

MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the New Shipper
Review and the Administrative Review of Oil Country
Tubular Goods, Other Than Drill Pipe, From Korea

SUMMARY:

We have analyzed the case briefs and rebuttal briefs of interested parties in response to Oil Country Tubular Goods, Other Than Drill Pipe, From Korea: Preliminary Results of New Shipper Review and Antidumping Duty Administrative Review, and Rescission, in Part, of the Antidumping Duty Administrative Review, 67 FR 57570 (September 11, 2002) (Preliminary Results). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review:

1. Freight Revenue and Constructed Export Price (CEP)
2. Indirect Selling Expenses in Korea
3. Cash Deposit Instructions for Husteel
4. Liquidation of Shinho Steel/Husteel's Entries

Comment 1: Freight Revenue and the Constructed Export Price

SeAH Steel Corporation (SeAH) maintains that, for certain U.S. sales, it charged the U.S. customer freight and product prices separately. For these sales, SeAH contends that it reported freight revenue (FRTREVU), the product price (GRSUPRU), and the related inland freight expense (INLFWCU), when incurred. SeAH notes that, consistent with the final results of the most recently completed review of this order, the Department did not include FRTREVU in the calculation of the starting price for U.S. sales where SeAH reported FRTREVU but did not report

a corresponding freight expense in the INLFWCU field. (See Oil Country Tubular Goods, Other Than Drill Pipe, From Korea: Final Results of Antidumping Duty Administrative Review, 67 FR 12520 (March 19, 2002) (“Fifth Review”).) In its brief, SeAH states that it believes that the Department applied the methodology in the Fifth Review because it “misunderstood that SeAH does sometimes receive the freight revenue component of the price but does not pay freight on those sales (generally because of a change in the terms of sale).” Further, SeAH contends that it clarified the record of the instant review in order “to avoid the same misunderstanding.” Specifically, SeAH contends that the record of this review shows that in some cases, SeAH “was paid freight revenue when no freight costs were incurred by SeAH.” As such, SeAH argues that the Department should revise its margin calculation so that all reported FRTREUVU will be part of the starting price in the calculation of CEP.

IPSCO Tubulars Inc., Lone Star Steel Company, and Maverick Tube Corporation (domestic interested parties) contend that the Department’s decision to exclude FRTREUVU from the calculation of starting price for sales which SeAH did not report a corresponding INLFWCU was proper and consistent with the Department’s practice in the Fifth Review. The domestic interested parties maintain that SeAH has not demonstrated in this review that, in such instances, FRTREUVU was part of the purchase price negotiated with its U.S. customers. The domestic interested parties also claim that SeAH has not shown that its customers have forsaken their “claim to a refund.” As such, the domestic interested parties urge that the Department should not revise its calculation of starting price for the relevant sales.

The domestic interested parties also argue that the Department need not expend scarce administrative resources parsing out this issue. The domestic interested parties contend that the Department may “decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise” 19 U.S.C. § 1677f-1(a)(2). The domestic interested parties cite to section 351.413 of the regulations which define insignificant adjustments as “any individual adjustments having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the export price, constructed export price, or normal value.” The domestic interested parties contend that the effect of the modification to the calculation of CEP requested by SeAH amounts to an insignificant adjustment as defined by the Department’s regulations. Accordingly, the domestic interested parties urge the Department to use its discretion and not make this insignificant adjustment.

Department Position: In the Preliminary Results, we did not include FRTREUVU in the calculation of the starting price for U.S. sales where SeAH reported FRTREUVU but did not report a corresponding freight expense in the INLFWCU field. We have continued to apply this methodology for these final results for the following reasons.

The information of the record on the current review with respect to this issue is essentially the same as the information on the record of the Fifth Review. Notwithstanding SeAH’s assertion that it clarified the record of this review with respect to these sales, we note that SeAH’s attempts at clarification were limited to a statement that sometimes it “charged customers and was paid

freight revenue when no freight charges were incurred by SeAH” and a statement that attributed this practice to changes in terms of sale. However, aside from these general statements, we note that SeAH did not provide documentation for the record which explained this practice. Moreover, with respect to the sales in question, SeAH has not specifically claimed a change in delivery terms, much less provide information on the record demonstrating such a change in terms.

In the instant review, SeAH reported that the vast majority of its U.S. sales were made through its U.S. sales channel 1. SeAH also reported that for its U.S. channel 1 sales, the negotiated delivery terms were either: prepaid freight which obligated SeAH to deliver the merchandise; or will call/collect auto which called for an “ex-warehouse” delivery where SeAH would not incur outbound freight expenses. For a complete analysis of the sales in question, see the business proprietary version of the Memorandum to File “Whether we should continue to exclude freight revenue from the calculation of Constructed Export Price for sales which SeAH did not report a corresponding inland freight expense.”

In the Fifth Review, the omission of a corresponding INLFWCU for the sales in question affected only a few sales and involved a relatively minor expense. However, the Department still excluded FRTREVU as part of the starting price for CEP. Consistent with the Department’s decision in the Fifth Review, the Department’s analysis here also must take into account that SeAH did not report the INLFWCU associated with the FRTREVU for the sales in question. Accordingly, to the extent that SeAH did not report INLFWCU to offset FRTREVU, the Department will continue to exclude FRTREVU as part of the starting price in our analysis.

Comment 2: Indirect Selling Expenses in Korea

SeAH contends that the deduction of its foreign indirect selling expenses (DINDIRSU) and foreign inventory carrying costs (DINVCARU) from U.S. price in the instant review contravenes the Department’s practice, applicable regulations, and its antidumping manual which limit the deduction for selling expenses to those expenses “associated with economic activities occurring in the United States.” SeAH acknowledges that the Department also deducted DINDIRSU and DINVCARU in the Fifth Review. SeAH contends that it did not appeal the Department’s deduction in the Fifth Review because it had “little impact on the margin.” Notwithstanding that fact, SeAH holds that the Department’s decision in the Fifth Review was “contrary to law” and that the continued use of that methodology is “equally unlawful and inappropriate.”

SeAH argues that the Department relied on Mitsubishi Heavy Industries, Ltd. v. United States, 54 F. Supp. 2d 1183 (CIT 1999) (Mitsubishi) and Porcelain-on-Steel Cookware From Mexico, 65 FR 30068 (May 10, 2000) (Mexican Cookware) to support its decision to deduct DINDIRSU and DINVCARU in the Fifth Review. SeAH maintains that neither Mitsubishi or Mexican Cookware provides authority for the Department’s treatment of foreign indirect selling expenses in the instant review. SeAH contends that in Mitsubishi, there was no presumption that foreign indirect selling expenses were associated with economic activity in the United States. Rather,

SeAH maintains that the Department established “that certain of the home-market indirect expenses were associated with U.S. activity. . . .” In addition, SeAH holds that before making its deduction of foreign indirect expenses associated with U.S. activity, the Department “removed the following types of expenses incurred in Japan from the indirect selling expense pool: salaries and related expenses, office expenses, planning expenses, consumable stationary expenses, books and printing expenses, insurance, employee education, and department, section, and other charges.”

SeAH contends the Department’s reliance on Mexican Cookware is misplaced because the facts in Mexican Cookware do not resemble the facts in the instant case. SeAH acknowledges that the Department deducted indirect selling expenses from certain sales which the Department reclassified as CEP sales. However, SeAH holds that the Department did so because the respondents explicitly acknowledged that the parent company incurred “expenses related to order solicitation” in the United States on sales to the unaffiliated customer. SeAH maintains that the Department did not, however, deduct any indirect selling expenses incurred in the home market that were associated with the respondent’s sales to its U.S. importer.

Moreover, SeAH contends that in Porcelain-on-Steel Cookware From Mexico, 66 FR 12926 (March 1, 2001) (Mexican Cookware II), the Department stated its policy on the deduction of indirect selling expenses from CEP as follows:

Under the post-URAA statute, the Department no longer deducts selling expenses associated with the foreign producer’s sale to the affiliate from the U.S. price when it calculates the margin based on CEP. The SAA describes how Congress intended for the Department to treat these expenses under the post-URAA statute, clearly stating that, in calculating the CEP, the Department is to deduct from the starting price only expenses “associated with economic activities occurring in the United States.” See SAA at 823. The remedy sought by the petitioner would eliminate the equilibrium embodied in the post-URAA statute by reducing U.S. price without a comparable reduction to the home market price.

SeAH contends that unlike Mexican Cookware, the record of the instant review establishes that this is a “classic” CEP case in which all sales in the U.S. market were sold by its U.S. affiliate, PPA. SeAH states that the record shows that PPA inventoried the vast majority of merchandise sold in the United States and further manufactured it before selling it to unaffiliated U.S. customers. SeAH also maintains that its role in U.S. sales was limited to communicating with its PPA and processing the affiliated party sales between SeAH and PPA.

SeAH also states that in the Fifth Review, the Department concluded that SeAH had not provided “all information necessary to demonstrate the extent to which the expenses covered by DINDIRSU and DINVCARU relate to SeAH’s sales to PPA,” as opposed to sales to the unaffiliated customer in the United States. SeAH argues that contrary to the Department’s position in the Fifth Review, it was “the respondent’s burden to document that selling functions captured in the DINDIRSU and DINVCARU relate solely to affiliated party sales,” the Department’s position in Mitsubishi was that “{i}n the absence of record evidence to the

contrary, it would be unduly punitive to presume that such expenses were incurred on the sale to the unaffiliated customer.”

Regardless, SeAH contends that in the instant review, it provided all of the information necessary to identify the expenses associated with economic activity in the United States in the form of a selling functions chart listing the activities related to sales and identifying the party responsible for the activity and the degree of involvement. According to SeAH, this chart not only confirms that PPA was responsible for all selling functions associated with sales to unaffiliated U.S. customers it also shows that SeAH’s involvement was limited to arranging for delivery of the merchandise to PPA’s inventory.

Thus, SeAH contends that the record in this review is devoid of evidence that any of SeAH’s selling expenses incurred in the home market were associated with economic activity in the United States and/or sales to unaffiliated parties in the United States. As such, SeAH argues that the Department’s deduction of SeAH’s home market indirect selling expenses from the CEP price is contrary to law.

The United States Steel Corporation (petitioner) contends that, as in the Fifth Review, SeAH failed to provide information showing that any of its DINDIRSU and DINVCARU expenses related solely to sales to PPA. Moreover, the petitioner argues that evidence on the record shows that some of the selling activities related instead to sales to unaffiliated U.S. customers. Consequently, SeAH is not entitled to an adjustment to remove these expenses from the CEP deductions.

The petitioner argues that the Department not only asked SeAH to list all selling activities and services performed in the U.S. market and the foreign market but also asked SeAH to specify which services are provided by SeAH and which are provided by its affiliate. Moreover, the petitioner contends that, for CEP sales, SeAH was required to state the extent to which its selling functions related to its sales to PPA, and the extent to which they related to PPA's sales to unaffiliated U.S. customers. The petitioner contends that SeAH provided a list of the selling functions performed, SeAH failed to state whether those activities related to its sales to PPA, or to PPA's resales to unaffiliated U.S. customers.

Nevertheless, the petitioner argues that an examination of the record shows that the activities included in DINDIRSU relate to SeAH's sales to unaffiliated U.S. customers. The petitioner contends that DINDIRSU, for the vast majority of SeAH’s sales, consists solely of a two selling functions: strategic and economic planning and price negotiations. The petitioner argues that strategic and economic planning is normally geared toward generating and supporting sales to unaffiliated customers. In addition, the petitioner holds that price negotiations also relate to sales to unaffiliated customers. Specifically, the petitioner maintains that the record shows that for each Channel 2 sale, SeAH granted its approval to an inquiry before the sale from PPA to the unaffiliated customer could be finalized. The petitioner claims that this activity, which took

place in Korea, is related to the sale to the unaffiliated U.S. purchaser. Moreover, the petitioner contends that there is no evidence that SeAH conducted any “negotiations” regarding its sales to PPA independent of the negotiations surrounding PPA's sales to unaffiliated U.S. customers.

The domestic interested parties argue that SeAH is incorrect in characterizing the Department’s practice regarding the deduction of indirect selling expenses and inventory carrying costs incurred in the home market. The domestic interested parties cite to Mitsubishi, which, according to the domestic interested parties, permits the Department to deduct these expenses. The domestic interested parties maintain that in Mitsubishi, the CIT stated that “under the statute, Commerce has the authority to deduct indirect selling expenses that are associated with the sales of exports in the United States from CEP, whether incurred in the United States or the home market.”

The domestic interested parties contend that section 351.402(b) of the Department’s regulations state “[i]n establishing constructed export price under section 772(d) of the Act, the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid.” The domestic interested parties argue that pursuant to the regulations, the Department’s practice, as illustrated in the Decision Memorandum in Mexican Cookware, has been to deduct indirect selling expenses and inventory carrying costs when the expenses relate to the sale to an unaffiliated purchaser.

The domestic interested parties maintain that SeAH provided no information showing that the selling functions captured in these two expenses relate to SeAH’s sales to PPA, their affiliated reseller, as opposed to PPA’s sales to unaffiliated customers in the United States.

Department Position: Pursuant to section 772(d) of the Act, the Department will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser no matter where or when paid. As such, in the Preliminary Results, we deducted foreign indirect selling expenses (DINDIRSU) and foreign inventory carrying costs (DINVCARU) because such expenses related to the sale to an unaffiliated U.S. purchaser. (See Mexican Cookware.)

Section 351.401(b)(1) of the Department’s regulations requires the interested parties in possession of information relevant to a claimed adjustment to establish the amount and nature of the particular adjustment to the Department’s satisfaction. Therefore, it is the respondent’s burden to document that the selling functions captured in the DINDIRSU relate solely to affiliated party sales. We disagree with SeAH’s contention that it provided all information necessary to demonstrate the extent to which the expenses covered by DINDIRSU relate to SeAH’s sales to PPA. To the contrary, SeAH has not established that the sales functions covered by DINDIRSU relate solely to its affiliated party transactions with PPA.

SeAH did submit a list of selling functions which identifies those functions performed by SeAH and those by PPA. The list identified two selling activities covered by DINDIRSU: strategic and economic planning and price negotiations, both of which we conclude are normally geared toward generating and supporting sales to unaffiliated customers. As such, we conclude that SeAH has not demonstrated which selling expenses covered by DINDIRSU should be removed from the deduction to CEP. Therefore, we will continue to include DINDIRSU in our deductions from CEP.

With respect to DINVCARU, we inadvertently included DINVCARU in the deduction of selling expenses from CEP. Accordingly, we have amended the margin calculation so that DINVCARU is not deducted from CEP for the purposes of these final results of review.

Comment 3: Cash Deposit Instructions for Husteel

Shinho Steel states that it changed its name to Husteel during the course of this review and prior to the Department's verifications at Husteel's headquarters in Korea and, subsequently, at Shinho America's facility in California. Shinho Steel maintains that at both locations, the Department verified in detail the nature of the name change including an examination of each of the factors considered by the Department in a "successor-in-interest" changed circumstances review, including management; production facilities; supplier relationships; and customer base.

More specifically, Shinho Steel contends that the Department verified that (1) the name change was made to enhance the Company's image; (2) the Company's business activities remained the same (with the exception that the Company would engage in two additional consulting services involving software development and corporate restructuring); (3) the same two production facilities – Incheon and Daebul – produced the same products both before and after the name change; and (4) the same customer base and supplier base existed under both names.

Shinho Steel points out that, despite confirming at verification in May 2002 that Shinho Steel operated under the name Husteel, the Department continued to identify the reviewed respondent as "Shinho Steel" in the discussion of both the cash deposit rate and the assessment rate in the Preliminary Results. Shinho Steel argues that while it is appropriate to issue the assessment instructions in Shinho Steel's name, as the sales used to calculate the dumping margin were made under that name and will be liquidated under that name, it is meaningless to issue cash deposit instructions in the Shinho Steel name, rather than the Husteel name, when the company no longer operates under the name "Shinho Steel." Rather, Shinho Steel maintains that as all of the company's exports are currently made under the Husteel name, Husteel's name should be added to the cash deposit instructions.

Neither the petitioner nor the domestic interested parties commented on this issue.

Department Position: In the Preliminary Results, we pointed out that Shinho Steel had advised the Department that it had legally changed its name to Husteel Co. Ltd. We also noted that a

changed circumstances review addressing this name change was being conducted on the antidumping duty order on Certain Circular Welded Non-Alloy Steel Pipe from Korea (A-580-809). The Department has since completed that changed circumstances review and found that Husteel was the “successor-in-interest” to Shinho Steel for antidumping duty cash deposit purposes and that Husteel would be assigned the same cash deposit rate with respect to the subject merchandise as the predecessor company, Shinho Steel. See Certain Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Changed Circumstances Review, 67 FR 69716, (November 19, 2002). As such, Husteel will be assigned the same cash deposit rate with respect to the subject merchandise as Shinho Steel, the predecessor company. This cash deposit requirement will be effective upon publication of these final results.

Comment 4: Liquidation of Shinho Steel/Husteel’s Entries

Husteel contends that in its initial response to the Department’s questionnaire, it reported U.S. sales that were sold and entered during the new shipper POR, August 1, 2000 through February 28, 2001. Husteel notes that the Department subsequently required that Husteel report all sales made during the new shipper POR regardless of when the entry was made. Husteel points out that the Department verified all the sales data and calculated dumping margins for those sales in the Preliminary Results. Since it is the Department’s practice to avoid reviewing the same sales twice, Husteel argues that the Department should issue liquidation instructions covering all sales reviewed by the Department.

Husteel acknowledges that the Department’s normal assessment methodology provided for under section 351.212 (b)(1) calculates the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise and applying the assessment rate to the entered value of the merchandise. However, Husteel contends that the Department has discretion to apply a different assessment methodology on a case-by-case basis. Husteel cites to Freshwater Crawfish Tail Meat from the People’s Republic of China, 67 FR 19546 (April 22, 2002) (Crawfish), to show that the Department has the latitude to liquidate entries in the review period based on a prior period margin to avoid double-counting the same sales in two consecutive reviews. Husteel contends that in Crawfish the Department refused to review sales that had entered during the review period but were sold and reviewed in the prior period. Rather, Husteel maintains that the Department applied the rate assessed in the prior review period, when the sales were made.

Neither the petitioner nor the domestic interested parties commented on this issue,

Department Position: The Department does have discretion to apply its assessment methodology to avoid double-counting the same sales in two consecutive reviews. The record of this new shipper review shows that Shinho Steel made very few sales during the POR for its new shipper review and that some of these sales entered the commerce of the United States subsequent to the POR. In our Preliminary Results, the Department analyzed all these sales regardless of when they entered. The Department has also found that there were no subsequent

sales or entries other than those reported by Shinho Steel throughout the remainder of the standard review period covered by the concurrent administrative review. Because of these unique circumstances (i.e., only a few sales and entries, the ability of the Department to match sales and entries, and no subsequent sales or entries), we find it appropriate to apply the calculated assessment rate to the sales analyzed in this new shipper review, regardless of when these sales entered.

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 results of the new shipper review and the administrative review and the final weighted-average dumping margins in the Federal Register.

Agree _____ Disagree _____

Faryar Shirzad
Assistant Secretary
for Import Administration

Date