsistent with Article 2.4 of the Antidumping Agreement. Respondent further argues that the Department's practice has been rejected by the WTO in the Softwood Lumber case from Canada. See Appellate Body Report, United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (December 15, 2003) (Softwood Lumber from Canada).

Respondent notes that a NAFTA panel recently remanded a dispute back to the Department with explicit instructions to "recalculate the final LTFV margins...without zeroing." See In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Dumping Determination, Decision of the Panel Following Remand, USA-CDA-2002-1904-02, at 25 (June 9, 2005). Respondent cites from this decision that the "Chevron Doctrine is not the only test a court or panel applies in reviewing a challenged agency interpretation of an ambiguous statute...An otherwise permissible agency interpretation (i.e. one that passes Chevron) which conflicts with a U.S. international obligation is, absent a clear legislative command, contrary to law." Respondent argues that there is no legislative command guiding the use of zeroing by the Department. Given that, Respondent states that the Department should not use zeroing to calculate its dumping margin.

Petitioners counter that Congress has not expressed any intent that zeroing is contrary to the law. Petitioners claim that the Court of Appeals for the Federal Circuit (CAFC) ruled in Timken Co. v. United States 354 F.3d 1334 (Fed. Cir. 2004) (Timken), that no Congressional intent exists with regard to zeroing. To support their argument, Petitioners quote the following from the ruling: "We find that the statute does not directly speak to the issue of negative-value dumping margins..." See Timken, 354 F.3d at 1342-43.

Petitioners argue that the Statement of Administrative Action, accompanying the URAA, H.R. Doc. No. 316, 103d Cong., 2d Session (1994) (SAA), also does not address the issue of zeroing.

According to Petitioners, the implementing bill of the URAA was intended to bring United States law fully into compliance with its obligations under the URAA. See SAA at 669. Petitioners further cite the SAA from the Articles in the Antidumping Agreement where it states:

> Article 2.4 establishes guidelines for comparing normal value and export price to calculate the margin of dumping. It includes a general requirement that comparisons be fair and provides specific requirements to achieve this, including requirements that comparisons be made at the same level of trade, normally at the ex-factory level, and between sales made as nearly as possible at the same time. As under existing U.S. law, Article 2.4 instructs national authorities to adjust for differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and other differences that are also demonstrated to affect price comparability.

See Id at 809.

Petitioners claim that this passage shows that there was no consideration of zeroing when Congress drafted this provision, and further argue that the SAA does not mention zeroing. Petitioners conclude that the implementation of the URAA did not change the law regarding the practice of zeroing and that this practice is supported by the decisions in Timken and Bowe Passat Reinigungs-und Waschereitechnik GmbH vs. United States, 926 F. Supp. 1138 (CIT 1996) (Bowe Passat), in which the CIT stated that it must defer to the Department's choice of zeroing methodology until such time the practice becomes impermissible or unreasonable.

Petitioners argue that after Article 2.4.2 of the Antidumping Agreement was implemented, Commerce changed its policy from calculating dumping margins for SSPC by comparing weighted-average home market prices to an individual export price to the practice of comparing weighted-averaged of normal values to a weighted-average of export prices. See 19 CFR §351.414. Petitioners also cite to the fact that the Department changed the definitions of "dumping margin" and "weighted average dumping margin" in Section 771(35) of the Act in order to comply with the URAA. According to Petitioners, the new definition of "dumping margin" in Section 771(35)(A) states that "a dumping margin...{is} the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Petitioners further state that the ". . . weighted average dumping margin" is 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." See Section 771(35)(B) of the Act.

Petitioners further argue that a plain reading of Section 771(35)(A) shows that merchandise is considered dumped only if the normal value exceeds the export price or constructed export price. Petitioners conclude that if the export price of the subject merchandise is below normal value then no dumping occurred; therefore, Petitioners argue, the item being exported should not be used to offset the dumping that is occurring. Petitioners contend that it is proper to

neutralize the negative difference in the calculation to ensure that the dumping margin on products that are being dumped is not diminished or eliminated.

Petitioners state that Section 771(35)(B) of the Act requires the Department to include all sales (i.e., even sales that were not dumped) in the calculation of the weighted average dumping margin. According to Petitioners, since the Department adds all of the individual dumping margins and divides the amount by the value of all sales, this provides a reasonable means of establishing the dumping margin and provides a fair comparison of normal value and the export price. Petitioners cite the CAFC's decision in the Timken case which states that the Department's methodology for calculating dumping margins makes sense and is in line with the statute.

Petitioners also take issue with Respondent's use of the Softwood Lumber from Canada case to support their argument against the Department's zeroing methodology. Specifically, Petitioners contend that the WTO's ruling in the Softwood Lumber from Canada case only pertained to the way the Department used zeroing in determining the dumping margin in the investigation of Canadian softwood lumber, and not to the Department's overall zeroing policy. See Softwood Lumber from Canada. In the investigation of Softwood Lumber from Canada, Petitioners argue that the Department calculated weighted-average margins by zeroing 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 zeroing 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 zeroing 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 zeroing 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 that this particular appeal did not address whether or not zeroing 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 zeroing in administrative reviews. Petitioners state that it is during the administrative review process that the Department determines dumping margins on an entry-by-entry basis to determine the amount of duties to be applied. To support this issue, Petitioners cite Timken; Serampore Industries PVT Ltd. v. the United States, 675 F. Supp. 1353 (CIT 1987); and Bowe Passat, in which the court held the Department's zeroing policy as reasonable and in accordance with the law.

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 the 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 executing the antidumping duty law. It is, however, Petitioners argue, not the responsibility of the agency to interpret and apply WTO agreements.

Petitioners also take issue with Respondent's argument that the Department must abide by WTO decisions and agreements. To support this point, Petitioners cite 19 U.S.C. §3533, which states that when ". . . a dispute settlement panel or Appellate Body finds that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded or otherwise modified in the implementation of such report unless and until" there have been consultations between the appropriate congressional committees, the agency in question, the U.S. Trade Representative, and the general public. Petitioners conclude that the WTO rulings on zeroing do not affect the Department's existing methodology nor would the Department be permitted to change its practice for this particular review without involving the procedures required by 19 U.S.C. § 3533.

Department's Position:
We disagree with Respondent and have not changed our calculation of the weighted-average dumping margin for the final determination. Specifically, we made model-specific comparisons of weighted-average constructed export prices with weighted-average normal values of comparable merchandise. See Section 777A(d)(1)(A)(i) of the Act. We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin. See Section 771(35)(A) and (B) of the Act. This methodology has been upheld by the CIT in Corus Engineering Steels, Ltd. v. United States, 2003 Ct. Intl. Trade LEXIS 110, 28-30 (Corus); see also Bowe Passat, 926 F. Supp. 1150. The value of such sales is included with the value of dumped sales in the denominator of the weighted-average margin calculation.

Furthermore, in the context of an administrative review, the CAFC has affirmed the Department's statutory interpretation which underlies this methodology as reasonable. See Timken.

Respondent claims that the WTO Appellate Body ruling in Softwood Lumber from Canada renders the Department's interpretation of the statute inconsistent with its international obligations, and therefore, unreasonable. However, in implementing the URAA, Congress made it 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 "zeroing" are not binding on the Department. See Timken, 354 F. 3d at 1344; see also Corus, 2003 Ct. Intl. Trade LEXIS 110 at 28-30. Therefore, the Department will not alter its practice in the instant case.

Comment 4: Prime and Non-Prime Merchandise

Petitioners argue that the language used in the programming for the Preliminary Results pulls in a combined prime/non-prime database of sales above cost, but does not allow the macros to distinguish between PRIMEH and PRIMEU. Petitioners contend that the data set generated by the U.S. sales program (USMODELS) does not use the field PRIMEU since there are no non-prime sales in the U.S. sales database while there are non-prime sales in the home market sales program (HMMODELS) data sets. As such, Petitioners argue that the Department should revise its home market sales programming so it removes non-prime information.

Respondent stated that it agrees with Petitioners in that the Department should correct any ministerial errors identified during the briefing process.

Department's Position

The Department agrees with Petitioners. The program for the Preliminary Results pulled in a combined prime/non-prime database of sales above cost, but did not allow the macros to distinguish between PRIMEH and PRIMEU. Accordingly, for these final results, we have removed non-prime sales information from the home market sales programming. For a complete discussion of the Department's methodology, see the Final Analysis Memo.

Comment 5: Revised Entered Values

Petitioners maintain that in the fourth supplemental questionnaire response, Respondent corrected the unit of measure it reported for its entered value (ENTVALU). Specifically, Petitioners contend that Respondent corrected its ENTVALU from dollars per pound to dollars per kilogram. As such, Petitioners conclude that the language in the Department's preliminary programming which converted Respondent's ENTVALU from dollars per pound to dollars per kilogram is no longer necessary and should be deleted.

Respondent agrees and argues that the Department should correct any ministerial errors identified during the briefing process.

Department's Position:

We agree with Petitioners. In its fourth supplemental questionnaire response, Respondent corrected its response and stated that it had reported its ENTVALU on a dollars per kilogram basis. As such, for these final results, we will use the revised database and will remove the

programming language that converted Respondent's entered value from dollars per pound to dollars per kilogram. For a complete discussion of the margin calculation, see the Final Analysis Memo.

Comment 6: CEP Offset

Respondent contends that although the Department stated in its Preliminary Results that it intended to make a "CEP offset" pursuant to Section 773(a)(7)(B) of the Act, the Department did not include a CEP offset in its Preliminary margin calculation. As such, Respondent maintains that the Department should revise its margin calculations for these final results to include a CEP offset.

Petitioners concur with Respondent that the Department should revise its programming for the final results to include a CEP offset.

Department's Position:

We agree with Respondent. As such, for these final results, we have revised the program for the final results to include a CEP offset. For a complete discussion of the margin calculation, see the Final Analysis Memo.

Comment 7: Duty Assessment

Petitioners contend that the record of this review shows a number of significant problems related to entered value of subject merchandise as reported to the Department and CBP and that these problems, left unaddressed, would prevent the accurate assessment of antidumping duties resulting from the final results of this review.

Petitioners contend that Respondent reported to the Department several U.S. sales of subject merchandise covered by entry numbers which were not suspended by CBP. As such, Petitioners maintain that these entries will not be subject to liquidation for antidumping duties. Petitioners contend that the Department should notify CBP of entries which cover undeclared subject merchandise. Petitioners also argue that the Department should collect the antidumping duties by adjusting the aggregate antidumping duties on properly suspended POR entries. Petitioners contend that this will allow for the collection of all the potentially uncollected dumping duties (PUDD), including that for the omitted entries.

Petitioners suggest that, after calculating the antidumping duties due on the sales reported and summing the total volume and value of entries by the importer, the Department should decrease the total volume and the total value, respectively, of the entries that Respondent improperly failed to report to CBP. By doing this, Petitioners contend that the assessment rate will increase marginally by the proportion of entries that were not suspended by CBP.

Petitioners contend that such an approach is consistent with the approach taken by the Department in other recent proceedings. Petitioners maintain that in the 2003/2004 review of Stainless Sheet and Strip from Germany, the Department adjusted the assessment rate by

marginally decreasing assessment rates because the company had inadvertently reported certain entries as subject merchandise to CBP during the POR that were not subject merchandise. See Stainless Steel Sheet and Strip in Coils from Germany: Notice of Final Results of Antidumping Administrative Review, 69 FR 6262 (February 10, 2004) (SSSSC from Germany). Petitioners argue that, in that case, the Department increased the assessment rate denominator in proportion to the entries at issue. As such, Petitioners contend that ensuring a correct overall duty assessment for the POR by modifying the assessment rates applied to entries suspended by CBP in the POR is consistent with the Department's prior practice.

In addition, Petitioners argue that the record of this review demonstrates that Respondent has not accurately reported its entered values to the Department. Specifically, Petitioners contend that Respondent over reported subject merchandise entry values. Petitioners contend that any assessment rate calculated based on the Respondent's over reported entry values would be understated, and that the Department should calculate a per-unit assessment rate.

Respondent disagrees with Petitioners' contention that its data shows a pattern of over reported entry values. Respondent believes that Petitioners' argument is based on minimal observations, and contends that the Department should continue to assess duties on an ad valorem basis. Respondent argues that antidumping laws are not punitive in nature and cannot be used to correct mistakes made by Respondent, specifically where the Department could assess punitive duties by adjusting the assessment rate upward. To support its argument, Respondent cites Alyeska Pipeline Service Co. v. United States, 643 F. Supp. 1128, 1132 (CIT 1986) (Alyeska) where CBP added duties to an entry to make up for duties that should have been collected on other entries. The Court held that "{t}he law does not permit the Customs Service to assign to one entry the values of merchandise in other entries or the duties owing on them."

Department's Position:
We agree with Petitioners. We will notify CBP of entries which cover undeclared subject merchandise. The Department will also take adequate steps to ensure a correct overall duty assessment for this POR by modifying the assessment rate for these final results of this review as necessary. The Department's practice to adjust assessment rates in order to collect an accurate overall duty assessment for a POR is evidenced by SSSSC from Germany.

In Alyeska, the CIT found that the "law does not permit the Customs Service to assign to one entry the values of merchandise in other entries or the duties owing on them." We note that in Alyeska, the CIT determined that the Customs Service had advanced the entered values for some twenty-four entries to a single entry and attempted to collect all duties due on those prior entries on that single entry. In contrast to the CBP's actions in Alyeska, the Department is not assigning the entered values from one entry to another entry. Indeed, the Department has determined that the entered values reported by Respondent are not reliable and will issue per-unit assessment instructions. Rather, the Department is ensuring that correct overall duty assessment for this POR is collected by modifying the per-unit assessment rate applied to the entries that were suspended during the POR.

We have examined Respondent's July 1, 2005, August 13, 2005, and September 27, 2005, questionnaire responses which included multiple entry packages. In comparing the entered value from these entry packages (as reported to CBP) to the reported entered value of sales by Respondent to the Department, the ENTVALU field reported by Respondent to the Department does not provide a reliable basis to calculate an accurate ad valorem assessment rate. As such, we will calculate a per-unit assessment rate. The Department intends to adjust the assessment rate in order to collect the proper per-unit dumping duties for all SSPC entered into the United States during this POR. Therefore, for the final results, we will marginally increase the per-unit assessment rate to take into account the volume of subject merchandise which Respondent did not declare to CBP be subject merchandise. For a complete discussion of the Department's methodology, see the Final Analysis Memo.

Comment 8: Whether Sales of SSPC with a Nominal Thickness of 4.75 mm or Greater Regardless of Actual Thickness Should Have Been Reported

Respondent contends that it "was not required to report sales of SSPC with a nominal thickness greater than or equal to 4.75 mm but with an actual thickness of less than 4.75 mm" (nominal SSPC) in this review for the following reasons: 1) the scope of the antidumping duty Order on SSPC from Belgium "does not expressly include coils with a nominal thickness of 4.75 mm or more"; 2) the Department did not instruct it to report sales of nominal SSPC in this review; and 3) it has not reported sales of nominal SSPC in the two prior completed reviews of this Order.

Respondent argues that it did not report sales of nominal SSPC in this review and previous reviews because the scope of the antidumping duty Order clearly applies only to SSPC with an actual thickness of 4.75 mm or greater. Respondent states that it relied on the scope of this antidumping duty Order to support its decision not to report sales of nominal SSPC. Respondent cited to Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 FR 27756 (May 21, 1999) (Antidumping Duty Orders) which reads:

> The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of these orders are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

Respondent maintains that the scope language clearly excludes sheet and strip, "a product that is defined in the ordinary course of business as being less than 4.75 mm in thickness." Respondent also contends that the scope explicitly excludes "any merchandise that, as the result of processing – i.e., rolling – is less than 4.75 mm in thickness." As such, Respondent argues that, because the

scope of the Order "so explicitly excludes coils with a thickness of less than 4.75 mm, Respondent has, quite reasonably, not reported these sales in past reviews" or in the current review.

Respondent maintains that if the Department wanted to include the nominal SSPC within the scope of the Order at any time after the conclusion of the investigation and subsequent remand proceeding, it was, and continues to be required to undertake a scope inquiry including notice and comment on the record. Respondent cites to section 351.225 of the Department's Regulations. Respondent argues that to do "anything other than a scope inquiry now would plainly be outside the reach of the Department's authority." Respondent cites to Smith Corona Corp. v. United States, 915 F 2d 683, 686 Fed Cir 1990 which states "although the scope of a final order may be clarified, it cannot be changed in a way contrary to its terms." Respondent also cites to Mitsubishi Electric Corp. v. United States "holding that it is well established that Commerce may not expand the scope of such orders beyond the merchandise encompassed by the final less than fair value determination."

Respondent maintains that in the less than fair value investigation it took issue with the Department's October 8, 1998 letter which clarified "its instructions with regard to the scope of the merchandise under investigation, as well as the reporting of such merchandise" (e.g., nominal SSPC). Respondent contends that in its October 14, 1998 letter it argued that the Department's clarification of the scope of the investigation would "significantly expand the scope of the investigation."[1] Respondent acknowledges that it nevertheless "included coils that had a nominal thickness of 4.75 mm regardless of their actual thickness" in the final home market and U.S. sales databases it submitted to the Department in the less than fair value investigation but maintains that it did so under protest.

Respondent argues that during the investigation it noted "that the Department had not clarified that it was interpreting the scope of the Order to cover material with a nominal gauge of 4.75 mm and an actual gauge of less than 4.75 mm." Respondent maintains that the Department's October 8, 1998 letter "refers specifically to the investigation only and notes that the requested reporting is only to ensure the accuracy of the response." Respondent points out that, on October 14, 1998, it "made clear to the Department its concern that any request to report transactions on the basis of nominal thickness would significantly expand the scope of the investigation." In addition, Respondent maintains that, at the time, it noted that "the Department could not take any decisions that would alter the scope of the Order without doing so in an orderly fashion – i.e., without making a scope inquiry."

Respondent contends that the Department "never addressed this issue – it never responded to Respondent's objection; nor did it publish any determination in the Federal Register or issue any

[1] The Department's October 8, 1998 letter to Respondent and Respondent's October 14, 1998 letter were placed on the record of this review. See attachment 1 of the Department's memorandum dated October 31, 2005.

decision memorandum clarifying its position on the scope of the order." In addition, Respondent argues that Department could have clarified its interpretation of the scope of the Order following the remand order by the CIT in Allegheny Ludlum Corp. Respondent "invites the Department to clarify its view of the scope of the Order in the context of a formal scope inquiry, involving notice and comment on whether nominal sales are, in fact, properly included in the scope of the Order."

Respondent also takes issue with Petitioners' contention that respondents in all SSPC cases have always been required to report sales of SSPC with a nominal thickness of 4.75mm regardless of its actual thickness. See Petitioner's comments, below. Respondent maintain that the Petitioners' "reliance on facts, arguments, and record data from other" SSPC proceedings is improper. Respondent cites NTN Bearing Corp. of America v. United States which states "Commerce's treatment of sales in another proceeding is irrelevant to this case." 903 F. Supp. 62, 68 (CIT 1995). Respondent further cites United States v. Mead Corp which states "Commerce's treatment of other parties, especially in reviews of different merchandise, cannot bind third parties when notice and comment procedures are not followed." 533 U.S. 218, 232 (2001). Moreover, Respondent argues that the Department's conduct in other SSPC proceedings should not supplant its course of conduct in this proceeding.

Respondent also argues that, in this review, "the Department has never clearly instructed Respondent that nominal sales are subject to review and, therefore, must be reported." Respondent cites to question 3.4 of sections B and C of the Department's August 3, 2004 questionnaire which, Respondent claims, states that it "should report only actual thickness." Respondent maintains that it relied on the clear language of question 3.4 "in reporting sales based on their actual thickness." Respondent contends that there is no reference to nominal thickness in the questionnaire other than Appendix V, Part I, Question 8. Instead, Respondent maintains that the Department only made one relevant reference to Appendix V in the main text of the questionnaire at the end of the instructions for question 3.1 (Grade). Respondent argues that this reference, however, is to part II of Appendix V which relates to Model Match Criteria. As such, Respondent argues that there is no reference in the questionnaire that instructs a respondent to read Appendix V, Part I, Question 8.

Respondent maintains that the only time it reported sales of nominal SSPC in any segment of this proceeding was during the investigation and argues that the investigation did not establish a pattern for reporting sales of nominal SSPC. Respondent concludes that the disparity between what it reported in the investigation and what it reported in subsequent reviews shows that it was only required to report nominal sales during the investigation.

Respondent contends that it reported its sales based on actual thickness in the two prior completed reviews of this Order. Moreover, Respondent argues that the Department twice verified and accepted its exclusion of nominal SSPC sales. Respondent cites the Department's 2000-2001 verification report, the public version of which states:

> The second report, "ALZ Antidumping Out of Scope = > .187" Thick," noted invoices for merchandise with an actual thickness of less than .187 inches, but with a nominal thickness greater than or equal to .187 inches. From this list we selected two invoices, [**********], and verified that the thickness noted on the invoices was not subject to this review.

Respondent also maintains that the record of the 2002-2003 Administrative Review shows that it did not report sales of nominal SSPC. Respondent maintains that the Department tested U&A Belgium's data and found no discrepancies with respect to the reported quantity and value.

Finally, Respondent argues that, in the current review, it first notified the Department that it excluded sales of nominal SSPC in its March 18, 2005 Sales Reconciliation. Respondent also maintains that it again notified the Department in its July 1, 2005 supplemental questionnaire response. Respondent takes issue with the fact that the Department did not contact it with respect to this exclusion until September 13, 2005, and argues that, given the delay in making this clarification, the Department should conclude that Respondent should either not be required to report nominal SSPC sales or should have been given a meaningful opportunity to put this sales information on the record.

Petitioners argue that the Respondent was clearly aware that it was required to report its home market and U.S. sales of nominal SSPC for the following reasons: 1) during the investigation, the Department clarified the scope of the Order on SSPC from Belgium (and other countries) to include nominal SSPC; 2) the Department clearly instructed Respondent to report sales of nominal SSPC in this review; and 3) the Department clearly instructed Respondent to report sales of nominal SSPC in all prior segments of this proceeding.

Petitioners argue that the Department has the sole authority to determine or clarify the scope of an Order. Petitioners note that, during the investigation, the Department established the requirement that Respondent must report sales of subject merchandise with a nominal thickness of 4.75mm or greater regardless of the actual thickness. Petitioners state that this requirement was consistent across all SSPC investigations.[2] Petitioners further note that the Department reminded Respondent of the requirement to report sales of nominal SSPC in each subsequent review of SSPC from Belgium Order, specifically in the questionnaire at Appendix V.

Petitioners also note that the Department established the requirement to report sales of nominal SSPC as SSPC to avoid any overlap with the Orders for the sheet cases. In the investigations of stainless steel sheet in strips (SSSS), the Department told producers of SSSS to report merchandise with a nominal thickness of less than or equal to 4.75mm.

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[2] The Department's October 8, 1998 scope clarification letters to respondents in the contemporaneous investigations of SSPC from Korea, South Africa, and Taiwan were placed on the record of this review. See attachment 1 of the Department's memorandum dated October 31, 2005.

Petitioners argue that the record of this review demonstrates that Respondent was required to report sales of nominal SSPC. Specifically, Petitioners contend that the Department clearly instructed Respondent to report all sales of nominal SSPC in Appendix V of the Department's questionnaire which clearly states: "Please ensure that you also include in your response all sales of products for which the nominal thickness is greater than or equal to 4.75 mm."

Petitioners argue that with such "explicit instructions, there is no tenable basis" on which Respondent can now claim that it was somehow unaware that its requirement to report sales of nominal SSPC. Finally, Petitioners contend that if Respondent found the Department's instructions in Appendix V to be unclear, or contradictory to other parts of the Department's questionnaire, then it had an affirmative obligation to seek clarification of the requirements listed in Appendix V.

Department's Position:

Notwithstanding Respondent's arguments to the contrary, the Department clarified the scope of this Order to include nominal SSPC during the investigation. In the Department's October 8, 1998 scope clarification letter, we instructed Respondent to report all sales of "products for which the nominal thickness is greater than or equal to 4.75 mm." (The Department sent out identical scope clarification letters to the respondents in the contemporaneous investigations of SSPC from Korea, South Africa, and Taiwan.) The record shows that on October 14, 1998, Respondent protested the Department's instructions to report sales of nominal SSPC. In that letter, Respondent also acknowledged that the Department has now redefined the "scope to include material with a nominal thickness of 4.75 mm or greater." As such, Respondent was clearly aware of the Department's clarification of the scope to include nominal SSPC, as well as the Department's requirement that Respondent report sales of nominal SSPC. Indeed, as Respondent acknowledges, it complied with the Department's instructions and reported sales of nominal SSPC in the investigation.

Thus, the record of the investigation established that the scope of this Order includes nominal SSPC. As both Respondent and Petitioners acknowledge, section 351.225 of the Department's Regulations requires that any party who wishes to change the scope of an Order is required to undertake a scope inquiry including notice and comment on the record. Thus, if Respondent believed that the scope of this Order should have been be amended to exclude nominal SSPC, it should have requested a scope inquiry on the issue under section 351.225 of the Department's Regulations. The record of this proceeding establishes that no party to this proceeding has requested that the Department conduct a scope inquiry with respect to the exclusion of nominal SSPC.

We also take issue with Respondent's argument that the record of this review shows the Department did not instruct it to report sales of nominal SSPC in this review or that those instructions were somehow unclear. The record of this review shows that Part I-8 of Appendix V of the Department's questionnaire clearly instructed Respondent to report "all sales of products for which the nominal thickness is greater than or equal to 4.75 mm." Indeed, Respondent

acknowledges that the instructions in Part I-8 of Appendix V refer to nominal thickness and that both Sections B and C of the questionnaire refer to Appendix V. We also note that the cover letter of this questionnaire instructed Respondent to refer to Appendices I-V. As such, Respondent was clearly aware of Appendix V and the other appendices. The fact that each and every question in the questionnaire where Appendix V or other appendices might be relevant does not contain a specific reference to an appendix cannot somehow be construed to mean that Respondent was not required to report sales of nominal SSPC.

Respondent's position that the instructions given in Question 3.4 and Part I-8 of Appendix V are somehow ambiguous is also strained. The record shows that Question 3.4 of sections B and C of the Department's August 3, 2004 questionnaire in this administrative review instructed Respondent to code the gauge or thickness (GAUGEH and GAUGEU) of its reported sales based on actual thickness for model matching purposes. Question 3.4 states that respondents should code the actual thickness of each of its sales of SSPC using one of three codes.[3] As such, Question 3.4 did not, as Respondent appears to argue, instruct Respondent to report only sales with an actual thickness of 4.75 mm or greater. Moreover, we also take issue with Respondent's contention that it was unclear that Appendix V actually applied to Question 3.4. As the record shows, Part I-8 of Appendix V instructed Respondent to report all sales with a nominal thickness of 4.75 mm or greater while Question 3.4 addressed how to report the thickness of all reported sales for model matching purposes. If Respondent believed that either of these instructions were ambiguous or had difficulty in complying with these instructions, then it had an obligation to contact the Department. (See section 351.301 of the Department's regulations.) The record shows that Respondent did not report any apparent difficulty in complying with these instructions.

We also take issue with the Respondent's claim that it notified the Department that it had excluded sales of nominal SSPC in its March 18, 2005 Sales Reconciliation. The March 18, 2005 Sales Reconciliation shows that Respondent reported sales of SSPC with a thickness of 4.75 mm or greater as subject merchandise by excluding sales of product with a thickness of "< 4.75mm" (i.e., less than 4.75 mm). The Department notes that in the Sales Reconciliation, Respondent did not state that it was excluding sales of nominal SSPC; therefore, the Department could not discern from this information that Respondent had excluded sales of nominal SSPC**.** In fact, it was not until July 1, 2005, after the Department pursued the discrepancy between Respondent's reported sales and entries suspended under this Order by CBP, that Respondent notified the Department it had not reported to the Department as U.S. sales a significant volume of nominal SSPC. Respondent also informed the Department that it had declared the nominal SSPC at issue to be subject merchandise and paid cash deposits to the CBP at the time of entry. On September 27, 2005, Respondent informed the Department that it had not reported as U.S.

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[3] Question 3.4 instructs the Respondent to code its thickness using a "1" if the SSPC is less than or equal to 0.2125 inches (5.4 mm). (See question 3.4 of page B-9 and C-9 of the Department's August 3, 2004 questionnaire). Nominal SSPC would be coded "1".

sales an additional volume of nominal SSPC. Documentation provided by Respondent at that time indicated that it had entered most of this additional nominal SSPC as subject merchandise and had paid antidumping duty deposits on those subject entries.

As noted above, the Department has consistently instructed Respondent to report sales of nominal SSPC in each segment of this proceeding. Respondent has argued on the record of this review that it excluded sales of nominal SSPC from its reported U.S. and home market sales databases in the 2000-2001 and 2002-2003 administrative reviews. Moreover, Respondent has argued that, during the course of both reviews, the Department verified and accepted the exclusion of nominal SSPC sales and that it relied on the Department's practice in those reviews to continue to exclude sales of nominal SSPC in this review. The Department placed copies of the verification report for the 2000-2001 administrative review and the verification report and Respondent's sales reconciliation for the 2002-2003 administrative review on the record of this review. Based on our analysis of these documents, it appears that Respondent did not report sales of nominal SSPC and that the Department accepted the exclusion of sales of nominal SSPC.

Accordingly, the Department has determined that we must factor in Respondent's unreported sales of nominal SSPC in our analysis. For a complete discussion of our treatment of these sales of nominal SSPC, see Department Position in comment 9 ("Application of Facts Available").

Comment 9: Application of Facts Available

Petitioners maintain that the Department must take the unreported sales of subject merchandise with a nominal thickness of 4.75mm or greater into account when calculating a final margin. Petitioners argue that the missing sales shows that Respondent's data cannot be relied on to calculate a margin and thus the Department should resort to the application of adverse facts available.[4]

[4] A corollary issue raised by Petitioners but not addressed in the briefs was the exclusion of a significant volume of sales of SSPC with a nominal and actual thickness of 4.75 mm or greater. Petitioners contend that Respondent did not substantiate its claim that this SSPC at issue was correctly excluded because it was sold outside the POR. We have also examined Petitioners' contention. As Petitioners have noted, Respondent did not substantiate its claim that the SSPC at issue was sold outside the POR by providing documentation which would establish the date of sale to an unaffiliated party in its September 27, 2005 response. However, we have been able to substantiate that Respondent had reported approximately one third of the SSPC at issue in a prior administrative review. See Final Analysis Memo. Moreover, our analysis of the entry dates covering the remaining SSPC at issue leads us to conclude that the remaining entries of SSPC were sold after the POR for the instant review. We will take adequate steps to ensure that these remaining SSPC sales are reported and reviewed in the next administrative review.

Petitioners state that the application of total adverse facts available is supported by the statute, the facts of this case, and precedent. Petitioners cite Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Taiwan, 64 FR 15493 (March 31, 1999) (SSPC from Taiwan) to support their argument. Petitioners contend that, in SSPC from Taiwan, the Department discovered un-reported home market sales during verification. Petitioners state that the Taiwan respondent also unilaterally decided what sales it would or would not report without consulting the Department. Petitioners note that the Department rejected the Taiwanese respondent's home market sales database on the grounds that the Department would not be able to determine normal value without the missing sales. Petitioners further note that the Department's decision was upheld on appeal to the CIT. According to Petitioners, the CIT noted that the percentage of un-reported home market sales was a reporting failure that goes to the heart of a dumping investigation. Petitioners maintain that the CIT also stated that the Department "squarely requested data regarding home market sales, a term which was defined both in the questionnaire and by long-standing practice." See Allegheny Ludlum v. United States, 215 F. Supp. 2d 1322, 1446 (CIT 2000).

Petitioners also take issue with the Respondent's contention that it should have been allowed the opportunity to report sales of nominal SSPC after this issue surfaced in July 2005. Petitioners argue that pursuant to 19 U.S.C. §1677m(e), the Department could accept information for the record only if the following five requirements listed are met:

1) the information is submitted by the deadline established for its submission,
2) the information can be verified,
3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
4) the interested part has demonstrated that it acted to the best of its ability . . . ,
5) the information can be used with undue difficulties.

Petitioners maintain that any nominal SSPC sales information submitted after July 1, 2005, would not have met four of the five requirements. First, Petitioners argue that the information for nominal SSPC should have been submitted with the original questionnaire response in accordance with the provision that information be submitted by the deadline established for its submission. Second, Petitioners contend that there would have been no time to verify the completeness and accuracy of the information submitted before the November 30, 2005 deadline for completion of this review. As such, Petitioners conclude that there would have been no way to know if the information is reliable. Third, Petitioners argue that Respondent has not acted to the best of its ability to comply with the Department's reporting requirements. Fourth, Petitioners argue that since Respondent did not notify the Department that it had excluded nominal SSPC sales until late in the review process, trying to incorporate the missing sales data would have presented undue difficulties.

As such, Petitioners argue that the Department should use adverse facts available. Petitioners contend that the Department identified a critical deficiency in Respondent's reporting and that this deficiency was the result of a deliberate choice made by the Respondent. Petitioners maintains that pursuant to Nippon Steel, "intentional conduct, such as deliberate concealment or inaccurate reporting" evinces a failure to cooperate. Petitioners argue that the Respondent intentionally chose to reinterpret the scope of the Order and has repeatedly failed to report sales of nominal SSPC. Petitioners contend that Respondent's deliberate behavior has undermined the integrity of the Department's calculations in this and prior reviews. Petitioners argue that the critical nature of the amount of missing data and the circumstances for the exclusion of this data support an adverse facts available determination.

Respondent argues that the Department has "no credible basis to apply adverse facts available in this review." Respondent maintains that the record shows that it properly reported it sales in this review (i.e., excluding sales of nominal SSPC). Respondent argues that the Department may only resort to adverse facts available when there is clear evidence that a respondent has failed to cooperate to the best of its ability. Respondent maintains that the record of this review shows that it has "cooperated with every request made by the Department in each of the eight supplemental questionnaires issued." Moreover, Respondent points out that its repeated offers to report its nominal SSPC sales is evidence of it a willingness to "work with the Department to find a reasonable way to resolve the current issue." Respondent further contends that Petitioners' reliance on SSPC from Taiwan is misplaced. Respondent contends that in SSPC from Taiwan, the unreported sales of the SSPC were in scope and the unreported sales were not discovered until verification. By contrast, Respondent argues that in this case, there are no unreported sales of subject merchandise. In addition, Respondent contends that in this case, it notified the Department that it had not reported sales of nominal SSPC well in advance of the any possible verification and the Preliminary Results. As such, Respondent argues that the Department has no basis to apply adverse facts available.

Department's Position:
The record of this review provides a basis for the application of partial facts available with respect to the nominal SSPC sales that the Respondent did not report pursuant to section 776(a)(2)(A) of the Act. However, the record of this review does not provide a basis for the use of adverse inferences in choosing from facts available with respect to these unreported sales pursuant to section 776(b) of the Act.

In Appendix V to the questionnaire, the Department clearly instructed Respondent to report nominal SSPC in this review. The record of this review shows that Respondent did not report either its U.S. or home market sales of nominal SSPC. Section 776(a)(2)(A) of the Act provides that the Department shall use facts otherwise available if a respondent "withholds information that has been requested by the administering authority." Since Respondent has withheld information requested by the Department, the application of partial facts otherwise available under section 776(a)(2)(A) of the Act is warranted for the unreported U.S. and home market sales of nominal SSPC. As partial facts available, we have applied the weighted-averaged margin

calculated using U&A Belgium's reported U.S. sales to U&A Belgium's unreported sales of nominal SSPC. For a more complete discussion of the Department's use of partial facts otherwise available, see the Final Analysis Memo.

Section 776(b) of the Act states that the Department may use adverse inferences in choosing from the facts available if it finds that an interested party has failed to cooperate by not acting to the best of its ability. As noted in the Preliminary Results, the Department had identified a significant discrepancy between Respondent's reported U.S. sales volume and the volume of entries suspended under this Order by CBP. This discrepancy largely resulted from the fact that Respondent had excluded sales of nominal SSPC from its U.S. sales database while it had declared the same nominal SSPC to be subject merchandise to CBP. However, this fact was not fully understood until well after the Preliminary Results. The record of this review shows that, consistent with every segment of this proceeding, the Department instructed Respondent to report sales of nominal SSPC. However, Respondent has argued that it did not report sales of nominal SSPC in either the 2000-2001 or the 2002-2003 administrative reviews of this Order. The record of the 2000-2001 administrative review shows that Respondent did not report sales of nominal SSPC. More importantly, the record of the 2000-2001 administrative review also shows that the Department verified and accepted Respondent's exclusion of nominal SSPC sales and that Petitioners did not comment on that exclusion in that review. Moreover, the issue was not identified or addressed by either the Department or Petitioners in the subsequent 2002-2003 administrative review. Accordingly, this fact represents a mitigating factor which leads the Department to conclude that an adverse inference in choosing from facts available is not appropriate under section 776(b) of the Act.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final weighted-average dumping margin and the final results of this administrative review in the Federal Register.

_____ _____ _____ _____

Agree Disagree

_____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____ _____

Date