A-423-808
Administrative Review
POR: 5/1/07-4/30/08
Public Document
AD/CVD: O6: GM, JZ

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

RE: Stainless Steel Plate in Coils from Belgium (Period of Review: May 1, 2007, through April 30, 2008)

SUBJECT: Issues and Decisions Memorandum for the Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Stainless Steel Plate in Coils from Belgium (2007-2008)

Summary

We have analyzed the case brief submitted by the respondent, ArcelorMittal Stainless Belgium N.V. (AMS Belgium).[1] As a result of our analysis, we have made changes from the Preliminary Results[2] in the margin calculations. We recommend that you approve the positions described in the Discussion of Interested Party Comments, infra. Outlined below is the complete list of the issues in this review for which we have received comments from AMS Belgium.

I. Background

On June 8, 2009, the Department of Commerce (the Department) published in the Federal Register the preliminary results of this administrative review. See Preliminary Results. This review covers one manufacturer/exporter of the subject merchandise: AMS Belgium.

[1] The case brief was submitted by AMS Belgium on July 8, 2009 (Case Brief). The petitioners did not submit a case brief or rebuttal brief. The petitioners in this case include: Allegheny Ludlum Corporation, North American Stainless, United Auto Workers Local 3303, Zanesville Armco Independent Organization, and the United Steelworkers of America, AFL-CIO/CLC (collectively, the petitioners).

[2] See Stainless Steel Plate in Coils From Belgium: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 27097 (June 8, 2009) (Preliminary Results).

II. List of Comments

Comment 1: Whether the Department Incorrectly Converted Inventory Carrying Costs (DINVCARU)

Comment 2: Whether to Exclude Certain Sales Transactions from the U.S. Sales Listing

Comment 3: Whether to Use Facts Otherwise Available for U.S. Other Transportation Costs (USOTHR1U)

Comment 4: Whether to Use Facts Otherwise Available for Failing to Report a Certain Selling Expense

Comment 5: Whether to Use AMS Belgium's Reported U.S. Warranty Expense

Comment 6: Whether to Offset Negative Margins

III. Discussion of Interested Party Comments

Comment 1: Whether the Department Incorrectly Converted Inventory Carrying Costs (DINVCARU)

AMS Belgium asserts that, in the Department's antidumping duty calculations used in the Preliminary Results, the Department failed to properly convert the data in the field DINVCARU reported in AMS Belgium's U.S. sales database. Specifically, AMS Belgium states that this expense was reported in Euros/kg and should have been converted to USD/kg. AMS Belgium claims that the Department converted DINVCARU to kilograms, resulting in a double conversion. AMS Belgium also claims that the Department failed to convert this data field from Euros to U.S. dollars and that this should be corrected for the final results.

The petitioners did not comment on this issue.

Department's Position:

The Department disagrees with AMS Belgium's assertion that the Department failed to convert this data field from Euros to U.S. dollars. The Department reviewed its calculations from the margin program used in the Preliminary Results. We examined the reported currency and unit of measure in the sales database submitted by AMS Belgium for DINVCARU.[3] The revised file layout submitted by AMS Belgium and the calculation of this expense indicate that this data field was reported in Euros/kg, which is consistent with AMS Belgium's argument stated above. However, the Department disagrees that it failed to convert this data field from Euros to U.S. dollars. Specifically, we reviewed the programming language and resulting calculations from the

[3] See AMS Belgium's Sections A-C Supplemental Questionnaire response, dated January 22, 2009, at Exhibit SC-2.

relevant sections of the margin program to identify whether the Department correctly performed its conversion of the currency for this expense to calculate this data field in terms of USD/kg.[4] Based on our examination of this data, the Department's programming language and the resulting calculations for this expense field, we have confirmed that the Department correctly converted DINVCARU from Euros/kg to USD/kg.[5]

Comment 2: Whether to Exclude Certain Sales Transactions from the U.S. Sales Listing

AMS Belgium states that in the Preliminary Results, the Department incorrectly included certain sales of non-subject merchandise of cut-to-length out-of-scope merchandise that was ultimately sold to a customer in a third country. AMS Belgium asserts that it demonstrated in its January 21, 2009 supplemental questionnaire response that the product was transformed into non-subject merchandise in the United States and then shipped to a third country. Therefore, they should be excluded from the U.S. sales listing.

The petitioners did not comment on this issue.

Department's Position:

We disagree with AMS Belgium. The merchandise in question entered the United States as subject merchandise and, therefore, U.S. Customs and Border Protection (CBP) required cash deposits on these entries. CBP examines whether the entries in question are classified as merchandise subject to the scope of the antidumping duty order of stainless steel plate in coils from Belgium (subject merchandise) upon entry. See Sales Verification Report at 12-13 and Exhibit 8. Similarly, the Department reviews entries into the United States classified as subject merchandise upon entry to define the respondent's universe of sales that are required to be reported to the Department in an administrative review. Therefore, the fact that certain merchandise may be ultimately transformed into a different product that is considered non-subject merchandise is not relevant to the Department's analysis of entries of subject merchandise in the instant review. Furthermore, AMS reported that the entries entered U.S. Customs territory as in-scope subject merchandise and did not enter into a foreign trade zone, bonded warehouse, or under a temporary import bond.[6] Because such sales entered the U.S. Customs territory as subject merchandise, the Department requires that such sales be included in AMS Belgium's U.S. sales database. This is necessary to calculate the antidumping duty margin

[4] See the memorandum to the File Through James Terpstra from Joy Zhang and titled, "Analysis Memorandum for ArcelorMittal Stainless Belgium N.V. for the Final Results of the Seventh Administrative Review of Stainless Steel Plate in Coils (SSPC) from Belgium," dated October 6, 2009 (Final Sales Analysis Memorandum), at Appendix I, included in the Department's Margin SAS Program log at lines 4764-4765 and 5224.

[5] See Final Sales Analysis Memorandum.

[6] See: AMS Belgium's Section A Questionnaire Response, dated September 18, 2008, at 5. See also the Department's Section A Questionnaire at question 1. g. which states "If you export merchandise for entry into a foreign trade zone (FTZ), into a bonded warehouse in the United States, or under a temporary import bond, this may affect the way we treat these sales…"

based on all of a respondent's entries of subject merchandise into the United States during the period of review (POR) which did not enter the United States pursuant to one of the aforementioned import duty regimes. Accordingly, the Department continues to include these entries in the U.S. sales listing for these final results.

Comment 3: Whether to Use Facts Otherwise Available for U.S. Other Transportation Costs (USOTHR1U)

AMS Belgium states that it reported USOTHR1U as averages for certain U.S. transactions in its Section C response when the necessary invoices were not available at the time of reporting, and also presented a minor correction of the average calculation at the onset of verification. Upon the Department's request at verification, AMS Belgium provided a spreadsheet recalculating USOTHR1U for these transactions based on the actual broker invoices. AMS Belgium contends that for the Preliminary Results, the Department rejected AMS Belgium's recalculation and used adverse facts available (AFA) on the ground that the verifier's own calculation based on two sample invoices did not match AMS Belgium's recalculation, and therefore, determined that AMS Belgium's recalculation was in error. AMS Belgium argues that the Department's use of AFA is unwarranted because the Department's calculations based on two broker's invoices are incorrect. According to AMS Belgium, the Department may only resort to AFA when the respondent has failed to supply necessary information to the best of its ability. AMS Belgium asserts that it has fully supplied the Department with the necessary information, and that the Department cannot fault AMS Belgium for failing to act to the best of its ability by not furnishing invoices that were not yet available to it at the time of its response but which were later provided when requested, once the invoices became available.

The petitioners did not comment on this issue.

Department's Position:

After reviewing AMS Belgium's case brief and our sales verification report and exhibits with respect to the calculation of USOTHR1U, we agree with AMS Belgium that we made a ministerial error in our two sample calculations of the per-unit USOTHR1U.[7] We find that AMS Belgium's recalculated USOTHR1U values provided at the constructed export price (CEP) verification for these two sample sales are correct. Accordingly, for the final results, we will use the actual USOTHR1U value that we collected at the CEP verification.

Comment 4: Whether to Use Facts Otherwise Available for Failing to Report a Certain Selling Expense

AMS Belgium states that it did not report a certain expense in its home market indirect selling expenses (ISE) because it did not incur such expense on sales of subject merchandise. AMS Belgium alleges that the Department, nevertheless, applied AFA on the basis that the company informed the Department at verification that it included such expense in AMS Belgium's general

[7] See Final Sales Analysis Memorandum.

and administrative (G&A) expenses, but the Department found that this expense in question was not included in the reported G&A. AMS Belgium contends that the Department verified that there were no unpaid or outstanding accounts receivable on home market sales subject merchandise and, therefore, it is inappropriate to include this certain expense in AMS Belgium's home market ISE.

AMS Belgium further argues that the Department's calculation of this expense is inappropriate because the Department assigned the amount on worldwide sales of subject and non-subject merchandise entirely to AMS Belgium's home market sales of subject merchandise. According to AMS Belgium, at most, the Department should have only applied a portion of the worldwide certain expense named to the home market ISE calculation.

The petitioners did not comment on this issue.

Department's Position:

Section 776(a) of the Tariff Act of 1930, as amended (the Act), provides that the Department will apply "facts otherwise available" if, inter alia, necessary information is not available on the record or an interested party: 1) withholds information that has been requested by the Department; 2) fails to provide such information within the deadlines established, or in the form or manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; 3) significantly impedes a proceeding; or 4) provides such information, but the information cannot be verified. Furthermore, in selecting from the facts otherwise available, section 776(b) of the Act authorizes the Department to use an adverse inference if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with the request for information.

As discussed in the Preliminary Results, during the sales verification, the Department found that AMS Belgium did not include a certain selling expense in its calculation of ISE. The Department inquired about this omission and AMS Belgium stated that this certain selling expense was reported in its G&A. See the Department's Sales Verification Report, dated June 1, 2009, at constructed export price (CEP) Verification Exhibit (CEP VE) 16. However, further examination demonstrated that this certain selling expense was not included in the reported G&A. See AMS Belgium's Section D Questionnaire Response, dated October 3, 2008, at Exhibit 19. Based upon further inquiry during the sales verification, we were told that AMS Belgium's accounts identify provisions only for a certain selling expense and not an actual (realized) amount of this certain selling expense. See CEP VE 16. However, this response contradicted information obtained during the cost verification of AMS Belgium. Specifically, the Department's cost verification team examined G&A (which they calculated based on 2007 COPA financial statements) and noted an amount which was excluded from G&A and listed as a selling expense. See the Department's Cost Verification Report, dated June 1, 2009, at Exhibit 16. This amount includes a net actual (realized) amount of this certain selling expense. Due to the proprietary nature of this discussion and data, see the Sales and Cost Verification Reports, dated June 1, 2009 (Sales Verification Report, Cost Verification Report), for additional details. Due to the fact that AMS Belgium could not accurately identify where in its response it reported

the certain selling expense in question, the Department was unable to verify the certain selling expense. Furthermore, AMS Belgium did not establish whether the specific amount of the certain selling expense in question was attributable to either the home market or the U.S. market. AMS Belgium's contradictory statements regarding the certain selling expense undermined AMS Belgium's reporting of indirect selling expenses. As a result, we find that it is appropriate to resort to facts otherwise available to account for the unreported information.

In selecting from among the facts otherwise available, section 776(b) of the Act authorizes the Department to use an adverse inference if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with the request for information. We find that AMS Belgium had the necessary information within its control and it did not properly report this information, and that it failed to put forth its maximum effort. As a result, we continue to find that AMS Belgium failed to cooperate to the best of its ability.

With regard to AMS Belgium's argument that it did not report this selling expense in its home market ISE because it did not incur such expense on sales of subject merchandise, we find that AMS Belgium has not demonstrated that it did not incur any of this certain expense in question on sales of subject merchandise. We find that AMS Belgium was neither able to document where such expenses were reported nor provide any basis for excluding such expenses from its reported ISE.

Furthermore, we find unpersuasive AMS Belgium's claim based upon the reference to the Department's verification of the payment date information, that it did not incur this expense. The Department's verification of payment date information on sample sales traces of certain home market sales does not provide evidence to conclude that the company did not incur the expense in question. On the contrary, the actual expense was recorded in the company's books and records. See Cost Verification Report at Exhibit 16. Therefore, we have continued to find that AMS Belgium failed to cooperate to the best of its ability by failing to report this certain selling expense. For the final results we continue to use facts otherwise available with an adverse inference to determine indirect selling expenses in accordance with section 776(b) of the Act. Accordingly, we find it was appropriate to include this expense in the build-up of AMS Belgium's ISE ratio calculation because this methodology is considered adverse to the interests of AMS Belgium in order to account for the non-reporting of the aforementioned certain selling expense.

Comment 5: Whether to Use AMS Belgium's Reported U.S. Warranty Expense

AMS Belgium states that it originally reported per-unit U.S. warranty expense, consistent with its prior practice in this case. AMS Belgium subsequently reported its U.S. warranty expense on a transaction-specific basis in its January 21st supplemental questionnaire response, as requested by the Department. AMS Belgium argues that the Department verified the reported U.S. warranty expense and did not identify any discrepancies in its verification report.[8] After the Preliminary Results, the Department issued an additional supplemental questionnaire requesting

[8] See Sales Verification Report at page 22.

that AMS Belgium report model-specific per-unit warranty expense. AMS Belgium provided this information on July 2, 2009. AMS Belgium argues that if the Department does not use AMS Belgium's expense, as reported in AMS Belgium's July 2, 2009 supplemental questionnaire response, it must issue either another supplemental questionnaire or a post-preliminary analysis for comment by the interested parties, in accordance with 19 U.S.C. § 1677m(d) and 19 U.S.C. § 1677m(g). See AMS Belgium's case brief, dated July 8, 2009, at 8-9.

The petitioners did not comment on this issue.

Department's Position:

In the original questionnaire issued to AMS Belgium on July 15, 2008, the Department requested that the company provide warranty cost based upon the respondent's experience by model. [9] Subsequently, the Department requested and AMS Belgium reported its U.S. warranty expenses on a model-specific basis in its July 2, 2009 supplemental questionnaire response. As part of the Department's review of the reported warranty expenses, where appropriate, we collect information on model-specific warranty expenses extending over a three-year period.[10] The Department examines the three-year period of such expenses in order to evaluate whether an individual year's expenses included in the three-year historical period appear to be aberrational. Where the annual warranty experience reflects a consistent historical pattern of experience and is not otherwise distortive, actual POR warranty information may be used. [11] We have examined AMS Belgium's calculation of its warranty expenses during the three most recently completed fiscal years and found that the per-unit warranty expense reported in the current review is not inconsistent with its model-specific warranty expenses reported for the three-year fiscal years. Therefore, we have used the U.S. warranty expense reported in AMS Belgium's July 2, 2009 supplemental questionnaire response for purposes of calculating the final results of this review.

Comment 6: Whether to Offset Negative Margins

AMS Belgium requests that the Department revise its margin calculation program to eliminate any offsets for negative margins ("zeroing") for the final results. AMS Belgium cites the Department's memorandum titled "Issues and Decision Memorandum for Final Results of Section 129 Determinations," stating that the Department has now revised its interpretation of

[9] The Department's Section C questionnaire for the warranty expense (WARRU) field states: "{i}f you produce different models or types of the merchandise under review, warranty cost should be based upon your experience by model."

[10] See the Department's questionnaire, Section C, field 46.0, which states "{i}nclude a schedule of direct and indirect warranty expenses incurred for the subject merchandise for the three most recently completed fiscal years."

[11] See, e.g. the Department's 2009 Antidumping Manual at < http://ia.ita.doc.gov/admanual/index.html> at Chapter 8 at 42-45.

the governing statute so that it no longer requires the use of "zeroing" in investigations.[12] Further, AMS Belgium asserts that, because the World Trade Organization (WTO) has found that the use of zeroing in reviews is inconsistent with the WTO rules,[13] the Department must now interpret the statute with regards to reviews in accordance with its international obligations.[14] AMS Belgium states that in a case challenging the Department's use of zeroing in a prior segment of this proceeding (and reviews in other antidumping cases), the Appellate Body in February 2009 reaffirmed its view that zeroing is impermissible in administrative reviews.[15]

AMS Belgium contends that, even if the Department were precluded from revising its methodology outside the procedures specified in 19 U.S.C. § 3538 and 19 U.S.C. § 3533, the Department must articulate its basis for refusing to invoke those procedures. AMS Belgium takes issue with the Department's interpretation of the statute that governs the price comparisons used in the margin calculations. Specifically, AMS Belgium argues that, by allowing offsets in investigations, but not in administrative reviews, the Department has created a conflicting interpretation of "exceeds" as contemplated in 19 U.S.C. §1677(35)(A). AMS Belgium claims that for investigations, "exceeds" means the normal value minus U.S. price (export or constructed export price), regardless of whether the result is negative; however, AMS Belgium states that for reviews, the Department has interpreted "exceeds" to mean normal value minus U.S. price (export or constructed export price), but only when the normal value is greater than the U.S. price. AMS Belgium asserts that Congress could not have intended for the Department to inconsistently apply the same statutory language.[16] Therefore, AMS Belgium requests that the Department eliminate the zeroing language from its margin calculation program for the final results.

The petitioners did not comment on this issue.

---

[12] See "Issues and Decision Memorandum for Final Results of Section 129 Determinations," Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations Under Section 129 of the UruguayRound Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 FR 25261 (May 4, 2007).

[13] See Appellate Body Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (Apr. 18, 2006); see also Appellate Body Report, United States – Measures Related to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007) (U.S.-Zeroing (Japan)).

[14] See, e.g., Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804); see also Fed.-Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (noting that trade laws are not exempt from the Charming Betsy principle).

[15] See Appellate Body Report, United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (Feb. 4, 2009) (US-Zeroing (EC II)).

[16] See 2A N. Singer, STATUTE AND STATUTORY CONSTRUCTION § 46:06 at 194 (6th ed. 2000) (noting that the same word should be given consistent meaning as used in a statute).

Department's Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by AMS Belgium 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 (NV) is greater than export price (EP) or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, 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 (CAFC) 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) (Timken); and Corus Staal BV v. U.S. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied, and 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 NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV 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. Specifically, 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 CAFC 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." See Timken, 354 F.3d 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 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) (NSK).

AMS Belgium cited certain 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 CAFC 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 URAA. See Corus I, 395 F.3d 1347-49; accord Corus II 502 F.3d 1375; and NSK, 510 F.3d 1375. 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 U.S.C. 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 U.S.C. 3533(g); see also Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006) (Zeroing Notice). With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

Furthermore, with respect to US-Zeroing (EC), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Zeroing Notice, 71 FR at 77724. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. Id.

With respect to US-Zeroing (Japan) and US-Zeroing (EC II), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is inconsistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above,[17] the Department has continued to deny offsets to dumping based on CEP transactions that exceed NV in this review.

IV. 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 results and the final weighted-average dumping margin in the Federal Register.

Agree _____ Disagree _____

_____
Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

_____
(date)

[17] See Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, 74 FR 40167 (August 11, 2009).