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

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

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

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**Summary**

We have analyzed the comments and rebuttal comments from interested parties in the administrative review of the antidumping duty order on SSSS in coils from Italy. As a result of our analysis of information and arguments on the record, including factual information obtained since the preliminary results, we have determined that the respondent in the above-captioned proceeding, ThyssenKrupp Acciai Speciali Terni S.p.A. (TKAST or respondent), made sales to the United States at less than normal value (NV) during the period of review (POR). We recommend that you approve the positions developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments from interested parties:

Comment 1: Treatment of Premiums Paid by ThyssenKrupp AG to Repurchase Shares Held by the Islamic Republic of Iran (Iran)
Comment 2: Application of Partial Adverse Facts Available for Certain Components of ThyssenKrupp Acciai Speciali Terni S.p.A.'s Reported Standard Costs
Comment 3: Deduction of Technical Service Expenses from U.S. Price
Comment 4: Treatment of Non-Dumped Sales
Comment 5: Ministerial Error Relating to the Addition of Billing Adjustments to Home Market Price

## Discussion of the Issues

### Comment 1: Treatment of Premiums Paid by ThyssenKrupp AG to Repurchase Shares Held by the Islamic Republic of Iran (Iran)

Allegheny Ludlum, AK Steel Corporation, Butler Armco Independent Union, J&L Specialty Steel, Inc., North American Stainless, United Steelworkers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization (collectively, petitioners) argue that the Department should adjust TKAST's U.S. selling expenses to account for costs of €406 million related to a share buyback from the Government of Iran. Petitioners assert that ThyssenKrupp AG (TKAG) repurchased 16.9 million TKAG shares (through its subsidiary IFIC Holding AG (IFIC)) from Iran at €24 per share, a premium when the market price at the time was €8.92 per share.

In particular, petitioners contend that accounting rules require that share repurchase prices represent additional selling expenses, and not changes in shareholders' equity. (*See* petitioners' case brief, dated September 8, 2004, at 3-4.) Petitioners state that TKAG's share purchase represents an additional expense as contemplated in the Financial Accounting Standards Board (FASB) *Technical Bulletin 85-6* (*FTB85-6*) and requires specific accounting for such transactions, including disclosure of the manner in which the company allocated between the market value of the stock re-purchase and "other elements of the transaction," which "should be accounted for according to their substance." *See FTB85-6*. Petitioners claim that *FTB85-6* instructs that equity transactions require allocation, and in principle applies to treasury stock repurchases, noting that such "transactions involve payment of an amount that must be allocated among assets acquired, liabilities settled, and expenses paid, because the prices paid for the individual assets, liabilities, and expenses are unstated." *See FTB85-6* at paragraphs 11 and 14. In this case, petitioners assert that because TKAG "repurchase{d} shares at a price that is different from the price obtainable in transactions in the open market or transactions in which the identity of the selling shareholder is not important," some portion of the premium paid represented a payment by TKAG for the stated privilege of its ability to sell in the U.S. market. *See* TKAST's March 1, 2004, supplemental questionnaire response at 42-43 and Exhibit A-40. Specifically, petitioners state that although no tangible physical assets were acquired from IFIC, the right of TKAG to generate sales "of just under 8 billion US dollars in the USA" was preserved. *See Id*.

Petitioners note that this repurchase, which sustained TKAST's ability to participate in the U.S. market, is substantially different from the exception allowed in *FTB85-6* for instances when a company seeks to buy a controlling interest as it covers purchases above market price to gain ownership for purposes of directing a company, without any outside considerations. *See FTB85-6* at paragraph 15.

Moreover, petitioners claim that FASB's FAS No. 123 also instructs that paying an above-market premium for share repurchases represents a cost or expense to the company. *See* Statement of Financial Accounting Standards No. 123, Accounting for Stock-Based Compensation at 14 (October 1995) (http://www.fasb.org/pdf/fas123.pdf). Petitioners assert that FAS No. 123 recognizes that while a stock repurchase at market value should be charged to equity and is not an additional cost, the payment of a premium over market value is an additional cost. Importantly, petitioners state that such a repurchase can only be charged to equity "provided that the amount paid does not exceed the value of the instruments purchased." Petitioners explain that in the context of a repurchase from employees, the premium is recognized to be "additional compensation cost." Petitioners claim that the premium of a repurchase from a shareholder in order to retain the right to make sales in a particular market must, by analogy, be recognized as a cost of doing business, *i.e.*, in this case, an expense related to selling in the U.S. market.

Petitioners cite *Silicomanganese from India: Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination*, 67 FR 15531 (April 2, 2002) and the accompanying Issues and Decision Memorandum at Comment 14, to support their claim that the Department has the discretion and authority to reclassify expenses regardless of how such expenses were recorded. Therefore, petitioners claim that the premium paid in connection with the share buyback constitutes an expense that results from, and bears a direct relationship to, sales to the United States in accordance with the statute and the Department's regulations. *See* section 772(d)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.402(b).

Petitioners note that TKAG incurred this expense during the POR (*i.e.*, in May 2003) in direct support of its U.S. sales operations, noting: "our activities in the USA would otherwise have faced major business losses under relevant US legislation." *See* petitioners' September 8, 2004, case brief at Attachment 1. According to petitioners, TKAG was forced to buy back these shares from the Government of Iran, because U.S. trade sanctions against Iran bar transactions with any firm in which Iran held an equity interest of more than five percent. To avoid these sanctions, TKAG had to buy down Iran's equity share in TKAG's subsidiary, IFIC. *See* petitioners' filing dated July 20, 2004. Petitioners argue that the premium paid by TKAG to repurchase shares from the Government of Iran should be treated as a direct selling expense because: 1) the buyback resulted from U.S. sales by TKAG's affiliates, and 2) this expense is directly related to economic activity in the United States. Specifically, petitioners contend that had TKAG not been doing business in the United States through its affiliates, the U.S. terrorism sanctions would not have applied as a result. Also, petitioners insist that the buyback is an expense directly related to economic activity in the United States, because it reduced the Iranian Government's ownership interests in TKAST and its U.S. subsidiary (TKAST USA), and other TKAG U.S. subsidiaries (TKNNA, TKUDM USA, and Mexinox USA) and allowed these subsidiaries to do business in the United States.

Notwithstanding their claim that the premium paid by TKAG in connection with the buyback should be treated as a U.S. direct selling expense, petitioners argue that the Department should at the very least consider the share buyback as an indirect selling expense. Petitioners state that this expense was associated with commercial activities in the United States, and therefore, must be deducted from constructed export prices (CEP) in the Department's final margin analysis.

According to petitioners, while the Department may, in limited cases, ignore expenses and income that it considers are extraordinary, the premium paid by TKAG to repurchase shares from Iran should not be considered "extraordinary," because: 1) TKAG did not have to repurchase the shares in question in order to be compliant with U.S. sanctions, and 2) the stock purchase was not unanticipated by TKAG. Petitioners state that although TKAG's decision to repurchase the shares in question likely constituted a sensible business decision, TKAG had other options (*e.g.*, further contesting U.S. policy in this area, divesting itself of subsidiaries that were operating in the U.S. market, issuing additional shares to dilute Iranian ownership, or simply ceasing sales in the U.S. market altogether) that it elected not to pursue. Moreover, petitioners assert that because TKAG has known for decades of various U.S. rules prohibiting significant Iranian ownership of companies conducting business in the United States, the company could have easily decided to repurchase the shares over time, rather than all at once as was the case in May 2003. Therefore, petitioners insist that TKAG's expenditure must be viewed as an expense in support of legal and regulatory compliance, which is not extraordinary in nature.

In light of all of the above, petitioners argue that the Department should treat TKAG's premium payment associated with its repurchase of stock from the Iranian government as a selling expense incurred on behalf of its U.S. subsidiaries. Given that the 16.9 million shares were purchased at €24 per share, when the market price was €8.92 per share, petitioners claim that the treasury purchase (*i.e.*, the amount attributed to equity) should be recognized as 16.9 million x i 8.92, with a premium of 16.9 million * (€24.00 - €8.92). Thus, petitioners propose that the amount recognized as a change in equity be equal to €150.75 million, with an expense item for continued U.S. market access of €254.85 million. Lastly, petitioners assert that allocating €254.85 million over €7.3 billion (the stated value of sales at risk by a possible ban) results in an adjustment of 3.49 percent.

In rebuttal, TKAST argues that the share repurchase by TKAG resulted in a reduction to stockholders' equity and not an expense, which is consistent with U.S. GAAP. TKAST states that its independent auditors, KPMG Deutsche Treuhand-Gesellschaft (KPMG), reviewed the May 2003 share repurchase during their audit of TKAG's 2002/2003 financial statements and issued an unqualified opinion. *See* TKAST's Verification Exhibit 1. TKAST states KPMG examined the facts surrounding the share repurchase and concluded that under *FTB85-6*, the entire amount of the cost of the repurchased shares was properly accounted for as a reduction of shareholders' equity. In particular, TKAST cites the TKAG FY 2003 Financial Report at 166. *See* TKAST's September 24, 2004, rebuttal brief at 4. TKAST asserts that *FTB85-6* states that a transaction such as a reacquisition by an entity of its own equity securities is mutually exclusive to transactions such as the incurrence of expenses that affect the income of a business entity.

Moreover, TKAST argues that the Department's established practice is consistent with TKAG's treatment of this transaction under U.S. GAAP. Specifically, TKAST asserts that the Department has recognized that the repurchase of stock is not an expense for antidumping purposes and has recently rejected an argument similar to those made by petitioners in the instant case. *See Stainless Steel Bar from Japan: Final Results of Antidumping Administrative Review*, 65 FR 13717 (March 14, 2000) (*SSB from Japan*) and the accompanying Issues and Decision Memorandum at Comment 8, stating that "it is not our normal practice to include repurchase of stock as a finance expense." *See, also, Certain Cold-Rolled Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 63 FR 781 (January 7, 1998) (*CR Carbon Steel from Korea*) and *Saccharin from Korea: Final Determination of Sales at Less Than Fair Value*, 59 FR 58826 (November 15, 1994). Based on all of the above, TKAST contends that there is no "expense" associated with the share repurchase, and there is no factual accounting or legal basis for an adjustment.

TKAST asserts that the Department routinely relies on the views of independent auditors in the conduct of its investigations and administrative reviews, indeed basing its total sales and total sales reconciliations at verification on a tie-in to audited financial statements. As such, TKAST argues that petitioners' arguments in the instant case do not challenge KPMG's independent conclusion as to the proper accounting treatment of the share repurchase. Specifically, TKAST states that for petitioners to imply or suggest, based on a secondary accounting source, *The Accountant's Handbook*, that IFIC transferred any right to TKAG or to respondent to conduct business in the United States is incorrect as only stock was acquired by TKAG from IFIC. *See* petitioners' filing, dated July 20, 2004, at Attachment 2. For either general accounting purposes or accounting for any costs that TKAG's subsidiaries may have incurred to enter into certain Department of Defense (DOD) contracts in the United States, TKAST argues that the methodology used must be based on objective evidence and arm's-length transactions, not subjective motivations. TKAST claims that in the instant case, petitioners are purposefully confusing the objective substance of the share repurchase transaction between TKAG and IFIC with TKAG's general motivation for participating in the transaction at the particular time. TKAST further claims that, despite petitioners' argument (*see* petitioners' case brief, dated September 8, 2004, at 4), the transactions identified in paragraph 15 of *FTB85-6* are not "substantially different" from TKAG's stock purchase. Rather, in all three transactions, TKAST explains that the acquiring corporation has its own business purpose for acquiring a large or controlling block of shares from a particular shareholder and is willing to pay a premium. In other words, TKAST states all that the acquiring entity purchases is a particular block of shares - no additional consideration is provided to the seller. However, TKAST asserts that it is the intrinsic nature of that particular block of shares that makes it more valuable to the purchaser than to the general market.

As stated in petitioners' case brief, TKAST notes that the three transactions described in paragraph 15 of *FTB85-6* consist of "purchases above market price for the purpose of gaining ownership for purposes of directing a company, without any outside considerations." Similarly, TKAST argues that TKAG repurchases the shares in question from IFIC at above market price to allow its worldwide subsidiaries to enter into certain DOD contracts at that time or in the future, free of outside legal constraints. Furthermore, TKAST notes that TKAG simply paid a premium to a large shareholder because of extrinsic factors that gave it added motivation to want to acquire that stock. TKAST cites paragraph 15 of *FTB85-6*, which concludes that, "{a} company's acquisition of its shares in those circumstances is solely a treasury stock transaction properly accounted for at the purchase price of the treasury shares. Therefore, in the absence of the receipt of stated or unstated consideration in addition to the capital stock, the entire purchase price should be accounted for as the cost of treasury shares."

TKAST argues that *FTB85-6* holds that unless other consideration is received from the selling stockholders, an acquisition of a corporation's own stock is solely a capital transaction that results in a direct debit to shareholder equity without an intermediate debit to an expense item on an income statement. As such, TKAST states that the arm's-length transaction itself has nothing to do with operations, and thus, should not be characterized or construed as generating an income statement expense. Instead, TKAST insists it is a direct debit to shareholder equity because it is a pure capital transaction as defined by *FTB85-6*.

Additionally, TKAST argues that petitioners' reliance on FASB's FAS No. 123 is similarly misplaced. *See* petitioners' case brief at 4-5. TKAST states that by its terms FAS No. 123 "establishes financial accounting and reporting standards for stock-based employee compensation plans." TKAST notes that FAS No. 123 explains it "also applies to transactions in which an entity issues its equity instruments to acquire goods or services from nonemployees. Those transactions must be accounted for based on the fair value of the consideration received or the fair value of the equity instruments issued, whichever is more reliably measurable." *See* FAS No. 123 at 4. In other words, TKAST explains that when an entity acquires services from its employees or goods or services from nonemployees, it is acquiring more for its stock than can be established based on the money that changes hands. By contrast, where, as here, no additional consideration (*e.g.*, services, products or even legal rights) is being acquired, TKAST argues that the entire amount of the acquisition cost should be treated as a reduction to stockholders' equity in keeping with *FTB85-6*, and, in particular, paragraphs 9 and 15.

In sum, TKAST claims that there are no U.S. "selling expenses" associated with the share repurchase by TKAST's parent corporation, TKAG. To consider the repurchase of treasury stock as an expense for antidumping purposes, according to TKAST, would be directly contrary to established Department practice, fundamentally at odds with longstanding public accounting guidance, and contrary to the application of an independent audit analysis of the relevant issues. Moreover, TKAST claims that it would create a dangerous precedent that would require the Department to attempt to second-guess the conclusions of independent auditors and to weigh subjective intentions of parties in subsequent similar matters.

Even if some portion of the share repurchase could be treated as an expense, TKAST asserts that there is no link between this expense and TKAST's or TKAST USA's U.S. sales of subject merchandise during the POR, as opposed to sales of other TKAG subsidiaries in the United States because: 1) neither TKAST nor TKAST USA themselves incurred the "expense," 2) there is no evidence that the "expense" was "incurred" "for the account of" TKAST or TKAST USA as required by the Act, and 3) there is no link between the so-called "expense" and "sales of subject merchandise" by TKAST or TKAST USA.

Citing section 772(d)(1) of the Act, TKAST states that the Department must deduct expenses from U.S. prices that were incurred either "by" or "for the account of" the producer or exporter, or the affiliated seller in the United States and incurred "in selling the subject merchandise." According to TKAST, none of these requirements are met in this case because the "expense" was not incurred "by"

TKAST or TKAST USA. Second, TKAST states that there is no evidence on this record that indicates TKAG engaged in the share repurchase "on behalf of" TKAST or TKAST USA in respect to sales of subject merchandise. Rather, as demonstrated by the record, TKAST reiterates that the purpose of the share repurchase was specifically and solely related to restrictions imposed on certain DOD procurement contracts under 10 U.S.C. section 2327, which prohibits certain DOD contracts with companies in which certain listed countries (including Iran) have shareholding interests in excess of five percent. In addition, TKAST states that the record does not contain any information as to whether TKAST or its U.S. subsidiary had any such DOD contracts. In fact, no such evidence exists. Nor, TKAST contends, is there any evidence that the share repurchase was in any other way related to sales by TKAST or TKAST USA of SSSS in coils during the POR or that TKAST or TKAST USA benefitted in any way from the share repurchase. TKAST notes that the share repurchase occurred in May 2003, at the end of the POR of this proceeding. Therefore, even assuming *arguendo*, that some portion of the share repurchase could be treated as an expense, TKAST insists that the share repurchase was not undertaken "by or on behalf of" TKAST or TKAST USA, did not benefit those entities, and did not relate to "selling subject merchandise" during the POR. As such, TKAST argues that it cannot be deducted as a selling expense.

Further, contrary to petitioners' claim that the share repurchase was "directly related to economic activity in the United States - no buyback, no U.S. sales," TKAST asserts that record does not indicate that the sales of subject merchandise by TKAST are within the scope of the statutory prohibition (*i.e.*, procurement of goods and services by DOD agencies). Therefore, TKAST argues that there is no basis for concluding that its sales would be affected by the share repurchase.

Notwithstanding, TKAST argues that the Department cannot deduct the share repurchase as an indirect selling expense to derive CEP because it was incurred outside the United States, and was not associated with the activities of the U.S. affiliated importer. TKAST states that the Court of Appeals for the Federal Circuit (the Federal Circuit) held in *Micron Technology, Inc. v. United States*, 243 F.3d. 1301, 1313 (Fed. Cir. 2001) that home market indirect selling expenses are not an appropriate CEP expense under 19 USC § 1677a(d)(1)(D) because they are incurred regardless of whether the exporter uses an affiliated distributor to market its products or sells directly to unaffiliated purchasers. Likewise, in *AK Steel*, TKAST explains that the U.S. Court of International Trade (CIT) affirmed the Department's decision not to deduct from U.S. price indirect selling expenses incurred in Germany by TKAG even though the Department had previously deducted the same expenses. *See AK Steel Corp. v. United States*, No. 03-00104 Slip. Op. 04-108 (CIT August 25, 2004) (*AK Steel*).

Lastly, TKAST contends that the share repurchase cannot be a direct selling expense within the meaning of section 351.410(c) of the Department's regulations because it is not a variable expense that results from and bears a different relationship to any particular sale of subject

merchandise by TKAST or TKAST USA. Therefore, TKAST argues that TKAG's decision to repurchase the shares has no relationship to sales of subject merchandise, and thus, should not be treated as a direct or indirect selling expense.

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

We agree with respondent. In reviewing *FTB85-6*, we find that *FTB85-6* does not support petitioners' assertion that the Department should treat the premium paid by TKAG associated with its repurchase of stock from the Iranian government as a selling expense incurred on behalf of its U.S. subsidiaries. Rather, *FTB85-6* advises that when a company acquires its own shares, those shares are considered treasury stock, and in the instant case, appropriately resulted in a reduction to TKAG's stockholders' equity. Treasury stock is not classified as an asset in a company's balance sheet, whereas gains or losses on sales of assets are recognized at the time that such sales occur. While the share buyback resulted in a reduction in stockholders' equity, there was no gain or loss to be accounted for from the sale of any asset. Nor did the resulting change in shareholder equity have any bearing on TKAST's U.S. sales activity relating to subject merchandise.

We further note that a corporation does not realize a gain or suffer a loss from stock transactions with its own stockholders. Treasury stock can either be retired or reissued. A company neither earns an income nor incurs an expense when it purchases or sells treasury stock. *See* Kieso, Donald, and Weygandt, Jerry, *Intermediate Accounting, Ninth Edition*, New York: John Wiley & Sons, Inc., 1998 at pages 771 - 774. Thus, any costs associated with TKAG's reacquisition of its own equity do not qualify as "expenses." Moreover, even if we were to consider the premiums paid by TKAG to be "expenses," there is no link between TKAG's repurchase of its shares and sale of subject merchandise that occurred in the United States. Therefore, for these final results, we continue to treat TKAG's share repurchase not as a selling expense, but as a reduction in stockholders' equity. *See SSB from Japan* and accompanying Issues and Decision Memorandum at Comment 8. *See also Stainless Steel Sheet and Strip in Coils from Germany; Final Results of Antidumping Duty Administrative Review*, 69 FR 75930 (December 20, 2004) and accompanying Issues and Decision Memorandum at Comment 1, in which the Department determined that TKAG's repurchase of shares from IFIC resulted in a reduction in stockholders' equity and did not qualify as an expense.

**Comment 2: Application of Partial Adverse Facts Available for Certain Components of ThyssenKrupp Acciai Speciali Terni S.p.A.'s Reported Standard Costs**

Respondent requests that, for purposes of these final results, the Department use its discretion and not make an adverse inference when applying partial facts available to TKAST's costs. In particular, respondent asserts that the Department's decision to apply partial adverse facts available stemmed from TKAST's failure to maintain all cost files associated with its phased-out cost accounting system - the BULL system. Respondent states that the Department was able to verify that TKAST's reported standard costs for three pre-selected product models (*i.e.*, CONNUMs) matched the standard costs reported in the company's standard cost ledger. In addition, respondent contends that the Department verified, without discrepancy, that these costs corresponded to the standard costs for each stage of production in TKAST's standard production cost worksheet. Moreover, respondent contends that the Department verified that the total standard and processing costs of each production phase from the company's standard cost ledger matched the detailed printouts from the BULL accounting system for three CONNUMs not pre-selected by the Department.

According to respondent, the only records that TKAST failed to maintain were the detailed material and processing costs for each production phase as maintained in the BULL system for the three pre-selected CONNUMs. TKAST argues that it is unclear what additional information this cross-check would have provided, given that the Department was already able to tie total standard costs and total standard material and processing costs at each production phase for each pre-selected CONNUM to TKAST's books and records. In light of the other two verifiable sources, respondent argues that TKAST was reasonable in assuming that it was not required to maintain the detailed cost database that was the source of these regularly generated ledgers and records. Therefore, because the Department was able to verify TKAST's standard costs for the pre-selected CONNUMs to two independent documents maintained in the ordinary course of business, respondent contends that it acted to the best of its ability as a sophisticated and experienced responding company.

However, should the Department disagree, respondent notes that TKAST's error in not maintaining the BULL system was completely inadvertent and unintentional, and nothing in the Department's verification report indicates otherwise. TKAST claims that even if a respondent does not act to the "best" of its ability, the Department nevertheless has the discretion to decline to apply adverse facts available in light of all circumstances. *See Nippon Steel v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003). Respondent states that CIT recently explained, "the agency's discretion *may* be influenced, but it is not precluded, by a respondent's inadvertence or mistake." *See AK Steel* at 12-13 (CIT August 25, 2004).

Alternatively, if the Department determines to continue to apply facts available to TKAST's costs in the final results, respondent requests that the Department exercise its discretion to accept verified data and neutral existing facts. In particular, respondent requests that the Department apply the facts only to the POR that falls in 2003.

Because TKAST was unable to provide documents to substantiate the costs claimed for certain products selected by the Department for examination during verification, petitioners assert that TKAST failed to substantiate the costs claimed in its questionnaire responses. Therefore, petitioners argue that the Department correctly applied partial adverse facts available in its preliminary margin analysis.

Petitioners contend that the Department should disregard TKAST's assertion that the Department should accept TKAST's data or apply neutral facts available on the basis that it has cooperated in current and past administrative reviews. In particular, petitioners argue that to do so the Department would have to look outside the record of this review, ignore the results of its verification in this review, and to accept data that was not verified. Additionally, petitioners urge the Department to reject TKAST's suggested methodology (*i.e.*, use TKAST's costs verified in the 2001-2002 administrative review) because the verification proceedings were intended to substantiate the weighted-average costs reported by TKAST in the instant review, rather than weighted-average costs for a different time period. Therefore, petitioners assert that the Department cannot and should not use non-record information from verification proceedings in a prior review as the basis for approving the weighted-average cost data submitted by TKAST in the instant review.

Petitioners argue that the Department's application of partial adverse facts available was appropriate because TKAST failed to substantiate its reported product specific costs, and thus, the Department should continue to use partial adverse facts available for these costs in the final results.

**Department's Position:**

We agree with petitioners that we should continue to apply partial adverse facts available in accordance with section 776(a)(2)(D) and (b) of the Act. We disagree with TKAST's argument that, for the final results, the Department should either accept its information as reported or apply neutral or non-adverse facts available. Contrary to respondent's assertions, the Department was not able to verify that TKAST's reported standard costs for three pre-selected product models (*i.e.*, CONNUMs) matched the standard costs reported in the company's standard cost ledger.

As discussed in detail in the Department's Sales and Cost Verification Report, TKAST failed to maintain all cost files associated with its phased-out cost accounting system - the BULL system. Consequently, TKAST was unable to provide Department officials with the specific and necessary detailed breakdown from the BULL system in order to illustrate how the standard costs for each production phase were derived for any of the CONNUMs pre-selected by the Department for verification purposes.[1] *See* Memorandum to the File through Abdelali Elouaradia, Program Manager, Office 6, AD/CVD Operations, Verification of Home Market Sales and Cost Questionnaire Responses Submitted by ThyssenKrupp Acciai Speciali Terni S.p.A., dated July 9, 2004 (Sales and Cost Verification Report) at 27.

Therefore, because we were unable to verify fully TKAST's standard cost data with respect to certain products, we are unable to determine that TKAST's product-specific costs are either an accurate or a reasonable reflection of the company's own production experience. Cost information is vital to our dumping analysis, because: 1) it provides the basis for determining whether comparison market sales can be used to calculate NV; and 2) in certain instances (*e.g.*, when there are no comparison market sales made at prices above the cost of production (COP)), it is used as the basis of NV itself. In cases involving a sales-below-cost-investigation, as in this case, lack of accurate COP/CV information renders a

[1] The Department specifically requested this information in its verification outline and expected to be able to verify all cost-related documents, as this is the practice for any sales or cost verification. *See* the Department's Letter to TKAST, Verification Agenda, dated June 3, 2004, at 10.

company's response so incomplete as to be unuseable. Based on all of the above and pursuant to section 776(a)(2)(D) of the Act, we continue to find it necessary to calculate TKAST's costs for certain products based on facts available as the Department could not verify the cost information provided by TKAST for the record of this review.

Moreover, in accordance with section 776(b) of the Act, if the Department finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may use information that is adverse to the interests of the party as facts otherwise available. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See Statement of Administrative Action* (*SAA*) accompanying the Uruguay Rounds Agreement Act (URAA), H. Doc. No. 316, 103d Cong., 2d Session at 870 (1994). Furthermore, "an affirmative finding of bad faith on the part of the respondent is not required before the Department may make an adverse inference." *See Nippon Steel Corporation v. United States*, 337 F. 3d 1373, (Fed. Cir. 2003) (*Nippon Steel*) ("Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquires . . ."). We have determined that TKAST did not act to the best of its ability in this proceeding, as required by section 776(b) of the Act, because we find that TKAST failed to maintain records necessary for the Department's determination in the instant review. As such, respondent did not put forth maximum effort to make such information available to the Department.

TKAST claims that it acted reasonably and to the best of its ability in assuming that it was not required to maintain the detailed cost database that was the source of the regularly generated ledgers and records in question. However, we find that, as one of the requesting parties, well-versed in the Department's antidumping duty procedures, TKAST has an obligation to maintain company records that contain the relevant information it relied upon when responding to our questionnaire responses (and that was examined by the Department during the verification of the previous administrative review), which is necessary for verification thereof, and which may be used in our analysis. In *Nippon Steel,* the Federal Circuit stated that, "{w}hile the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping. It assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken and requires that importers, to avoid a risk of an adverse inference determination in responding to Commerce's inquiries: (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce . . ." *See Nippon Steel* 337 F.3d. at 1382. Therefore, we find it appropriate to use an inference that is adverse to the interests of TKAST in selecting from among the facts otherwise available. By doing so, we ensure that TKAST will not obtain a more favorable result by failing to cooperate than had it cooperated fully in this review. *See SAA* at 870.

An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. *See* section 776(b) of the Act. Accordingly, for purposes of these final results, we continue to base TKAST's costs on the average total reported cost of manufacturing (TCOMH) and variable cost of manufacturing (VCOMH), weighted by production quantity on a grade-specific basis, as adverse facts otherwise available. Where the reported total cost of manufacturing (TOTCOM) for the control number (CONNUM) was higher than the weighted-average TCOMH for that CONNUM's grade, we relied upon the CONNUM-specific data for TOTCOM and VCOMH. Otherwise, we used the weighted-average TCOMH by grade in our calculation of TOTCOM and VCOMH. For programming details, *see* Memorandum to the File through Abdelali Elouaradia, Program Manager, Office 6, AD/CVD Operations, Analysis Memorandum for the Preliminary Results, dated July 29, 2004 (Prelim Analysis Memo). A public version of the analysis memorandum is on file in the Central Records Unit (CRU), room B-099 of the Herbert C. Hoover Department of Commerce building, 1401 Constitution Avenue, NW, Washington, DC.

**Comment 3: Deduction of Technical Service Expenses from U.S. Price**

Respondent states that the technical services expenses reported in field TECHSERU reflect only the indirect selling expenses of the technical services department in Italy, rather than expenses incurred in the United States during the POR. In particular, respondent argues that the TECHSERU expense reflects an indirect selling expense incurred regardless of whether its distributors are affiliated or unaffiliated in the United States. Respondent states that pursuant to the Department's policy and court precedent, the TECHSERU should not be considered a CEP expense because it was not incurred due to a specific United States sale. Therefore, respondent requests that the Department not deduct the technical service expense as part of the U.S. CEP expense.

Petitioners claim that the Department should continue to deduct technical service expenses from TKAST's U.S. price. In particular, petitioners note that section 351.402(b) of the Department's regulations states that the Department will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchase, "no matter where or when paid." Citing the Preamble to the Department's regulations, in which, according to petitioners, the Department explains that it will deduct expenses related to commercial activities in the United States even if the foreign parent of the affiliated U.S. importer pays those expenses. *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27351 (May 19, 1997) (Preamble). Petitioners claim that the excerpt at footnote 6 to TKAST's case brief shows that the expenses in question relate to commercial activities in the United States. Specifically, petitioners state that TKAST's description shows that the expenses at issue include costs to prepare and provide mill test certificates provided to unaffiliated U.S. customers for all sales of prime products. *See* TKAST's case brief at 10, n.6. Moreover, petitioners assert that TKAST has confirmed that these mill certifications are provided to customers in Italy and to U.S. customers and it would be inappropriate for the Department to deduct these expenses from NV (as part of the CEP offset), but not deduct the same expenses from CEP.

Because the expenses at issue are related to commercial activities in the United States specific to the sales to unaffiliated purchases, petitioners argue that the Department should, consistent with it regulations and practice, continue to deduct technical service expenses from U.S. price for its final analysis. *See Preliminary Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 69 FR 43389 (July 20, 2004).

**Department's Position**:

It is the Department's practice to deduct expenses incurred in the home market (in this case, Italy) related to economic activity in the United States. In reviewing information on the record, we find that TKAST's technical service department incurred expenses associated with TKAST USA's sales of subject merchandise to unaffiliated U.S. customers; *i.e.*, expenses incurred by TKAST's technical service department in Italy relating to pre-sale technical assistance, sample analysis, and warranty claims for sales to unaffiliated customers in the United States. Due to the proprietary nature of this issue, *see* the Memorandum to the File through Abdelali Elouaradia, Program Manager, Office 7, AD/CVD Operations, Analysis Memorandum for the Final Results, dated February 7, 2005 (Final Analysis Memo), for a detailed discussion of the services provided by TKAST's technical service department on U.S. sales to unaffiliated customers. A public version of the analysis memorandum is on file in the CRU, room B-099 of the Herbert C. Hoover Department of Commerce building.

As stated by petitioners, the Preamble to the Department's regulations states that the Department will deduct all CEP expenses related to the first sale to an unaffiliated U.S. customer " * * * even if, for example, the foreign parent of the affiliated U.S. importer pays those expenses." *See also SAA* at 823. The CIT has upheld such deductions. *See Mitsubishi Heavy Industry Ltd. v. United States*, 54 F. Supp. 2d 1183 (CIT 1999). Because we were able to determine that the indirect selling expenses reported in field TECHSERU by respondent were associated with economic activity occurring in the United States, we find it necessary to adjust U.S. price for these expenses. Because TKAST is not able to distinguish between domestic and export market technical service expenses, TKAST allocated these expenses over total SSSS in coils sales revenue in order to derive an indirect selling expense factor. Therefore, consistent with Department practice and in accordance with section 772(d)(1) of the Act, we deducted from the U.S. price indirect selling expenses (including expenses incurred by TKAST's technical service department in Italy) related to economic activity in the United States. *See Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 69 FR 68309 (November 24, 2004) and accompanying Issues and Decision Memorandum at Comment 4.

**Comment 4: Treatment of Non-Dumped Sales**

Respondent requests that, for purposes of these final results, the Department include so-called "negative margins" in its calculation of the aggregate margins and discontinue its practice of "zeroing," (*i.e.*, failing to give credit for non-dumped transactions when calculating the weighted-average dumping margin). In prior proceedings of this case, respondent notes that the Department rejected similar arguments raised by TKAST. Respondent also notes that, in all instances, the Department rejected TKAST's argument regarding this issue for two reasons: (1) the Department is required by the Act to "employ this methodology," and (2) it is not obligated to conform its practices based on World Trade Organization (WTO) decisions that state otherwise. *See Stainless Steel Sheet and Strip in Coils from Italy: Final Results of Antidumping Administrative Review*, 68 FR 69382 (December 12, 2003) and accompanying Issues and Decision Memorandum at Comment 5. However, respondent claims that neither of the above-stated reasons are still valid.

Respondent states that, in its past calculation of individual dumping margins, the Department appears to have, in the process of setting model-specific margins to zero – assumed that if NV is less than the export price or the CEP, it cannot "exceed" it, and therefore, cannot be negative. As such, respondent states that the Department has set these margins to zero. However, respondent argues that an "amount" does not have to be positive. Respondent notes that *Black's Law Dictionary* (6th ed. 1990) defines amount as "the whole effect, substance, quantity, import result or significance." Thus, respondent asserts that a quantity can be positive or negative and similarly a dumping margin could be positive or negative. By this definition and interpretation, respondent contends that the statute does not require the practice of "zeroing."

According to respondent, the Federal Circuit and the CIT affirmed that the Act does not require the Department to employ a "zeroing" methodology but that this practice is a permissible construction of the statute in *Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004) (*Timken* 2004) and *SNR Roulements et al. v. United States*, No. 01-00686, Slip. Op. 04-100, at 20 (CIT August 10, 2004) (*SNR Roulements*), respectively.

Respondent argues that the methodology used by the Department is inconsistent with WTO rules as interpreted by two decisions of the Appellate Body (*i.e.*, *EC-Bed Linen*[2] and *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (August 11, 2004) (*U.S.-Softwood Lumber*)). According to respondent, the WTO found that the Department's refusal to offset or reduce the amount of dumping found in its calculation by non-dumped comparisons in the context of an investigation was not consistent with U.S. obligations under the *WTO Anti-Dumping Agreement*.

Although the "zeroing" issue before the WTO Appellate Body in *US - Softwood Lumber* arose in the context of an investigation, respondent argues that the WTO Appellate Body fundamentally held that the product under investigation must be treated as a whole, and that the prices of export transactions

[2] Report of the Appellate Body on the Complaint of India Concerning *European Communities - Antidumping Duties On Imports of Cotton-Type Bed Linen From India*, WT/DS141/AB/R (March 1, 2002) (*EC-Bed Linen*) at www.wto.org.

should be considered in their entirety. *See US - Softwood Lumber* at 36. Likewise, respondent asserts that, in the context of administrative reviews, if the Department sets the comparisons with "negative dumping margins" to zero, it has effectively found dumping for sub-categories (indeed individual transactions) as opposed to the product under investigation as a whole, as required by the definition of dumping contained in Article 2.1, which applies throughout the agreement - to administrative reviews as well as to investigations. *See WTO Anti-Dumping Agreement*. Based on all of the above, for purposes of these final results, respondent submits that the Department revise its past practices with respect to "zeroing" in light of recent U.S. case law and the ongoing WTO dispute with the European Communities (EC).

Petitioners state that TKAST incorrectly relies on the Appellate Body's recent decision in *U.S.-Softwood Lumber* as support for its claim that the Department's methodology is no longer valid. In particular, petitioners argue that the *U.S.-Softwood Lumber* decision, by its express terms, is limited to the Department's policy "as applied" to facts specific to the Department's antidumping duty investigation on softwood lumber from Canada, rather than a ruling on the WTO consistency of the U.S. policy "as such." *See U.S.-Softwood Lumber* at 63. Because the *U.S.-Softwood Lumber* ruling was confined to the particular facts of that case, petitioners claim that this ruling does not address the matter at issue nor is it controlling or instructive for the Department with regard to the instant review.

Citing *Timken* 2004, petitioners contend that the Federal Circuit upheld the Department's treatment of non-dumped sales in the context of administrative review proceedings because this approach comports with the Department's calculation of dumping margins on an entry-by-entry basis, for duty assessment purposes, by allowing the Department to fully neutralize dumped sales without having an effect on fair-value sales. Petitioners note that in *Timken* 2004, the appellate court expressly upheld the numerous decisions of the CIT that have previously found the Department's treatment of non-dumped sales to be reasonable and in accordance with law. *See Timken* 2004, 354 F.3d at 1343.

Petitioners assert that in its final analysis of this review, the Department's responsibility is to interpret the U.S. antidumping statute, which necessarily often means "filling gaps" that Congress has either deliberately or inadvertently left in the statutory regime. Citing *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), petitioners state that the courts have long recognized that in light of the antidumping law's inherent complexity, the agency's attempts to interpret and apply the statute are entitled to special deference. Moreover, petitioners claim that 19 USC § 3533, addressing the procedures governing U.S. responses to WTO dispute settlement decisions, expressly prohibits the agency to interpret and apply the WTO agreements or decisions of WTO dispute settlement bodies, as suggested by TKAST. Specifically, 19 USC § 3533(g) recognizes that WTO agreements and rulings do not have the status of "supreme law" in the United States. In summary, petitioners contend that the WTO agreements are not a self-executing treaty and they apply in the United States only to the extent they have been implemented into U.S. law by the legislature, such as in the URAA, which instructs that recommendations in WTO rulings will be adopted in U.S. law and practice only after careful and deliberate evaluation by Congress and the affected agency.

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

We disagree with TKAST and have not changed our calculations of the weighted-average dumping margin as suggested by the respondent for these final results. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. *See e.g., Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 FR 50408 (October 3, 2001), and accompanying Issues and Decision Memorandum at Comment 1; *Final Results of Administrative Antidumping Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 69 FR 61649 (October 20, 2004), and accompanying Issues and Decision Memorandum at Comment 7; and *Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 69 FR 68309 (November 24, 2004), and accompanying Issues and Decision Memorandum at Comment 8. Furthermore, the CIT has consistently upheld the Department's treatment of non-dumped sales. *See, e.g., SNR Roulements*; *Corus Engineering Steels, Ltd. v. United States*, Slip Op. 03-110 at 18 (CIT 2003) (*Corus*); *Timken* 2004 at 1341; and *Bowe Passat* at 1150. Finally, the Federal Circuit in *Timken* 2004 has affirmed the Department's methodology as a reasonable interpretation of the statute.

As noted above, TKAST asserts that the WTO Appellate Body rulings in *EC-Bed Linen* and *U.S.-Softwood Lumber* render the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. However, the Federal Circuit in *Timken* 2004 specifically found *EC-Bed Linen* was not only distinguishable but, more importantly, not binding. With regard to *U.S.-Softwood from Canada*, in implementing the URAA, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." *See SAA* at 660. The *SAA* emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . . " *See 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)).

TKAST argues that the EC WTO dispute challenging the practice of "zeroing" "as such" will result in a ruling against Department policy, and therefore, the Department should take preemptive measures by changing its policy in the instant review. The EC WTO dispute is ongoing, and no ruling has been made. Accordingly, TKAST's argument is premature.

As discussed below, we include U.S. sales that were not priced below NV in the calculation of the weighted-average dumping margin as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow U.S. sales that were not priced below NV to offset dumping margins found on other sales.

Section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate 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 value exceeds export price (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) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applying 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 on sales that did not fall below NV permitted to cancel out the dumping margins found on other sales.

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

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that the U.S. Customs and Border Protection (CBP) is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows the CBP to apply this rate to all merchandise subject to review.

**Comment 5: Ministerial Error Relating to the Addition of Billing Adjustments to Home Market Price**

Respondent claims that the Department should correct a ministerial error and subtract (not add) billing adjustments to home market price and other calculations within its Home Market Sales SAS Program.

Petitioners did not comment on this issue.

**Department's Position:**

In reviewing sales traces performed during verification, the Department finds that in the preliminary results, it inadvertently erred when it added rather than deducted billing adjustments

from TKAST's home market price and other calculations. For example, *see* Verification Exhibit 13. Accordingly, for these final results, we have deducted billing adjustments from TKAST's home market price and other calculations. For programming details, *see* Final Analysis Memo.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final antidumping 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