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MEMORANDUM TO: James J. Jochum
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 Fourth Administrative Review of the Antidumping Duty Order on Stainless Steel Plate in Coils (SSPC) from Belgium

Summary

We have analyzed the case and rebuttal briefs of interested parties in response to the preliminary results of this review and to the sales and cost verification reports for Ugine and ALZ, N.V. Belgium (U&A Belgium), TrefilARBED, and Arcelor Stainless U.S.A. As a result of our analysis, we recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comments and rebuttals by parties:

1. Changes in Methodology for Sale without Pay Date

2. U.S. Indirect Selling Expenses/General and Administrative (G&A) Expenses

3. Home-Market Commissions (COMMH) and Indirect Selling Expenses (INDIRSH)

4. Products Hot-Rolled in Germany

5. Scope Language

6. The Reporting of Home-Market and U.S. Sales of Cold-Rolled SSPC

7. Start-Up Costs Incurred by U&A Belgium

8. Offsetting Margins with Above-Normal-Value Transactions

9. Ministerial Errors: Constructed Export Price (CEP) Revenue Calculation and Merging Dates of Payment

Discussion of the Issues

Comment 1: Changes in Methodology for Sale without Pay Date

Petitioners contend that in order to account for a missing payment date for a certain sale reported by U&A Belgium in its Section C questionnaire response, the Department of Commerce (the Department) should use a more accurate reflection of the value of this sale by modifying the price or the pay date of this sale to calculate credit expenses instead of the method used by the Department in the preliminary results. See Memorandum to the File Through Maureen Flannery from Scot Fullerton and Elfi Blum: Analysis for Ugine & ALZ, N.V. Belgium (U&A Belgium for the Preliminary Results of the Fourth Administrative Review of Stainless Steel Plate in Coils (SSPC) from Belgium (October 7, 2004) (Analysis Memo for Preliminary Results). Petitioners argue that the gross unit price reported does not reflect the actual price paid by the customer since there is no indication in the verification reports that the circumstances surrounding this sale changed. According to Petitioners, it cannot be argued that the sale should be treated as a cancelled sale; therefore, this sale must be treated as a de facto discount.

U&A Belgium counters that Petitioners cited no precedent supporting their argument to apply a discount in calculating U.S. sales price. U&A Belgium argues that the Department may not assign a punitive dumping margin to a sale based on post-sale circumstances that were beyond a respondent's control. If the Department were to follow Petitioners' suggestion and apply a discount to an unpaid sale, as an example, U&A Belgium contends that such a policy would in effect be punitive. To illustrate this point, U&A Belgium puts forth a scenario where an exporter sells merchandise for the same price under the same terms in both its home and U.S. markets. Using the methodology proposed by Petitioners, U&A Belgium contends that if a U.S. customer fails to pay the exporter the invoiced amount or goes bankrupt, the Department would designate the bad debt as a discount and then would have grounds to declare that dumping had occurred. To further support their argument, U&A Belgium cites the case of Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 66 FR 45279 (April 28, 2001) (SSSSC from Korea), where the Department rejected the idea of accounting for bad debt as a de facto discount. In that case, the Department instead applied the average credit period extended to the respondent's customers, since this method more accurately reflects the actual price of the subject merchandise.

Department's Position:

In instances of missing payment dates, the Department's practice is to base the payment period for such sales on the length of time between shipment and the last day of verification. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Italy, 62 FR 40422 (July 29, 1998) (Wire Rod from Italy); Extruded Rubber Thread from Malaysia; Final Results of Antidumping Administrative Review, 63 FR 12757 (March 16, 1998) (Rubber Thread from Malaysia);

Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 FR 8909 (February 23, 1998) (SRAMS from Taiwan); and Brass Sheet and Strip from Sweden; Final Results of Antidumping Administrative Review, 60 FR 3617 (January 18, 1995) (Sheet and Strip from Sweden). Based upon the record of this review, the last day of verification is the last day that we can determine with any certainty that the sale in question remained unpaid and that U&A Belgium was still extending credit to this customer. Therefore, the Department has recalculated the imputed credit expenses for this particular sale using the last day of verification as the payment date. See Memorandum to the File Through Maria MacKay from Toni Page and Elfi Blum: Analysis for Ugine & ALZ, N.V. Belgium (U&A Belgium)for the Final Results of the Fourth Administrative Review of Stainless Steel Plate in Coils (SSPC) from Belgium (December 7, 2004) (Final Analysis Memo).

Comment 2: U.S. Indirect Selling Expenses/General and Administrative (G&A) Expenses

Petitioners state that the Department should incorporate in the calculations the revised U.S. indirect selling expense (INDIRSU) ratio, which was submitted by TrefilARBED at verification. U&A Belgium counters that this is no more than a reminder to the Department to implement this correction, since the Department is already aware of the revised expense ratio and intends to adjust INDIRSU accordingly.

Petitioners further assert that revenue added to G&A expenses, which resulted in a revised G&A rate submitted at verification, cannot be properly identified because the verification report provides no narrative determination of the sources of the revenue. Furthermore, U&A Belgium did not provide a narrative explanation of its "miscellaneous" expenses. Therefore, Petitioners claim, the Department is unable to ascertain which line items U&A Belgium omitted from its G&A and were incorrectly applied as offsets to G&A. Petitioners argue that based on Verification Exhibit C-10, U&A Belgium has 1) not reported the individual line-items that make up its G&A numerator; 2) not identified when parts of the selling G&A (SG&A) included in the financial statements as SG&A have been omitted in its G&A numerator and reported elsewhere; and 3) not provided a detailed description of the specific components of its miscellaneous revenue that U&A Belgium applies as an offset to G&A.

Petitioners further argue that certain offsets used by U&A Belgium are not valid offsets nor should they be part of the G&A calculation. Specifically, Petitioners assert that certain elements applied as an offset by U&A Belgium have no apparent or documented connection to the core business, and should have been reported as revenue in the income statement and not as G&A offsets. Petitioners cite Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Round Wire from Taiwan, 64 FR 17336 (April 9, 1999) (SSRW from Taiwan) in support of their argument concerning the Department's practice governing G&A expenses.

U&A Belgium counters that this is a moot point since the Department already revised U&A Belgium's G&A expenses when it calculated the preliminary dumping margin.

Department Position:

The Department has recalculated U.S. indirect selling expenses based on the corrections submitted by U&A Belgium at the on-site verification in New York. Further, in the preliminary results the Department made adjustments to G&A based on the information placed on the record. See Final Analysis Memo. However, based on information obtained at verification, the Department accepted U&A Belgium's explanation that a miscellaneous expense actually constituted a miscellaneous revenue. See Memorandum from Scot Fullerton and Elfi Blum to Maureen Flannery: Sales and Cost Verification of Ugine & ALZ Belgium, N.V. in the Antidumping Administrative Review of Stainless Steel Plate in Coils (SSPC) from Belgium (October 6, 2004) (U&A Belgium Verification Report), at page 21. Therefore, for these final results we have granted U&A Belgium an offset to its G&A expenses by including this miscellaneous revenue in the calculation of the G&A expense ratio.[1] Since the inclusion of the miscellaneous revenue resulted in an insignificant (less than one-hundredth of a percent) change to the G&A expense ratio and would have no impact on the G&A expense calculation or the overall margin calculation, the Department did not further analyze the contents of the miscellaneous category. See 19 CFR 351.413.

Comment 3: Home-Market Commissions and Indirect Selling Expenses

Petitioners contend that the Department did not analyze the applicability of commissions (COMM1H) and indirect selling expenses (INDIS2H) to certain sales in the verification report for U&A Belgium. See U&A Belgium Verification Report. Petitioners further argue that the sales database, Section B of the questionnaire response, and the supplemental questionnaire response do not support the methodology used by U&A Belgium to report U&A Benelux's selling expenses incurred to support sales of SSPC produced by U&A Belgium to unaffiliated customers in lieu of commissions. Furthermore, because there are no commissions paid to unaffiliated parties, Petitioners state U&A Belgium could not demonstrate that the commissions paid to U&A Benelux and U&A S.A. were at arm's length. According to Petitioners, when a commission is paid to U&A Benelux, U&A Belgium reports the indirect selling expenses under COMM1H and does not report it under INDIRS2H. However, when no commission is paid to U&A Benelux, U&A Belgium reports the indirect selling expenses for U&A Benelux under INDIRS2H. Commission payments to U&A S.A. are reported under COMM2H, and U&A Belgium's indirect selling expenses in the field INDIRS1H. Petitioners assert that this method of accounting for payment or non-payment of commissions results in home-market sales with values reported for both COMM1H and COMM2H as well as under both INDIRS1H and INDIRS2H. In addition, Petitioners claim that U&A Belgium reported commissions and indirect selling expenses which pertain to unreported sales of further processed products by U&A Belgium's affiliated customers, i.e., U&A Benelux.

Petitioners state that U&A Belgium claimed in its responses that these expenses incurred by U&A Benelux are appropriately allocated to U&A Belgium's home market sales of SSPC because U&A Benelux incurred those expenses on sales of subject merchandise to the first unaffiliated party.

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[1] In the preliminary results, the Department denied U&A Belgium this offset. See Analysis Memo for Preliminary Results.

Furthermore, Petitioners state that U&A Belgium claimed it cannot report the sale to the first unaffiliated customer for its "transfer sales," i.e. sales to affiliated customers which sold the consumed product to unaffiliated customers. Petitioners contend that neither the commissions paid to nor the indirect selling expenses incurred by U&A Benelux are related to those sales which were made to affiliated customers which consumed the merchandise for further processing into non-subject merchandise. Petitioners further assert that if those sales, instead, are not consumed by the affiliated party, they should be reported as downstream sales by U&A Belgium, and be subject to partial adverse facts available. Petitioners claim that deducting indirect selling expenses or commissions from sales to U&A Benelux is only correct if U&A Benelux was the selling agent for a reported sale to the unaffiliated customer.

U&A Belgium argues that Petitioners have a flawed understanding of the facts because Petitioners do not comprehend the structure of U&A Belgium's sales practice nor the role that U&A Benelux plays in that structure. U&A Belgium counters that it has previously reported on the structure and function of U&A Benelux's role within U&A Belgium. U&A Belgium further contends that its operating structure is detailed in the Department's U&A Belgium Verification Report at page 6. U&A Belgium states that U&A Benelux has two roles: 1) it is the Belgian-based selling agent for U&A Belgium and U&A S.A., and, as such, U&A Benelux is paid a commission for the sales it makes whether or not the sale is to an affiliated or unaffiliated customer; and 2) U&A Benelux is an affiliated customer of U&A Belgium and thus consumes the SSPC it purchases by turning it into non-subject merchandise.

Further, U&A Belgium claims that it paid commissions to U&A Benelux on sales of SSPC produced by U&A Belgium, to both affiliated and unaffiliated customers. U&A Belgium asserts that it has no role in the downstream sales of SSPC that was purchased by U&A Benelux and further processed into non-subject merchandise. U&A Belgium states that the expenses reported in the commissions field (COMM1H) are for U&A Benelux's role as sales agent and not for its role as processor and reseller and thus are not related to downstream sales. U&A Belgium further asserts that the expenses submitted in (COMM1H) refer specifically to U&A Benelux's expenses to sell subject merchandise for U&A Belgium, and that it has properly allocated and represented those indirect expenses, since no commissions are paid to non-affiliates. To bolster its claim, U&A Belgium cites the Department's U&A Belgium Verification Report at page 15 where the Department states that U&A Benelux's indirect selling expenses related to its own merchandise are kept separate from its activities as a sales agent.

Department Position:

The Department did not analyze the applicability of commissions and indirect selling expenses to certain sales in its verification report. See U&A Belgium Verification Report. In accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act) and section 351.307(a), (b)(iv), (c), and (d) of the Department's regulations, the ". . .Department will visit with the persons listed below in order to verify the accuracy and completeness of the submitted factual information." Thus, the Department verified the information with respect to U&A Benelux, as submitted in U&A Belgium's questionnaire responses.

U&A Belgium reports in its section A response of September 11, 2003, that it sold subject merchandise to three affiliated customers which consumed the merchandise. Thus, the Department determined that U&A Belgium did not have any downstream sales to report. The Department agrees with U&A Belgium that Respondent fully explained its relationship with U&A Benelux and U&A S.A. and accounted for all the functions of its affiliated selling agents in their reporting of commissions and indirect selling expenses. Further, U&A Belgium clearly detailed in its responses[2] that it was unable to demonstrate to the Department that its commission payments to its affiliates were at arm's length because U&A Belgium sold through affiliated selling agents only, and the affiliated selling agents sold only for their affiliates. Therefore, as instructed by the Department's questionnaire,[3] U&A Belgium reported the indirect selling expenses of its affiliates in lieu of the actual commissions paid on each sale in the commissions field.

At verification, the Department confirmed that U&A Belgium paid commissions to its affiliates U&A Benelux and U&A S.A., which were in direct relationship to the sale of the subject merchandise. See U&A Belgium Verification Report footnote 7 at page 15. However, it is the Department's practice to use the actual indirect selling expenses incurred by an affiliated selling agent when the respondent cannot prove that the commissions are paid at arm's length. See Notice of Final Determination of Sales at less Than Fair Value: Stainless Steel Bar from France, 67 FR 3143 (January 23, 2002), at Comment 7. Therefore, the Department continues to accept U&A Belgium's reporting of the indirect selling expenses of its affiliates U&A Belgium and U&A S.A. in lieu of commissions.

We do not need to address the issue of whether to allow commission expenses on sales to affiliated customers and sales agents in this case because all sales to U&A Benelux failed the arm's length test and were not included in the calculations. Therefore, for these final results we continue to deduct as commissions, the indirect selling expenses of U&A Benelux and U&A S.A, as reported by U&A Belgium, from the gross unit price of certain home market sales by U&A Belgium, for which U&A Benelux and U&A S.A. acted as selling agents.

Comment 4: Products Hot-Rolled in Germany

Petitioners argue that SSPC which is hot-rolled in Germany and not further cold-rolled in Belgium is within the scope of this review and should be included in the analysis. Petitioners contend that in the preliminary results the Department conditionally accepted U&A Belgium's characterization of those products, albeit without providing a detailed analysis of the bona fides of Respondent's argument. Petitioners assert that U&A Belgium's argument "represents a significant threat to the efficacy of the order of this proceeding." They claim that U&A Belgium is seeking to force the Department into endorsing either hot rolling or annealing and pickling as effecting substantial transformation for SSPC. By forcing a ruling between the two options, Petitioners claim that U&A Belgium will then transfer

[2] See page 34 of the section B response of October 2, 2003, and pages 11 through 13 of the supplemental response of May 26, 2004, and pages 2 and 15 through 16 of U&A Belgium Verification Report.

[3] See field 30.0 of the Department's section B questionnaire.

production to the location where the substantial transformation renders the products out of the scope of the order. U&A Belgium rebuts this argument by stating that Arcelor would not incur extraordinary restructuring costs simply to avoid U.S. antidumping duties. They claim that "mere conspiracy theories," such as this, should not be allowed to undermine Department methodology.

In determining the country of origin, Petitioners argue that the Department is not bound by the same boundaries that apply to Customs cases and that the Department has applied its own substantial transformation test. Petitioners recognize that while hot and cold rolling has traditionally been treated as the point of substantial transformation (see Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip In Coils from the U.K., 64 FR 30688 (June 9, 1999) (UK SSSSC)), the Department has also determined that the order on SSPC requires the merchandise to be annealed and pickled in order to fall within the scope. See Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 FR 27756 (May 21, 1999). Therefore, Petitioners argue, either rolling or annealing and pickling could "theoretically" affect the treatment of subject merchandise, but neither need necessarily be dispositive of scope. According to Petitioners, case precedent and Court of International Trade (CIT) rulings provide the Department flexibility in applying this rule in order to prevent circumvention. "The term 'substantial transformation' generally refers to a degree of processing or manufacturing resulting in a new and different article. Through that transformation, the new article becomes a product of the country in which it was processed or manufactured." See Final Determination of Sales at Less Than Fair Value; Cold-Rolled Steel from Argentina, 58 FR 37062, 37065 (July 9, 1993) (Steel from Argentina). In the case of E.I. Dupont De Nemours & Co. vs. United States, 8 F. Supp. 2d 854, 857 (1998) (E.I. Dupont), the CIT has interpreted the Department's position in Steel from Argentina to mean that the test for substantial transformation is "{w}hether the processes performed on merchandise in a country are of such significance as to require that the resulting merchandise be considered the product of the country in which the transformation occurred." In the same case, the CIT further states that the "substantial transformation" rule provides a means for Commerce to carry out its country of origin examination and properly guards against circumvention of existing orders." See E.I. Dupont at 858.

Petitioners state that the substantial transformation rule must be applied to take into account the remedial purpose of the antidumping laws and to consider the totality of the circumstances surrounding the production and sale of the merchandise. They claim that consideration of other factors involving a tolling relationship in determining the country of origin is not contrary to the statute. In fact, the statute instructs the Department to compare the price of the subject merchandise in the United States to the price of the "foreign like product." A foreign like product, they argue, is defined as merchandise that is "produced in same country by same person," therefore the locus of production and the identity of the producer are specifically linked in determining "foreign like product." Petitioners also argue that "produced in same country" is not specifically defined, and that the statute does not necessarily require the Department to dissect each stage of the production process to determine substantial transformation. Therefore, Petitioners contend, the Department has discretion to perform the substantial transformation test in a manner that compares how much of the production process of the subject merchandise

occurred in Belgium, for example, and how much occurred at the affiliated producer in Germany. Since the investigation indicates that the majority of the value and process is attributable to activity in one country, the Department should recognize that location as the site of production for the purposes of enforcing the antidumping duties.

U&A Belgium argues that the Department should not abandon its well-established rule to determine country of origin, a rule on which every antidumping duty order is based. U&A Belgium disagrees with the Petitioners' claim that "produced in one country" is not specifically defined and therefore open to interpretation. U&A Belgium argues that the statute specifically defines country to mean one country in an antidumping proceeding:

> The term "country" means a foreign country, a political subdivision, dependent territory, or possession of a foreign country, and, except for the purpose of antidumping proceedings, may include an association of two or more foreign countries, political subdivisions, dependent territories, or possessions of countries into a customs union outside the United States.

Petitioners claim that given the complexity of the commercial and legal relationships between Arcelor and its affiliates, the country of origin analysis should incorporate additional circumstances beyond the locations where the rolling and annealing/pickling operations take place. In order to consider the totality of the circumstances in its country of origin analysis, Petitioners propose to examine seven additional factors:

1) SSPC is toll rolled by an affiliate of U&A Belgium, and therefore, ownership and control over the merchandise remains constant throughout the production process. Petitioners contend that the Department "will not consider a toller or subcontractor to be a manufacturer or a producer where the toller or subcontractor does not acquire ownership and does not control the relevant sale of the subject merchandise or foreign like product." See 19 CFR § 351.401(h). "In determining whether a company that uses a subcontractor in a tolling arrangement is a producer pursuant to 19 CFR § 351.401(h), we examine all relevant facts surrounding a tolling agreement." In Stainless Steel Bar from India: Preliminary Results of New Shipper Antidumping Duty Administrative Review, 66 FR 13496 (March 6, 2001), the Department determined that an Indian company was the producer of merchandise which had been hot rolled by an affiliated subcontractor. This was based on the fact that the Indian company: purchased all of the inputs; paid the subcontractor a processing fee for the toll services; and, maintained ownership at all times of the input as well as the final product. See Stainless Steel Bar from India: Preliminary Results of New Shipper Antidumping Duty Administrative Review, 65 FR 59173 (Oct. 4, 2000). Petitioners point out that in Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products From Italy, 64 FR 73234, 73242 (Dec. 29, 1999) the Department stated:

> Significantly, section 351.401(h) of the Department's regulations notes that a subcontractor will not be considered to be a producer where the subcontractor "does not acquire ownership and does not control the pertinent sale of the subject

> merchandise or foreign like product." This provision indicates that ownership of the produced merchandise and control of the relevant sale of such merchandise are important considerations in identifying the producer.

Petitioners argue that since U&A Belgium admits that hot rolling in Germany is performed by an affiliated producer, and that U&A Belgium maintains control of the product throughout the process, the locus of production is in Belgium the whole time, including when the merchandise is in Germany.

2) U&A Belgium does not purchase a product from the German affiliate but is simply purchasing a service. Petitioners believe that the purchase of a service from an affiliate in another country should not determine the locus of production. They also point out that there are no effective commercial borders in the EU and therefore, goods and services can flow freely between countries and among various Arcelor companies.

3) The producers of subject merchandise are collapsible entities and can be treated as a single producer for purposes of the Department's antidumping analysis. Therefore, the country-of-origin should be Belgium.

> In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production. 19 CFR § 351.401(f)(1)

Petitioners state that Arcelor can easily shift production between facilities (in Belgium and Germany) and therefore the facilities should be considered collapsible entities and be treated as such for purposes of the antidumping analysis. This, in turn, would recognize Belgium as the country of origin for all of U&A Belgium's SSPC production, including those coils hot-rolled in Germany and not further cold-rolled in Belgium.

4) Hot-rolled products toll-rolled in Germany are semi-finished products and have no other purpose than to be further processed later on in Belgium, where the annealing and pickling occur, giving the product its essential characteristics. Therefore Belgium should be recognized as the country of origin.

5) The majority of the production process and the overall value come from activities occurring in Belgium. Claiming that minimal production costs are attributed to the tolling process, Petitioners regard the costs incurred from activities in Germany as insufficient to effect a substantial transformation. Therefore, Germany should not be recognized as the country-of-origin.

6) Following the hot rolling process (in Germany or Belgium), the stainless steel sheets that have not yet been annealed or pickled are not yet within the scope of the antidumping duty order. Only

when they are annealed and pickled are they within the scope; therefore, the final step to create an in-scope product occurs in Belgium, not Germany.

7) After the merchandise is annealed and pickled in Belgium, the finished SSPC is sold by U&A Belgium and its affiliates in Belgium or the export market. This final step, Petitioners argue, completes the circle and shows that the whole process of production and sales took place in Belgium, with only a "detour into Germany." Thus, the country of origin is Belgium.

U&A Belgium counters that the "totality of the circumstances" method is an unworkable concept that, if it were implemented, would lead to an endless stream of litigation. They contend that this proposed rule "relies on everything and nothing at the same time."

With respect to whether the production process and overall value from activity in Germany warrant substantial transformation, U&A Belgium claims that this question has been addressed in UK SSSSC. In that case, according to U&A Belgium, the facts were virtually identical and the location of the rolling of stainless steel slab was considered the site of substantial transformation and, therefore, country of origin.

> The processing of slabs into hot bands dramatically changes the physical characteristics of the product, drastically reducing the thickness, extending its length, changing the micro structure and significantly increasing its strength characteristics. Therefore, we find that U.K. slabs hot rolled in Sweden do not fall within the scope of this investigation. Accordingly, we are continuing to exclude hot-rolled sales in our final analysis. See UK SSSSC.

U&A Belgium cites a number of cases, such as Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation, 64 FR 38642 (July 14, 1999) (Hot Rolled Steel from Russia); Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China, 66 FR 22183 (May 3, 2001) (Hot-Rolled Steel from China); and Final Determination at Less than Fair Value: Wax and Wax Resin Thermal Transfer Ribbon from the Republic of Korea, 69 FR 17645 (April 5, 2004) (Thermal Transfer Ribbon from Korea) where the Department has defined annealing and pickling as "minor processing that does not result in a substantial transformation or a change of the country of origin of the product that is processed." In Hot-Rolled Steel from China, the Department stated:

> In this case, the manufacturing process undertaken by Yi Chang in the PRC did not result in a change in the class or kind of merchandise between the third country hot-rolled steel coils and Yi Chang's pickled hot-rolled steel coils. In addition, although Yi Chang does perform some processing on the imported hot-rolled coils (i.e., trimming and pickling), that further processing does not result in a substantial transformation within the context of this antidumping investigation.

See Hot-Rolled Steel from China, 66 FR at 22186.

Therefore, since annealing and pickling are considered minor processes, hot rolling is the last significant phase of processing, and therefore, U&A Belgium claims, Germany should be the country of origin.

U&A Belgium further states that the Department has claimed that toll processing is irrelevant to the determination of country of origin. U&A Belgium argues that the location of substantial transformation, not ownership, is the key determinant for country of origin. To support this argument, Respondent cites the Memorandum from Joseph A. Spetrini to Susan Esserman: Discussion Memorandum: A Proposed Alternative to Current Tolling Methodology in the Current Antidumping Reviews of Carbon Steel Flat Products (December 12, 1994) which states:

> Moreover, for purposes of determining dumping under section 731 of the Act, the Department should distinguish, where appropriate, between the site of production and the location of the person or entity responsible for production, i.e., the "producer." The site of production of the subject merchandise has the legal significance of determining the scope of the order and the country in which FMV must be determined. However the location of the producer has no such significance. Tolling cases often represent situations in which such a distinction is relevant, as the owner and seller of the merchandise may be located in a country other than that in which the tolling takes place. Id at 2

And further:

> Where tolling has resulted in a substantial transformation, and the merchandise resulting from that transformation is subject to an order against the toller's country, we should maintain our current practice of considering that merchandise a product of the toller's country. Id at 7

In reference to the issue of collapsing companies across country lines, U&A Belgium argues that the regulations state that collapsing can only occur within an antidumping proceeding. Since the antidumping proceeding involves merchandise from one country, the Department cannot collapse across country lines. According to Respondent, in the antidumping investigations of stainless steel bar from France and Italy, the Department unambiguously determined that its investigations of affiliated entities located in different countries could not be collapsed into a single investigation.

> The Department's regulations set forth the rules for collapsing. The regulations begin by stating, "{i}n an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of

> either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price and production." Thus, the regulations make clear that collapsing can only occur within "an antidumping proceeding." Because an antidumping proceeding only involves the subject merchandise of one country, this means that the Department cannot collapse producers across country lines under 19 CFR 351.401(f). See Issues and Decision Memo for Antidumping Duty Investigations of Stainless Steel Bar from Italy: Final Determination (January 15, 2002) at page 18; and Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Stainless Steel Bar from France (January 23, 2002) at Comment 1.

U&A Belgium maintains that the statute, requiring antidumping duty orders to be administered on a country-specific basis, has been upheld by the CIT.

> The dumping margin is the amount that the normal value of the foreign like product subject to the antidumping proceeding exceeds the export price of the subject merchandise. 19 USC §1673. The foreign like product is restricted, under any of its definitions in 19 USC §1677(16), to identical or similar merchandise that is produced in the same country as the subject merchandise. See Slater Steel v. United States, 297 F. Supp. 2d 1362, 1365 (CIT 2003) (Slater Steel).
>
> "Normal value" is defined in 19 USC §1677b(a)(1)(B) as home market sales of the foreign like product, third country sales of the foreign like product, or constructed value of the subject merchandise. Under any of these definitions, both the "foreign like product" and the "subject merchandise" must be in the same country as the merchandise that is the subject of the investigation. Congress has further defined a country in antidumping duty proceedings to be "a foreign country, a political subdivision, dependent territory, or possession of a foreign country." This definition does not allow for more than two foreign countries to be counted as one, especially in the instance of antidumping duty proceedings. 19 USC §1677(3). See Id.

Lastly, Petitioners argue that this case has specific circumstances that make it unique and that U&A Belgium has misinterpreted previous rulings in defending their position. Petitioners claim U&A Belgium incorporated decisions from previous cases without taking into account different circumstances which ultimately have a bearing on the outcome:

- U&A Belgium has incorrectly cited the findings in UK SSSSC. The circumstances in the two cases are not "virtually identical" as claimed by U&A Belgium. The main factual difference between the two cases regards control over production. In UK SSSSC, the product was always sold to its affiliate in which ownership and control of merchandise was shifted, following production the merchandise was resold to the original affiliate. In this case, instead, control and ownership of the merchandise remains constant throughout the process.

- U&A Belgium has improperly applied the E.I. DuPont case. That situation was distinguishable from this case as merchandise was sent from a country that was not subject to an antidumping order to a country that was covered by the order.

- U&A Belgium has clearly misinterpreted the scope ruling accompanying the UK SSSSC case. Petitioners argue that, when read properly, the memo would indicate that the merchandise should be of Belgian origin. The scope ruling for the UK SSSSC case said that there was "no logical reason to distinguish between merchandise produced entirely by the seller itself and merchandise which had been produced in part by subcontractors." Petitioners argue then that when tolling has resulted in a substantial transformation and the merchandise resulting from that transformation is subject to an order against the toller's country, the Department will maintain its current practice of considering that the merchandise is a product of the toller's country. However, since there is no order against the subject merchandise in the tolling country, this rule cannot apply. Petitioners argue by implication since only one of the conditions was satisfied the country of origin does not change. See E.I Dupont; Tung Mung Development Co. Ltd, v. United States, 219 F. Supp. 2d 1333, 1343 (Ct. Intl. Trade 2002); and Mitsubishi Elec. Corp. v. United States, 12 C.I.T. 1025, 1046, 700 F. Supp. 538, 555 (1988), aff'd 898 F. 2d 1577 (Fed. Cir. 1990) showing that the Department possesses the power to act reasonably to implement the law to make sure to follow the intent of the law and to avoid circumvention.

U&A Belgium counters that the distinction Petitioners brought up is insignificant. They claim that nowhere in the UK SSSSC decision, in determining the country of origin, does the Department use or even mention the fact that at least some of the merchandise in question in that case was not toll-processed in the third country. U&A Belgium argues that it does not consider this point because the Department has stated toll processing is irrelevant to the determination of the country of origin, the location is the determining factor.

Department's Position:

The Department agrees with U&A Belgium that the country of origin for SSPC hot-rolled in Germany, and not further cold-rolled in Belgium, is Germany. The Department disagrees with Petitioners' argument that the tolling arrangement between U&A Belgium and its German affiliate, where the German company neither takes title nor controls the relevant sale of the merchandise, means that the merchandise is of Belgian origin and should be included in the normal value calculation of this administrative review. As discussed further below, the tolling regulation was not intended to apply for the purpose of determining the country of origin of merchandise.

In arguing that merchandise hot-rolled in Germany should be considered a product of Belgium, the Petitioners appear to conflate the distinct legal standards for determining 1) a producer's identity and 2) a product's country of origin. As the CIT held, the substantial transformation test "provides a means for Commerce to carry out its country of origin examination and properly guards against circumvention of existing antidumping orders." See E.I. DuPont, 8 F. Supp. 2d at 858-859. Furthermore, the CIT also found that the Department's tolling regulation "addresses the relationship of the parties in the manufacturing process, not the nationality of the merchandise itself." Id at 859. Upon remand, the CIT affirmed the Department's determination that merchandise owned by a U.S. producer, DuPont, which was substantially transformed by a toller in Taiwan, was merchandise of Taiwanese origin. See E.I. DuPont v. United States, 25 F. Supp. 2d 365 (CIT 1998). Therefore, the tolling arrangement between DuPont and its Taiwanese toller did not affect the product's country of origin. Rather, the country in which substantial transformation occurred was dispositive for purposes of determining country of origin.

Contrary to Petitioners' claim, the relationship between U&A Belgium and its German toller is not relevant to the country of origin of the merchandise. For merchandise hot- rolled in Germany, then pickled and annealed in Belgium, the question for purposes of country of origin is whether the process at issue constitutes substantial transformation. In this case, we determine that because hot rolling constitutes substantial transformation, the country of origin of U&A Belgium's merchandise which is hot-rolled in Germany, and not further cold-rolled in Belgium, is Germany. Therefore, this merchandise is not subject to the order on SSPC from Belgium and not reviewable in the instant proceeding.

Although the Department agrees with Petitioners regarding the Department's discretion in the application of the substantial transformation test for purposes of determining the country of origin of merchandise potentially subject to antidumping duty orders, in this case, as explained above, we continue to find that the merchandise hot-rolled in Germany, and not further cold-rolled in Belgium, is of German origin. Based on (1) the totality of the record evidence; (2) past practice, particularly the Department's findings that pickling and annealing do not constitute substantial transformation; and (3) the relationship between U&A Belgium and its German affiliate, we find no basis for the Petitioners' assertion that U&A Belgium's arrangements constitute an attempt to circumvent the antidumping duty order. A hot-rolling operation involves the acquisition and building of rolling mills, which are very capital intensive and expensive to maintain. In contrast, in the Notice of Final Determination of Sales at Less Than Fair Value: Wax and Wax Resin Thermal Transfer Ribbons from France, 69 FR 10674 (March 8, 2004), the Department addresses its concern of respondents shifting a minor process or processes which are not capital-intensive to third countries in order to circumvent an antidumping duty order. Petitioners do not point to any particular evidence of circumvention, nor do they make a circumvention allegation under section 781 of the Act.

The Department also disagrees with Petitioners' arguments on whether hot-rolling the merchandise in Germany satisfies the substantial transformation test. The Department defined "minor processing" as processing that does not result in a substantial transformation or a change in country of origin of the product that is processed. What constitutes minor processing may vary by product. An illustrative list follows: "Flat-rolled Products: painting; slitting; beveling/edge finishing; pickling and oiling; annealing/heat treating . . . ." See Proposed Agreement Concerning Trade in Certain Steel Products from the Russian Federation. 64 FR 9892, 9893 (February 26, 1999). Furthermore, Petitioners did not submit any new information on the record of this case to change the Department's determination in this case that annealing and pickling does not constitute substantial transformation. By contrast, on several occasions, the Department has recognized that annealing and pickling is a minor process. See e.g. Hot Rolled Steel from Russia, Hot Rolled Steel from China, and Thermal Transfer Ribbon from Korea. Given that rolling results in a dramatic change in the physical characteristics of the steel product, while annealing and picking is recognized as minor processing, the Department disagrees with Petitioners' analysis that the value-added in Germany should be dispositive.

Additionally, we agree with U&A Belgium's arguments that antidumping duty orders must be applied on a country-specific basis. The Act limits the term "country" for purposes of antidumping proceedings. See section 771(3) of the Act. Thus, because the instant order covers subject merchandise from Belgium and exported to the United States, the statute requires the Department to limit its review to merchandise whose country of origin is Belgium. Based on our determination that Germany is the country of origin of SSPC hot-rolled in Germany and later sold by U&A Belgium, merchandise that is produced in another country, and therefore has a different country of origin, is not subject to this review.

Petitioners claim that the hot rolling does not change the country of origin since the German company performs the hot-rolling under a tolling arrangement, i.e., the German company neither takes title nor controls the relevant sale of the subject merchandise (see 19 CFR Sec. 351.401(h)). However, as the Department found in the Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France, 66 FR 65877 (December 21, 2001), "the purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value. Thus, under the tolling regulation, the issue is . . . who is the seller of the subject merchandise for determining U.S. price and normal value, or more specifically, what is the appropriate way in which to value subject merchandise and foreign like product." Under the tolling regulations, the Department recognizes that a seller of subject merchandise need not be located in the country covered by the antidumping duty order. However, for purposes of determining the country of origin, the locus of the production or manufacturing where substantial transformation is performed is dispositive.

Comment 5: Scope Language

Petitioners argue that the amended scope language regarding the inclusion of cold-rolled SSPC published in the Federal Register on March 11, 2003, should apply to all shipments entered during the period of this review, May 1, 2002, through April 30, 2003, because all entries of cold-rolled SSPC during that period are subject to the order. According to Petitioners, since all cold-rolled SSPC during that period are subject to the order, the amended scope of the order should also apply to both the final results and the final customs instructions.

U&A Belgium counters that the Department only requested sales information for cold-rolled plate in coils from the date of the Federal Register notice forward. U&A Belgium argues further that Appendix III of the initial questionnaire sent to them by the Department specified that there were two scopes, one covering sales during the period May 1, 2002, through March 10, 2003 and the other one covering sales from March 11, 2003, through April 30, 2003. U&A Belgium states that the Department's instructions clearly exclude those sales of SSPC that have been cold-reduced by 25 percent or more from reporting before March 11, 2003. In addition, U&A Belgium claims that Petitioners request that the Department apply duties on entries, which under the stated terms of the CIT decision, (see Allegheny Ludlum Corp. v. United State, 287 F.3d 1365 (Fed. Circuit 2002) remanded to CIT No. 99-06-00361, slip opinion 2002-147 (CIT December 12, 2004) (Allegheny Ludlum)), and the amended antidumping duty order are not subject to those duties, penalizes U&A Belgium for complying with the Department's written scope instructions.

Department Position:

In this administrative review, the effective date of the amended order to include sales of cold-rolled SSPC is March 11, 2003, as specified in the scope section of the Notice of Amended Antidumping Duty Orders; Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 FR 11520 (March 11, 2003) (Amended SSPC Order). Therefore, as indicated in Appendix III of the Department's questionnaire, two different scopes apply to this POR, one for sales before March 11, 2003, and one for sales from March 11, 2003, through April 30, 2003. See Amended SSPC Order. As a result, U&A Belgium has appropriately reported only those U.S. sales during the relevant period covered by each scope. This determination is consistent with the CIT decision in Allegheny Ludlum, which required the Department to amend the scope to include sales of cold-rolled SSPC.

Comment 6: The Reporting of Home-Market and U.S. Sales of Cold-Rolled SSPC

Petitioners state that U&A Belgium failed to report all required home market and U.S. sales of cold-rolled SSPC before March 11, 2003. Petitioners contend that all sales of cold-rolled SSPC made during the POR should be reported. Citing the assessment language in the Department's Amended SSPC Order, Petitioners claim that the amended order applies to

entries of subject merchandise going back to the date of the initial suspension of liquidation during the original investigation.

Petitioners further argue that the statute requires the Department to calculate a dumping margin by comparing "the normal value and export price (or the constructed export price) of each entry of the subject merchandise." See section 751(a)(2)(A)(i) of the Act. Petitioners interpret this section of the statute to mean that each entry made during the POR must be analyzed in order to determine the level of Respondent's dumping. In addition, Petitioners claim that neither U&A Belgium nor the Department cite any legal authority to support U&A Belgium's claim that it need not report those sales.

Petitioners assert that the current situation is similar to the Department issuing a scope ruling that interprets or clarifies the scope of an order. Citing Wirth Ltd vs. United States, 5 F. Supp. 2d 968 (Wirth Ltd.), Petitioners argue that in such cases, the Department may apply a scope ruling beginning with the entire period of the investigation during which entries of the scope merchandise were first suspended. Petitioners contend that the current situation involving cold-rolled SSPC is more compelling than the scope inquiry that was in question in the Wirth Ltd. case since cold-rolled products have always been explicitly included in the scope. Since prior reviews in this case are final, Petitioners contend that the amended scope applies to periods where the subject merchandise has not been liquidated, such as in this review. Petitioners conclude that since U&A Belgium has been aware of the Federal Circuit decision to include cold-rolled SSPC in the scope since its decision in April 2002, the Department should instruct U&A Belgium to report all sales of cold-rolled SSPC made during the entire POR for consideration in the final results of this review. Petitioners further assert that if the Department cannot, in the time allowed, instruct U&A Belgium to provide a new database that includes the sales of cold-rolled SSPC, then the Department should apply the otherwise calculated final margin on all POR entries of SSPC regardless of the degree of cold-rolling.

U&A Belgium counters that the language of Appendix III of the questionnaire issued by the Department explicitly excludes sales of cold-rolled SSPC prior to March 11, 2003. U&A Belgium further states that they followed the Department's instructions in not reporting sales of cold-rolled SSPC before March 11, 2003. With respect to Petitioners' proposal to apply the calculated margin to all sales of SSPC regardless of the degree of cold rolling, U&A Belgium counters that the Department cannot calculate a dumping duty based on sales that the Department did not request and that were expressly excluded in this review.

Department Position:

The Department agrees with Respondent that sales of cold-rolled SSPC were not subject to this antidumping duty order until March 11, 2003. Thus, U&A Belgium does not have to report sales of cold-rolled SSPC that were made prior to the effective date of the amended scope. The Department disagrees with Petitioners' analogy of this case to a determination in a

scope inquiry in which the Department determines that a particular item is properly covered by the scope of the order in spite of a party's claim to the contrary. In such a case, the Department's determination is a clarification of the scope of the existing order as it was issued, and there is ultimately no change to the scope of the order. In this case, the scope as issued in the original order (see Antidumping Duty Orders; Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 FR 27756 (May 21, 1999)) was amended as a result of a court order. In its decision, the Court determined that injury had in fact occurred as a result of imports of cold-rolled SSPC into the United States. See Allegheny Ludlum. Consequently, the Department amended the scope of the order to include cold-rolled SSPC, effective March 11, 2003. See Amended SSPC Order. Therefore, in Appendix III of our questionnaire, we requested that sales of cold-rolled SSPC be reported only as of March 11, 2003.

Comment 7: Start-Up Costs Incurred by U&A Belgium

U&A Belgium states that the Department confirmed at verification that U&A Belgium incurred substantial start-up costs in the reconstruction of its furnace and casting lines. The Department did not allow for such an adjustment in its preliminary determination. U&A Belgium contends that, based on the information presented to the Department during verification, the Department should reverse its preliminary decision and allow for a start-up adjustment offset in calculating the final margin.

Petitioners counter that the information presented at verification does not warrant any reconsideration or reversal of the Department's preliminary decision to deny start-up costs. Petitioners argue that the Department stated in the Analysis Memo for Preliminary Results that the start-up costs incurred by U&A Belgium did not meet the Department's standards for start-up adjustments as listed in Section 773(f)(1)(C) of the Act. Petitioners assert that the information presented at verification by U&A Belgium does not support their claim for start-up cost adjustments and that the Department was correct in determining that the costs incurred by U&A Belgium were more aptly categorized as improvement costs than as start-up costs, since the improvement or expansion of an existing facility does not meet the Department's requirements for a start-up adjustment. Petitioners cite section 773(f)(1) (C)(i) of the Act which states that in order to qualify for a start-up adjustment, a respondent must demonstrate that: 1) the company is using new production facilities or producing a new product that requires substantial additional investment, and 2) production levels are limited by technical factors associated with the initial phase of commercial production. According to Petitioners, U&A Belgium fails both of these tests. Petitioners assert that on the first point, the expansion and improvement of U&A Belgium's smelt shop did not result in the production of new merchandise nor did U&A Belgium ever claim that it did. On the second point, Petitioners argue that U&A Belgium did not show that its production levels were limited by any technical factors associated with the expansion or improvement. Petitioners note that even though U&A Belgium had to close production while making the additions, such closures for equipment improvement are temporary events in the ongoing production process.

In support of their argument, Petitioners also cite the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, accompanying H.R. 103-316 (SAA), at 835, which states that "any adjustment for start-up costs must be carefully limited to ensure that such an adjustment is not transformed into a license to dump" and that improvements to existing products or to existing facilities do not qualify for a start-up adjustment. Petitioners also cite three instances where the Department denied start-up adjustments based on its determination that the companies did not meet the test for start-up adjustments as described in section 773(f)(1)(C)(i) of the Act because respondents were only expanding their production facilities. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Chile, 63 FR 56613 (October 22, 1998) (Mushrooms from Chile); Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Past from Italy, 67 FR 300 (January 3, 2002) (Pasta from Italy); and Certain Preserved Mushrooms from India: Final Results of Antidumping Duty Administrative Review, 68 FR 42507 (August 13, 2001) (Mushrooms from India).

In addition, Petitioners cite PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362 (CIT 2003) and Pohang Iron & Steel Co., Ltd. v. United States, 23 CIT 778 (CIT 1999) (Pohang) where the CIT affirmed the Department's position that expansions of existing production lines do not meet the standards of a new production facility for start-up adjustments. In the Pohang case, respondent invested more capital into their new production than U&A Belgium did. Petitioners cite U&A Belgium's questionnaire response where they state they incurred substantial costs with the installation of the second electric-arc furnace and other improvements to their melt shop. Petitioners assert that, as affirmed in the Pohang case, a "substantial investment" to improve an already existent facility by the respondent is not sufficient to warrant a start-up adjustment. Therefore, for all the above reasons, Petitioners conclude that the Department's preliminary determination should be upheld in the final results of this review.

Department Position:

We agree with Petitioners that the Department was correct in disallowing U&A Belgium's start-up adjustment for its expansion and renovation of its melt shop. U&A Belgium reported that it built a new electric-arc furnace (EAF), and relined and retooled the existing EAF from being a fixed vessel to an exchangeable vessel. U&A Belgium also replaced one of its converters and improved its continuous casting capabilities by replacing its fixed-width continuous caster with a variable-width caster. See Preliminary Results at 32503.

Section 773(f)(1)(C)(ii) of the Act states that the Department shall make an adjustment for start-up costs where the following two conditions are met: (1) a producer is using new production facilities or producing a new product that requires substantial additional investment, and (2) the production levels are limited by technical factors associated with the initial phase of commercial production. The SAA, at 836, provides further guidance regarding what

constitutes a new production facility or a new product. For the Preliminary Results, we examined U&A Belgium's claim and preliminarily determined that the criteria for granting a start-up adjustment within the meaning of section 773(f)(1)(C) of the Act had not been satisfied. At our on-site verification in Belgium, we verified the information submitted by U&A Belgium regarding the renovation and expansion of its melt shop. See U&A Belgium Verification Report. We verified that U&A Belgium installed a new EAF and relined and retooled the existing EAF. We also verified that U&A Belgium replaced a converter and a fixed-width continuous caster. However, we continue to hold, as clearly stated in the Preliminary Results, that these renovations and expansions do not constitute a "new production facility." As also stated in the Preliminary Results, we continue to hold that the renovations and expansions did not result in the production of a "new product" requiring substantial additional investment, within the meaning of section 773(f)(1)(C)(ii)(I) of the Act. Rather, the addition of a new production line within an already existing facility is a "mere improvement" that the SAA, at 835, states will not qualify for a start-up adjustment. Likewise, an expansion of the current production capacity of a facility will not qualify for a start-up adjustment unless it requires the construction of a new facility. The CIT affirmed the Department's position that expansions of existing production lines do not constitute new production facilities as required to warrant a start-up adjustment. See Pohang. Moreover, U&A Belgium has not identified the actual costs associated with "substantially retooling" its existing facility. Because section 773(f)(1)(C)(ii) of the Act establishes that both prongs of the start-up test must be met to warrant a start-up adjustment and because U&A Belgium did not satisfy the first prong of the test, for the purposes of these final results, we continue to find that U&A Belgium's renovations do not meet the statutory requirements for receiving a start-up adjustment by either constituting a new production facility or producing a new product. See e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms From Chile, 63 FR 41786, 41788 (August 5, 1998) and Pohang. Therefore, we continue to disallow a start-up adjustment to U&A Belgium for theses final results.

Comment 8: Offsetting Margins with Above-Normal-Value Transactions

U&A Belgium contends that by using "zeroing methodology," the Department did not accord full value to sales for which U&A Belgium had a negative dumping margin. U&A Belgium further states that the Department's zeroing practice is not in accordance with Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement), which states that dumping margins are established in one of two ways: 1) comparing the weighted average normal value with a weighted average of prices of all comparable export transactions; or 2) comparing normal value and export prices on a transaction-to-transaction bases. According to U&A Belgium, the Department's practice of giving a zero to sales with negative dumping margins does not allow for the Department to make comparisons of all comparable export transactions.

U&A Belgium further asserts that the Department's use of zeroing is inconsistent with the fair

comparison requirement of Article 2.4 of the Antidumping Agreement. U&A Belgium cites the World Trade Organization (WTO) appellate decision in the case of European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (Bed Linen from India), where the WTO found that the European Community's (EC) use of zeroing methodology when calculating antidumping duties is not consistent with the Antidumping Agreement.

To support this argument, U&A Belgium cites Bed Linen from India at page 16 in which the WTO Appellate Body states that zeroing results in an inflated dumping margin and does not result in a fair comparison between export price and normal value as required by the Antidumping Agreement. U&A Belgium also cites United States-Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products form Japan, Report of the Appellate Body, AB-2003-5, WT/DS244/AB/R (December 15, 2003) (Steel from Japan), where the WTO states that Article 2.4 of the Antidumping Agreement applies to dumping cases whether they are investigations or reviews and that the calculation of the dumping margin must conform to the tenets of Article 2.4. The WTO goes on to say that there is no other alternative for members to calculate dumping margins since to do so would result in margins that are legally flawed and inconsistent with Article 2.4 of the Antidumping Agreement. U&A Belgium states that the Department's practice has been rejected by the WTO in the Softwood Lumber case from Canada. See Report of the Appellate Body: United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (December 15, 2003) (Softwood Lumber from Canada).

Petitioners argue that U&A Belgium is incorrect in asserting that the Department is bound by the WTO's decisions in the Bed Linen from India, Steel from Japan, and Softwood Lumber from Canada cases for a number of reasons. Petitioners assert that Bed Linen from India does not apply since the WTO was examining the EC's, and not the United States', zeroing policy. To support their argument, Petitioners cite cases where the Department has expressly stated it will not follow the WTO's Bed Linen from India ruling. See Certain Preserved Mushrooms from India: Final Results of Administrative Review, 66 FR 42507 (August 13, 2001); Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Germany, 67 FR 55802 (August 30, 2002); Stainless Steel Wire Rod from India; Final Results of Antidumping Duty Administrative Review, 67 FR 37391 (May 29, 2002); and Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain, 67 FR 35482 (May 13, 2002). In the accompanying Decision Memoranda of the above cited cases the Department stated that since the Bed Linen from India case was a dispute between the EC and India, the Department is not required under U.S. law to act on this decision.

Petitioners also argue that U&A Belgium's reliance on Steel from Japan is inappropriate since this case involved a sunset review and not an administrative review. Petitioners also note another case, Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands: Final

Results of Antidumping Duty Administrative Review, 69 FR 33630 (June 16, 2004), where the WTO Appellate Body determined that even though Bed Linen from India applied to antidumping reviews, it could not determine that the methodology used by the United States in its administrative reviews was similar to the EC's method in determining the margins for Bed Linens from India. Petitioners note that the WTO Appellate Body could not find that the United States has violated Article 2.4 of the Antidumping Agreement.

Petitioners also take issue with U&A Belgium's use of the Softwood Lumber from Canada case to support their argument against the Department's zeroing methodology. Specifically, Petitioners contend that the WTO's ruling in the Softwood Lumber from Canada case only pertained to the way the Department used zeroing in determining the dumping margin in the investigation of Canadian softwood lumber, and not to the Department's overall zeroing policy. See Softwood Lumber from Canada. The Department calculated weighted-average margins by zeroing at two different levels, one for typical softwood lumber and another for a sub-group of similar softwood lumber like products. To emphasize their point that the WTO was concerned only with the Department's zeroing methodology in that specific case, Petitioners point to the WTO Appellate Body's ruling where the Appellate Body: 1)noted that both Canada and the U.S. agreed that the issue before the Appellate Body was the consistency of zeroing as used in this specific case and not zeroing in general; 2) acknowledged that Canada's claim to the Appellate Body was limited to the consistency of zeroing when used in calculating dumping margins based on the comparison of a weighted-average normal value with a weighted average of prices of all comparable export transactions; and 3) stated this particular appeal, did not address whether or not zeroing could be used as a methodology under Article 2.4.2 of the Antidumping Agreement.

Petitioners also argue that Softwood Lumber from Canada is not relevant to zeroing in administrative reviews. Petitioners state that it is during the administrative review process that the Department determines dumping margins on an entry-by-entry basis to determine the amount of duties to be applied. To support this issue, Petitioners cite Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004) (Timken); Serampore Industries PVT Ltd. v. the United States, 675 F. Supp. 1353 (CIT 1987); and Bowe Passat Reinigungs-und Waschereitechnik GmbH vs. United States, 926 F. Supp. 1138 (CIT 1996), in which the Court of Appeals for the Federal Circuit (the CAFC) has upheld the Department's zeroing policy as reasonable and in accordance with the law. Petitioners contend that the CAFC held in Timken that the Department was correct in its interpretation of section 771(35)(A) of the Act, which defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," as allowing for zeroing.

Petitioners also argue that since interpreting the antidumping statute often means filling gaps that Congress has either deliberately or inadvertently left in the statute, the CAFC has given latitude to Department in the application of the statutes to the cases under review. Specifically, Petitioners cite Smith Corona Group vs. United States, 713 F.2d 1568 (Fed. Cir. 1983),

where the Court stated that the Department has broad discretion in executing antidumping law. It is however, not the responsibility of the agency to interpret and apply WTO agreements.

Petitioners also take issue with U&A Belgium's argument that the Department must abide by WTO decisions and agreements. To support this point, Petitioners cite section 3533(g) of the Act, which states that when a dispute settlement panel or Appellate Body finds that a regulation or practice of a U.S. department or agency is inconsistent with any URAA, the regulation or practice in question cannot be amended, rescinded or modified without first getting input from the appropriate congressional committees, the agency in question, the U.S. Trade Representative, and the general public. Petitioners conclude that the WTO rulings on zeroing do not affect the Department's existing methodology nor would the Department be permitted to change its practice for this particular review without involving the procedures required by 19 U.S.C. section 3533.

Department Position:

We disagree with U&A Belgium and have not changed our calculation of the weighted-average dumping margin for the final determination. Specifically, we made model-specific comparisons of weighted-average constructed export prices with weighted-average normal values of comparable merchandise. See section 773(c) of the Act; see also section 777A(d)(1)(A)(i) of the Act. We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin. See section 771(35)(A) and (B) of the Act. This methodology has been upheld by the CIT in Corus Engineering Steels, Ltd. v. United States, 2003 CIT Lexis 110,3 28-30; see also Bowe Passat Reiningungs-und Waschereitcechnik GmbH v. United States, 20 CIT 558, 572, 926 F. Supp. 1138, 1150 (1996). The value of such sales is included with the value of dumped sales in the denominator of the weighted-average margin calculation.

Furthermore, in the context of an administrative review, the CAFC has affirmed the Department's statutory interpretation which underlies this methodology as reasonable. See The Timken Company v. United States, 354 F. 3d 1334, 1342 (Fed. Cir. 2004).

U&A Belgium asserts that the WTO Appellate Body ruling in Softwood Lumber from Canada renders the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. However, 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 . . . " 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)). Furthermore, the CAFC and the CIT have consistently found that WTO rulings with respect to "zeroing" are not binding on the Department. See Timken, 354 F. 3d at 1344; see also Corus, 2003 CIT Lexis 110 at 28-30. Therefore, the Department will not alter its practice in the instant case.

Comment 9: Ministerial Errors: Constructed Export Price (CEP) Revenue Calculation and Merging Dates of Payment

Petitioners argue that the Department was not consistent in how it calculated CEP profit in the home market and revenue in the U.S. sales program. Petitioners cite the home- market sales program and the Analysis Memo for Preliminary Results where, they state, the net revenue elements for the CEP profit calculation included variables for surcharges, freight, and billing adjustments. However, in the U.S. sales program, the corresponding calculation for revenue does not include the surcharges, freight, and billing adjustment variables. Petitioners assert that the Department should correct the U.S. sales program to include those variables in its calculation of revenue and to make it consistent with the calculations for home market sales.

Secondly, Petitioners argue that the methodology used by the Department to account for missing pay dates in its calculation of credit expenses in the home market sales database should be changed for the final results of this review. For sales that did not have pay dates, Petitioners state that the Department used payment dates from the other sales database, which included sales of products hot-rolled in Germany, in order to calculate credit expenses. See Analysis Memo for Preliminary Results. Petitioners contend that the Department can account for the missing payment dates by one of the following: 1) the Department should rely on the other database, which includes sales of hot-rolled products in Germany, for calculating normal value; or 2) if the Department decides to continue using the home market sales database of the preliminary results, it should correct the ministerial error by including a "By" statement in the home-market sales program to actually merge the pay dates of the two data sets. U&A Belgium states that if there are any ministerial errors, then the Department should correct them.

Department Position:

The Department agrees with Petitioners that it inadvertently failed to adjust the CEP revenue calculation in the U.S. sales program, and to properly merge the payment dates of the two home-market sales databases. Therefore, for these final results, we recalculated CEP revenue for the U.S. sales program to include variables for surcharges, freight, and billing

adjustments. We also included the "By" statement in our home market sales program to properly merge the payment dates. See Final Analysis Memo.

Recommendation

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

_____ _____

Agree Disagree

_____

James J. Jochum
Assistant Secretary
for Import Administration

_____

Date