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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Administrative Review of the Antidumping Duty Order on Oil
Country Tubular Goods ("OCTG") from Korea

On September 8, 2005, the Department of Commerce ("the Department") published Oil Country Tubular Goods from Korea: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 53340 (September 8, 2005) (Preliminary Results).

Since the Preliminary Results, the Department received a timely filed case brief from Husteel Co., Ltd. ("Husteel") and SeAH Steel Corporation ("SeAH") (collectively, "Respondents") and a timely filed rebuttal case brief from IPSCO Tubulars, Lone Star Steel Company, and Maverick Tube Corporation (collectively, "Petitioners").

Issue: The use of China, a non-market economy, as the basis for normal value.

We have analyzed all comments and rebuttal comments submitted by Respondents and Petitioners. No issues were raised by Petitioners. Only one issue was raised by Respondents in its case brief: the Department's rejection of the People's Republic of China (PRC) as a third-country market as the basis of normal value ("NV") in the Preliminary Results. Respondents argue that the Department's decision not to use the PRC as a third-country market was incorrect. Petitioners argue that the Department properly disregarded sales to the PRC. For these final results, as discussed below, we recommend that the Department continue to find that sales in a non-market economy ("NME") cannot serve as the basis for NV and to use Constructed Value ("CV") for Husteel and sales to Canada for SeAH as the basis for NV. We recommend that you approve the analysis and position we have developed in this memorandum.

Summary of Arguments

Respondents' Arguments

1. The Statute Does Not Preclude Use of the PRC as a Third-Country Market as the Basis of Normal Value

Respondents argue that, when a home-market price does not permit a proper comparison, section 773(a)(1)(B)(ii) of the Act directs the Department to use prices in a third-country market that are (I) representative; (II) of sufficient aggregate quantity; and (III) not subject to a “particular market situation” that prevents a proper comparison. Respondents argue that their sales to the PRC meet all three of these criteria.

A. Sales to the PRC are Representative

Respondents argue that the Department has, in effect, stated that since the PRC is a NME country, prices for goods sold for export to the PRC cannot be used as the basis for establishing NV because those prices are “unrepresentative.” Respondents state that the term “representative” is not defined in the statute, regulations, legislative history, nor has it been defined by the courts. Respondents argue that the term cannot have the meaning attributed to it by the Department in this review, claiming that the implicit conclusion in the Department’s finding is that sales made by companies in market economy countries to entities in NMEs are not made at market prices. Respondents state that this contradicts the Department’s practice in calculating NV in NME cases. Respondents note that, according to 19 C.F.R. 351.408(c)(1) of the Department’s regulations, “there is a preference for calculating normal value in an NME case using prices paid by the NME producer in a market economy currency to market economy suppliers for the NME producer’s factors of production.” See 19 CFR 351.408(c)(1). Therefore, Respondents argue, the Department does not reject prices simply because the purchaser is located in an NME.

Respondents claim that numerous court decisions confirm its contention that sales made by market-economy suppliers to NME purchasers and paid for in market economy currencies are made at market prices which are used in the calculation of NV in NME cases. Respondents cite Lasko Metal Products Inc. v. United States, 43 F.3d 1442, 1146 (Fed. Cir. 1994), in which the Federal Circuit stated “the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was the price charged for those supplies on the international market.” Respondents also cite to Shakeproof Assembly Components Div. of Ill. Tools Works vs. United States, 268 F.3d 1376, 1383 (Fed. Cir. 2001) (Shakeproof), where the Federal Circuit upheld the use of prices where “the {Chinese} producer purchased its steel wire rod from a market economy supplier through a market economy trading house and paid in market economy currency.” Respondents contend that in Shakeproof, the Court quoted the Department’s determination, which stated that there was “an actual, market economy price for steel wire rod paid by the {non-market economy} producer in question. It is an actual price determined by market economy forces which has been paid to the market economy supplier by

the respondent in convertible currency. Thus, the actual market economy price is both reliable and accurate.” Id at 1380. Respondents state that, as in Shakeproof, the prices paid by the NME producer in this case were: 1) determined by market economy forces; 2) reliable and accurate; and 3) paid in U.S. dollars.

Respondents argue that the statute cannot be read to consider sales to an NME purchaser from a market-economy supplier to constitute market prices in one context, and non-market prices in another very similar context. This, Respondents argue, would violate general rules of statutory construction. Respondents contend that, according to this interpretation, when a market-economy producer sells to an NME customer, this sale can be disregarded for purposes of calculating NV for the Korean producers, but accepted as an input from a market-economy supplier used to establish NV for the NME producer who purchased the material.

B. Sales to the PRC are of Sufficient Aggregate Quantity

The Respondents state that there is no question of sufficient aggregate quantity of export sales to the PRC.

C. Sales to the PRC are not Subject to a “Particular Market Situation”

Respondents contend that the Department has not found, and should not find, that there is a “particular market situation” that would disqualify the PRC as a comparison market. Respondents argue that, although Petitioners cited this provision as the basis for their position, they offer no evidence to support this position other than that the PRC government controls the OCTG industry. According to Respondents, the “particular market situation” provision in the Statement of Administrative (“SAA”) accompanying the Uruguay Round Agreements Act (“URAA”) holds that a “particular market situation” exists where “there is government control over pricing to such an extent that. . . prices cannot be considered to be competitively set.” H.R. Doc. No. 103-316 (1994), Vol. I at 822. Respondents state that to implement this provision, the Department requires evidence of not only government involvement but also government control over prices. Respondents cite Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. 18404, 18411-12 (April 15, 1997), where the Department found some evidence of Korean government involvement in domestic steel pricing, but determined there was not “convincing evidence” that the Korean government controlled prices to such an extent that those prices could not be considered to have been competitively set. Respondents argue that, in this case, there is no evidence of any government involvement, let alone evidence of government control over pricing. Respondents state that prices in this review are freely negotiated with the unaffiliated Korean trading company, and that the location of the ultimate purchaser in an NME does not mean that the NME government had any control over the price negotiated between Respondents and the Korean trading companies. Therefore, Respondents argue, there is no “particular market situation” in this case.

2. *The Department Has Previously Used the PRC as a Third-Country Market*

Respondents argue that the Department has used the PRC as a third-country comparison market to calculate NV in other cases. Respondents argue that in Certain Polyester Staple Fiber from Korea: Preliminary Results of Antidumping Duty Administrative Review, 67 FR 39350 (June 7, 2002) (Polyester Staple Fiber from Korea) the respondent in that case reported that the PRC was its largest viable third-country market. The Department accepted this argument and used the PRC sales to calculate NV.

Respondents further argue that the Department used the PRC as a third-country comparison market in another OCTG case. During its investigation of Antidumping Duty Order: Oil Country Tubular Goods from Argentina, 60 FR 41055 (August 11, 1995) (OCTG from Argentina), the Department determined that the PRC was the appropriate comparison market for determining NV because: 1) sales to the PRC were the largest of any third country; 2) the OCTG exported to the PRC was the most similar to the OCTG exported to the U.S.; and 3) the PRC market was most similar to the U.S. market in organization and development. See Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Oil Country Tubular Goods from Argentina, 60 FR 6503 (February 2, 1995) and Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Argentina, 60 FR 33539 (June 28, 1995).

Respondents argue that even though the decision in OCTG from Argentina was made prior to the URAA, it does not change the fact that the Department found that the PRC and U.S. markets were similar. Respondents state that the Department found sales to the PRC were made at market prices in OCTG from Argentina, and there is no reason to make a different determination in the instant case.

3. *Chinese Sales Made at Market Prices to Market-Economy Purchasers*

Respondents contend that POR sales made to the PRC were made through unaffiliated Korean trading companies, which charged market prices to their PRC customers. Respondents argue that all price negotiations are done by the unaffiliated Korean trading company. Respondents further argue that they are not involved in the price negotiations between the trading company and the PRC customer.

Respondents claim that the neither the Department nor Petitioners provide any evidence showing that the PRC's NME status distorts the prices paid by PRC customers for OCTG. Respondents take issue with Petitioners' argument that prices paid by PRC customers must be distorted because they are located in an NME country. Respondents also disagree with Petitioners' use of Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986) (Georgetown Steel), to support Petitioners' argument regarding NME pricing since: 1) this case relates to whether subsidies can be applied to NMEs and the treatment of exports from NMEs; and 2) nothing in Georgetown Steel relates to sales by market-economy suppliers to NME companies.

Respondents conclude that all the evidence on the record of this case shows that POR sales of OCTG to customers in the PRC were transactions between market-economy companies through a market-oriented sales process at market prices.

Petitioners' Arguments

1. Chinese Sales Are Unrepresentative According to the Law

Petitioners disagree with Respondents' argument that the statute, regulations, and Department's practice do not support the Department's rejection of the use of the PRC as a third-country comparison market in the instant review. Petitioners maintain that the rejection of the PRC as a third-country comparison market is in full accordance with the law and facts of this case.

Petitioners state that the term "representative" is not defined in the statute. Therefore, Petitioners argue that Congress has granted the Department the authority to determine when third-country prices are representative. Petitioners argue that the Department has "considerable discretion" in defining this term in making its determinations. Petitioners argue that OCTG sales to the PRC are unrepresentative and are not an accurate determination of NV. Petitioners cite to Section 771(18) of the Act, which states that an NME "does not operate on market principle of cost or pricing structures, so that sales of merchandise in such a country do not reflect the fair value of the merchandise." See Section 771(18) of the Act. Therefore, Petitioners argue that since "economic conditions in China clearly affect the prices of the sales at issue" the Department's decision not to use third-country sales to the PRC as the basis for NV was correct.

Petitioners argue that the Department's determination of PRC sales as unrepresentative is consistent with the Department's NME methodology for determining NV. Petitioners state that, as discussed in Georgetown Steel, Congress enacted a special "surrogate" country methodology for determining when inputs for NMEs were being "dumped" in the US. In Georgetown Steel, the Federal Circuit quoted the Senate response when it stated that in "state-controlled-economy countries . . . the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison." See Georgetown Steel, 801 F.2d at 1316 (quoting S. Rep. No. 1298, 93d Cong. 2d Sess. 174 (1974)). Therefore, Petitioners state that the distortion inherent in sales of subject merchandise between an NME producer and a market-economy purchaser requires that the Department calculate NV based on surrogate countries and factor values. Petitioners contend that purchases by NME buyers from market-economy sellers are influenced by market conditions in the NME in the same manner that sales by NME sellers to market-economy buyers are influenced by these conditions. Therefore, Petitioners argue, the Department's ruling that subject merchandise sold to the PRC is "unrepresentative" of market prices is in accordance with the surrogate country methodology.

2. *Difference in Prices Between PRC and Market-Economy Sales*

Petitioners point to differences in Respondents' prices for OCTG sales to the PRC and those for OCTG sales into market economies as clear evidence of the unrepresentativeness of sales to the PRC. Petitioners argue that the prices at which OCTG is sold to the PRC are clearly not driven by market-economy forces.

Petitioners argue that, as noted by Congress, supply and demand forces do not produce prices in the NME that are comparable to market prices. Petitioners claim that NME prices are dictated by non-market conditions which affect the price the purchaser is willing to pay market-economy sellers. Petitioners contend that the price paid by the purchasers of OCTG in the PRC were well below the market price, stating "most Chinese producers receive massive government subsidies for energy and materials used in production, and Chinese laborers are paid well-below laborers in most market economies, making the cost of producing OCTG in China less than the cost of production in Korea. As a result, Chinese OCTG purchasers are not willing to pay the market price for OCTG from Korea."

3. *The Department's Regulations do not Require the Department to Find PRC Sales to be Representative*

Petitioners disagree with Respondents' argument that the Department's regulation applying surrogate valuation demonstrates that the Chinese OCTG sales are not influenced by non-market conditions. 19 C.F.R. 351.408(c)(1) provides that "where a factor is purchased from a market-economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier." See 19 C.F.R. 351.408(c)(1). Petitioners argue that this regulation applies to the surrogate valuation of inputs used to produce subject merchandise and not to sales of merchandise to an NME country which are used as the basis of NV.

Petitioners argue that a purchase made by an NME purchaser from a market-economy supplier does not insulate the transaction from the distortions caused by non-market conditions in the NME. Petitioners argue that the price that NME purchasers pay for subject merchandise and substitutable merchandise in the NME is similarly affected by the same NME conditions which render the price charged by the NME seller to both NME and market purchasers unrepresentative of the fair value of the subject merchandise.

Petitioners argue that although the purchase price paid by NME respondents for inputs produced in a market-economy can be used for surrogate values, these surrogate values are not free from the distortion of non-market conditions in the NME country. Petitioners contend that the influence of non-market conditions does not invalidate these prices for deriving surrogate values since these surrogate values are the "best information available." Petitioners state that the price paid by an NME respondent for a market-economy input would ordinarily be a more reliable surrogate value for that input than would be the price paid for that input by an NME respondent to an NME supplier. However, Petitioners contend, in this case there is better information

available, namely third-country sales to a market-economy and the use of constructed value, both of which are subject to market-economy forces.

Petitioners contend that the two prior cases, in which the Department used Chinese third-country sales for NV are not relevant to this case. The first case, OCTG from Argentina, occurred before the URAA. Petitioners state that the only case that used PRC third-country sales after the URAA was Polyester Staple Fiber from Korea. In that case, Petitioners contend, the issue of representativeness was never raised. Therefore, Petitioners argue that Respondents have not cited any policy or practice which support the use of the PRC as a third-country market.

Petitioners disagree with Respondents' claim that PRC sales are made between market economy companies through a market-oriented sales process at market prices. In addition, Petitioners argue, these sales are properly classified as PRC third-country sales, rather than Korean home-market sales, since the producer had knowledge of the ultimate destination.

Petitioners also disagree with Respondents' claim that the transactions are not distorted by non-market conditions. Petitioners argue that the use of a trading company does not change the influence of non-market conditions on the transactions because the end purchasers are located in an NME country and the producers knew the destination of the merchandise at the time of sale.

Department's Position

The Department finds that the decision to disregard Husteel and SeAH's sales of OCTG to the PRC in the Preliminary Results was appropriate. As discussed below, our determination not to use sales to an NME as a basis for NV is supported by the statute, our regulations, and our administrative practice regarding the treatment of NMEs.

In calculating NV, the statute directs the Department to determine which country will serve as a viable market and provide a proper comparison to calculate an accurate dumping margin. Section 773(a)(1)(B)(ii) of the Act provides that NV be based on prices at which the foreign like product is sold (or offered for sale) for consumption in a country other than the exporting country or the United States, if: (I) such price is representative; (II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is five percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export into the United States; and (III) the administering authority does not determine that a "particular market situation" in such other country prevents a proper comparison with the export price or constructed export price.

The Department's regulations at 19 CFR 351.404(c)(2) further provide that the Department may decline to calculate NV in a particular market if it is established that: (1) in the case of either the exporting country or third country, a particular market situation exists; or (2) in the case of a third country only, the prices are not representative. Since the term "representative" has not been

defined in the statute, regulations, or past cases, the Department has the discretion to develop reasonable interpretations of this term.

Moreover, the fact that the statutory requirement for prices to be “representative” only applies to third-country sales and not to home-market sales is an indication that there were concerns about using third-country sales prices as the basis for NV that went beyond the concerns that could be addressed through the “particular market situation” analysis which applies to both third-country and home-market sales.

Because the Department is faced with a situation where it must examine whether sales to the PRC can serve as an appropriate market for purposes of establishing NV for comparison with sales into the United States, the Department finds the statutory provisions defining an NME and our practice regarding NMEs to be instructive to the analysis. Notably, in section 771(18)(A) of the Act, the term NME is defined as any foreign country that the Department determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.

1. Sales into NMEs Are Not Representative Because Prices Are Not Determined on Market Principles.

For the reasons discussed below, we find that the sales made in NMEs are not representative because the prices for such sales are not determined on the basis of market principles. The Department has treated the PRC as an NME in all past antidumping cases, and continues to treat it as an NME in this proceeding. Prices and costs are central to the Department’s dumping analysis and calculation of NV. Therefore, the prices and costs that the Department uses to establish NV must be meaningful measures of value. NME prices, as a general rule, are not meaningful measures of value because they do not sufficiently reflect market-determined demand conditions or the relative scarcity of the resources used in production. Specifically, the demand and supply elements that individually and collectively make a market-based price system work and, as a consequence, make market-based prices and costs meaningful measures of value, are absent in NMEs. See Memorandum for Faryar Shirzad, Assistant Secretary, Import Administration through Jeffrey May, Director, Office of Policy and Albert Hsu, Senior Economist, Office of Policy, from Shauna Lee-Alaia, George Smolik, Athanasios Mihalakas, and Lawrence Norton, Office of Policy: Antidumping Duty Investigation of Certain Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status (November 8, 2002), at 7. Moreover, foreign suppliers to NMEs are often competing with domestically set prices. Therefore, sales into an NME may very well not be at prices that reflect the fair value of the merchandise. See section 771(18)(A) of the Act. Therefore, sales prices into an NME cannot be considered to be “representative,” as required by the statute.

2. *The Valuation of Market Economy Inputs in NMEs Does Not Conflict with the Department's Determination.*

Respondents have argued that the Department's decision not to use sales to the PRC as the basis for NV conflicts with the Department's practice in calculating NV in NME cases. Specifically, Respondents argue that in past cases the Department has used prices paid in NMEs for inputs purchased from market economy countries, where those inputs were purchased in a market economy currency. However, we find the Respondents' arguments unconvincing because the Department's methodology for selecting appropriate third-country prices is distinguishable from its methodology for calculating NV in NME cases.

In identifying dumping from a NME country, the Department calculates NV by valuing the NME producer's factors of production in a market economy country. For purposes of valuing the factors of production, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Department normally will use the price paid to the market economy supplier. See 19 CFR 351.408(c)(1). We find that our practice of valuing factors of production from market economy suppliers and paid for in a market economy currency does not conflict with our determination in this case to reject an NME as a third-country comparison market for several reasons.

First, the Department's regulations and practice make clear that the Department has the discretion to use market economy prices paid for market economy inputs purchased in the NME; whereas the regulations do not discuss the use of NMEs as a third country basis of NV. Second, the "best available information" standard is the basis for determining factors or inputs in NME countries. See Section 773 (c)(1) of the Act, generally ("the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country"). The standard for determining prices to a third country as the basis for NV delineated in Section 773 (a)(1)(B), on the other hand, is not a "best available information" standard.

As previously discussed, Section 773 (a)(1)(B)(ii) of the Act states that third-country price may be used as the basis for NV, if: (I) such price is representative; (II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is five percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export into the United States; and (III) the administering authority does not determine that a "particular market situation" in such other country prevents a proper comparison with the export price or constructed export price. We note that this standard is more rigorous than the "best available information" standard used in the calculation of NV in NMEs. The Act requires that third-country prices be representative, whereas such a standard is not required for the inputs used in calculating NV for NMEs. A higher standard is necessary because the third-country market prices form the entire basis of NV, whereas the "best available information" standard only applies to a portion of the NV. Thus, we find that the "best available information" standard used in NME cases is different than the

standard for determining prices to a third country in market economy cases. Therefore, this decision is not contrary to our practice for of using the price of market economy inputs in NME cases.

3. *The Department's Determination Does Not Conflict with Previous Determinations where the Department Used the PRC as a Comparison Market.*

Respondents have argued that the Department has used the PRC as the basis for NV in previous cases. We acknowledge that the Department used third-country prices to an NME as the basis for NV in Certain Polyester Fibers and OCTG from Argentina. OCTG from Argentina was concluded prior to the inclusion within the statute of the provisions pertaining to representative prices, and therefore is not applicable in this review. In Certain Polyester Fibers, the only post-URAA case in which the PRC was used as a third-country market, no party raised the issue of the appropriateness of these prices as a basis for NV. As such, there is no established practice indicating that third-country sales to an NME are suitable for purposes of calculating NV.

4. *Respondents' OCTG Sales Are Third-Country Sales to an NME.*

Respondents have argued that its OCTG sales in question were made between two companies in a market economy at market prices (*i.e.*, the Korean producer and the Korean trading company). Respondents state that these are not direct sales to the PRC purchasers, but are in fact sales made through unaffiliated Korean trading companies. The Department finds that although Respondents' sales were made through Korean trading companies, these sales are properly classified as sales to the PRC, since Respondents were aware of the ultimate destination.

This determination is consistent with the Department's practice. In Notice of Final Determination of Sales at Less Than Fair Value: IQF Red Raspberries from Chile, 67 FR 35790 (May 21, 2002) and the accompanying Issues and Decisions Memorandum, at Comment 7, the Department classified certain sales as third-country sales instead of home-market sales because the respondent had knowledge of the ultimate destination at the time of sale. Consistent with our practice, these sales are accurately classified as sales to the PRC, an NME country, because Respondents had knowledge of the ultimate destination of the merchandise.

For the reasons provided above, we find that sales to NME countries cannot serve as a reliable basis for the establishment of NV. We find that these sales are not representative of the fair market value of the merchandise because the prices are not determined on the basis of market principles. Additionally, we find that this determination does not conflict with the Department's practice of using market economy inputs in NMEs, nor does it conflict with previous determinations. We also find that these sales are in fact sales to an NME, since Respondents had knowledge of the ultimate destination of the merchandise at the time of the sale.

Recommendation

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

Agree

Disagree

David M. Spooner
Assistant Secretary
for Import Administration

Date