

Public Version

FINAL RESULTS
OF REDETERMINATION
PURSUANT TO COURT REMAND
NIPPON STEEL CORPORATION V. UNITED STATES
99-08-00466

BACKGROUND

The Department of Commerce (the Department) has prepared these Final Results of Redetermination pursuant to the order issued by the Court of International Trade (CIT) with regard to the mandate issued by the Court of Appeals for the Federal Circuit (CAFC) in Nippon Steel Corp. v. United States, 337 F.3d 1373, 1384 (Fed. Cir. August 8, 2003) (“Nippon”). The CIT remanded this case to the Department for further proceedings not inconsistent with the CAFC’s opinion which 1) reversed the CIT’s finding that the Department’s application of partial adverse facts available with regard to NSC’s untimely submitted conversion factor data was not supported by substantial evidence and in accordance with 19 U.S.C. §1677e(b); 2) reversed the CIT’s decision to uphold the Department’s methodology for using, as the “starting price” for U.S. sales, the net yen price reported by Nippon Steel Corp. (NSC); and, 3) vacated as moot the CIT’s holding that 19 C.F.R. § 351.104(a) is invalid. A draft version of these results of remand was provided to the parties for comment. The Department’s responses to these comments are included in these Final Results of Redetermination.

ANALYSIS

In order to fulfill the mandate of the CAFC and apply partial adverse facts available with regard to NSC’s untimely submitted conversion factor data, the Department utilized the same methodology used in the final results of the original investigation. *See* Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 64 Fed. Reg. 24329, 24361-62 (May 6, 1999)(“Final Determination”). In selecting a partial adverse facts available margin for theoretical-weight sales, we used margins from individual actual-weight sales of the affected product, as identified by control numbers (CONNUMs). These sales involved substantial commercial quantities and fell within the mainstream of NSC transactions. We calculated a simple average of the highest calculated sale-specific margins for these CONNUMs by using the highest margins based on actual-weight transactions from CONNUMs which also included theoretical-weight transactions.

In order to comply with the court’s order to use as the “starting price” for NSC’s U.S. sales the U.S. dollar price on the sales invoice, we first identified the field in NSC’s database that reported the gross unit price in dollars recorded on NSC’s invoice to the customer. We then adjusted this gross unit price in dollars to account for the same standard trading company discount that was reflected in the net yen price used in the Final Determination. For certain U.S.

sales made through one of NSC's affiliated resellers, we used the reported resale price in U.S. dollars. No discounts were included in these resale amounts.

COMMENTS

Comment 1: Application of U.S. Dollar Price to Section 129 Determination

Petitioners note that the portion of the remand that deals with the change in the starting price for U.S. sales should not be limited by the November 22, 2002 effective date of the Section 129 Determination, because the WTO dispute resolution report underlying that determination did not address the question of starting price. See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled, Flat-Rolled Carbon-Quality Steel Products from Japan, 67 FR 71936, 71939 (December 3, 2002) (“Section 129 Determination”). NSC did not comment on the effective date issue.

Department's Position:

We agree with petitioners that the issues addressed in the WTO Appellate Body report and the associated Section 129 Determination made by the Department govern the margin to be applied to entries made on or after the Section 129 effective date. This includes, for purposes of these final results of redetermination, the treatment of NSC's U.S. sales made on a theoretical weight basis. However, the other issue associated with this remand, the use of the dollar invoice price rather than the yen invoice price as the starting price in the margin calculation, was not addressed before the WTO and was not an issue in the Section 129 Determination. Therefore, the Section 129 Determination has no limiting effect upon the application of this remand with respect to the choice of starting price for U.S. sales.

Accordingly, the Department has calculated two margins for NSC entries in these Final Results of Redetermination. The first margin, 21.12 percent, reflects the use of the same adverse inference made in the original investigation with respect to the margins for NSC's theoretical weight sales, but changes the starting price for U.S. sales from yen to U.S. dollars. This margin will be applied to unreviewed entries made prior to November 22, 2002, the effective date of the Section 129 Determination. The second margin, 19.95 percent, reflects the various changes made to the original investigation margin as a result of the Section 129 Determination (including the changes with respect to margins for NSC's theoretical weight sales), but also reflects the use of the U.S. dollar starting price. This margin will be applied to unreviewed entries made on or after November 22, 2002.

Comment 2: Selection of Adverse Facts Available for Theoretical Weight Sales

NSC contends that the draft remand determination fails to adequately explain how the Department's selection of an adverse facts available methodology for NSC's theoretical weight

sales comports with the requirement in prior judicial decisions for selection of such a methodology. Specifically, NSC states that Congress “intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.” F. LII De Cecco Di Filippo Fara S. Martino v. United States (“De Cecco”), 216 F.3d 1027, 1032 (Fed. Cir. 2000). NSC further relies upon Krupp Thyssen Nirosta Gmbh v. United States (“Krupp I”), 2000 Ct. Int’l Trade LEXIS 91, *12, for the principle that the Department must explain how its choice of adverse facts available satisfies the statutory purpose; that is, is not “aberrant” or “unduly punitive.” NSC states that the Department’s choice of an adverse facts available margin fails to comply with these requirements, produces aberrant results, and unreasonably relies upon sales that it claims are not in substantial commercial quantities and are outside the mainstream of NSC’s transactions during the period of investigation. NSC further argues that the Department has already rejected the use of “the highest sale-specific margins” in its selection of adverse facts available for Kawasaki, another respondent in the same investigation, and claims that the Department offered no explanation as to why it reached a different decision for NSC’s highest margin sales.

NSC claims that, at a minimum, the Department should calculate the adverse facts available rate using a weighted average, rather than a simple average, of the margins from the sales of products sold on both an actual weight basis and theoretical weight basis. Similarly, NSC argues that, rather than using the highest transaction margin from each product group, the Department should analyze the frequency distribution in each product group to identify what it terms the highest “non-aberrational” margin.

Department’s Position:

In the Draft Results of Redetermination, the Department made only the changes required by the opinion of the CAFC. Thus, in returning to the computer programming for the NSC margin calculation in the original investigation, we returned as well to the adverse facts available margin calculated in the original investigation. We agree with NSC that, in view of subsequent jurisprudence, a more detailed discussion of the methodology used and the rationale underlying it is appropriate. We do not agree, however, that the Department’s original choice of adverse facts available for NSC’s theoretical weight sales was improper.

NSC’s theoretical weight sales were U.S. export sales. When NSC failed to timely report the data (which it had in its possession) that would enable the Department to convert its small number of theoretical weight sales to a basis equivalent to that of its actual weight sales of the same products in the home market, the Department was unable to make the margin comparison for the theoretical weight U.S. export sales. Thus, the Department used a facts available margin for each such export sale.

Because NSC did not cooperate in timely providing the necessary conversion factor, the CAFC agreed that the Department could make an adverse inference in determining the facts available margin with respect to the theoretical weight sales. Nippon, 337 F. 3d at 1384.

In determining the margins for these sales, the Department relied upon NSC's own verified data with respect to the sales of the same products (CONNUMs) for which NSC had made the theoretical weight sales. Commerce first isolated the products sold on a theoretical weight basis, and then identified NSC's U.S. sales of the same products made on an actual weight basis. The Department calculated a margin for each of these actual weight sales that shared the same CONNUMs as the theoretical weight sales, and identified the highest margin for each such CONNUM. The Department further checked that nothing on the record indicated that the transactions thus selected were not conducted in a normal manner. Final Determination, at 24362. The Department then averaged these margins, and applied the resulting average to NSC's U.S. theoretical weight sales.

This choice of adverse facts available fulfills the judicial guidelines referenced by NSC in its comments on the Draft Results of Redetermination. The first prong of the De Cecco standard is that the adverse facts available should result in a "reasonably accurate estimate of the respondent's actual rate." De Cecco, 216 F.3d at 1032. Here, the Department selected NSC's own verified data as surrogate, and applied the facts available at a limited, transaction-specific level, using a margin derived from the same products affected by the absence of the data in question. As a result, this methodology met the first prong of the De Cecco standard. The second prong of the De Cecco standard is that the value selected must serve as a deterrent to withholding data in future proceedings. Id. Here, the use of the highest margin within each CONNUM met the second prong of the De Cecco standard by presumably allowing for "some built-in increase intended as a deterrent for non-compliance." Id.

This choice of adverse facts available also fulfills the guidelines for such selection referenced in Krupp I, producing margins that were non-aberrant, rationally related to the NSC's sales, and indicative of NSC's customary selling practices. Because the Department relied on actual sales from NSC's own sales data, this data was "rationally related" to NSC's sales. Furthermore, the transactions used by the Department were related to the specific products affected by the U.S. theoretical weight sales, thereby ensuring that the margins were customary for these products.

The De Cecco opinion rejected the use of a petition margin that the Court found had been "discredited," but upheld the lower court's decision that Commerce could use the "highest verified margin" for another respondent in a situation calling for a respondent-specific overall adverse facts available margin. Thus, the De Cecco court accepted that a margin that was the "highest" in the relevant sphere was not, for that reason, "aberrant."

NSC argues that some of the margins applied by the Department to the theoretical weight sales of [* * *] CONNUMs are disproportionately high margins because, NSC claims, they involve sales in small quantities and produce aberrant results in the Department's adverse facts available rate. We disagree. Specifically, the margins for the [* * *] transactions that NSC characterized as combining small quantities with abnormally high margins, ranged from [* * *] percent to [* * *] percent. In contrast, the highest margins for the remaining [* * *] CONNUMs, involving theoretical weight sales of somewhat larger commercial quantities than the [* * *]

noted by NSC, represented a very comparable range of margins: from [* * *] percent to [* * *] percent. We note that the highest margin for *all* the CONNUMs at issue was [* * *] percent and involved a sale of more than twice the volume ([* * *] tons) of each of the [* * *] CONNUMs for which NSC suggested that the margin was unduly high because of the quantities involved. Furthermore, the simple average margin Commerce used as the facts available for NSC's theoretical weight sales was [* * *] percent, well within the mainstream of NSC's margins for the affected products, and below the median margin of [* * *] percent found in the range of the [* * *] other CONNUMs which NSC did not contest.

The margins used by the Department for the theoretical weight sales simply reflect a large range within the actual sales prices NSC itself presented as being in the ordinary course of trade. They do not demonstrate that sales at the "highest" margin within this range are "aberrant." Rather, they demonstrate that normal prices can vary significantly. Nothing in the record indicated that these sales were in any way a departure from NSC's customary selling practices. Thus, the standards set forth in Krupp I were also met on the facts of this case.

Furthermore, it bears mentioning that the margins originally rejected by the court in Krupp I (highest normal value reported, by CONNUM) were later affirmed by the same court, once a further explanation of the Department's selection had been provided. See Krupp Thyssen Nirosta GmbH v. United States ("Krupp II"), 2001 Ct. Intl. Trade LEXIS 91, *6 - *14 (July 9, 2001) ("adverse facts selected and used by Commerce were not unduly harsh or punitive"). Thus, Krupp II also confirms that the use of the "highest" product-specific margins does not prevent the achievement of the balance sought by section 19 U.S.C. § 1677e(b). Cf. Krupp II, at * 13 *with* Krupp I, at * 12.

Finally, the Department's decision to disregard an "outlier" margin in selecting the adverse facts available margin for certain of Kawasaki's sales was in no way inconsistent with the adverse facts available methodology it used for NSC's theoretical weight sales. In the Final Determination, the Department applied, as adverse facts available for a group of sales for which Kawasaki had failed to provide information needed to calculate a margin, "the second highest calculated margin for an individual CONNUM." 64 FR at 24369. The Department explained that, in the preliminary determination, it had used the highest margin by CONNUM as facts available for the Kawasaki sales in question. Id. Although no party had commented unfavorably on that choice, the Department had, nevertheless, reexamined its decision. Id. In doing so, it found that "the margin chosen was not sufficiently within the mainstream of KSC's sales in that the rate was derived from sales of a product that accounted for a very small portion of KSC's total sales as well as the highest rate by CONNUM." Id. The Department sought a margin which was "indicative of KSC's customary selling practices and . . . rationally related to the transactions to which the adverse facts available {were} being applied." Id. Therefore, the Department selected a margin for a CONNUM that involved substantial commercial quantities and fell within the mainstream of KSC's transactions. Id. The Court upheld the Department's selection of the second-highest margin for any CONNUM as adverse facts available. Kawasaki Steel Corp. v. United States, 110 F. Supp. 2d 1029, 1039-40, 1043 (CIT, August 1, 2000).

Commerce's use of the highest margins, rather than the "second highest" margins, in calculating an adverse facts available margin for NSC was the result of different underlying data, not a different, or more stringent, analysis. Thus, Commerce similarly "sought a margin that {was} indicative of NSC's customary selling practices and . . . rationally related to the transactions to which the adverse facts available {were} being applied." 64 FR at 24362. Therefore, the Department selected "margins from individual sales of CONNUMs that involved substantial commercial quantities and fell within the mainstream of NSC's transactions." *Id.*

The adverse facts available margin used for Kawasaki was the second highest from *all* of Kawasaki's U.S. sales in *all* CONNUMs, whereas, the NSC margin was drawn, instead, from the more closely related group of CONNUMs involving theoretical weight sales. *Id.* Thus, the Department's rejection of the single highest margin for Kawasaki is not dissimilar to the Department's use of the margins chosen for the NSC adverse facts available calculation, since both adequately represented the set of merchandise to which the adverse facts available rate would be applied, and ensured that the margins bore a rational relationship by eliminating all margins outside the affected product group. Because the Department found a broad range of margins, as explained above, indicating that there was no clear relationship between the size of the transaction-specific margins at issue and the volume of the associated sales, there was no compelling reason for the Department to depart from the adverse facts available methodology used in the original investigation.

Comment 3: Notification of Draft Remand Results

NSC notes its objection to the short time period provided by the Department for parties to comment on the Draft Results of Redetermination. Further, NSC contends that it did not receive a copy of the draft results until Friday, November 21, 2003, the day after it was issued by the Department. As a result, NSC states that it virtually had no opportunity to review the draft results before the Monday deadline established by the Department.

Department's Position:

Contrary to NSC's assertion, the Department notified counsel for NSC of the Draft Results of Redetermination via a representative of our Administrative Protective Order Office, who directly contacted the offices of Gibson, Dunn & Crutcher LLP on Thursday, November 20, 2003 at 12:19 p.m. If NSC had retrieved the documents when first notified, it would have had approximately four days in which to comment. Given that the Department was limited to 30 days in which to comply with the CAFC's mandate to address the parties' comments, and to alter its margin programming in both the original investigation and the Section 129 Determination, we were only able to provide a limited amount of time for commenting on the Draft Results of Redetermination.

RESULTS OF REDETERMINATION

The Department has determined that this recalculation of NSC's margins, using the U.S. dollar export price on the invoices and applying the Department's original partial adverse facts available methodology with regard to NSC's theoretical-weight sales, results in an antidumping margin for NSC which is not inconsistent with the opinion of the CAFC in this case. Based on this recalculation, a final antidumping margin for NSC of 21.12 percent will apply to all unliquidated NSC entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after February 19, 1999 and prior to November 22, 2002. See Antidumping Duty Order; Certain Hot-Rolled, Flat-Rolled, Carbon-Quality Steel from Japan, 64 FR 34778, 34780 (June 29, 1999).

No annual review of NSC entries has ever been conducted. Therefore, the results for NSC set forth in the Section 129 Determination will govern entries of merchandise entered or withdrawn from warehouse, for consumption, on or after the November 22, 2002, the effective date of that determination with respect to the less than fair value investigation. Because the treatment of NSC's U.S. theoretical weight sales was addressed in the Section 129 Determination, the only issue associated with this remand that will affect entries after that effective date is the use of the dollar invoice price rather than the yen invoice price as the starting price in the margin calculation. Based on our recalculation of NSC's margin program from the Section 129 Determination to include the change to the U.S. dollar starting price, the final antidumping margin for NSC is 19.95 percent. This margin will apply to all unliquidated NSC entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after November 22, 2002.

Holly A. Kuga
Acting Assistant Secretary
for Import Administration

Date