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

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

SUBJECT: Issues and Decision Memorandum for the 2005-2006 Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada; Final Results of Antidumping Duty Administrative Review

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2005-2006 administrative review of the antidumping duty order on carbon and certain alloy steel wire rod from Canada. As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review on which we received comments and rebuttal comments from parties:

Comment 1: Adjustment to Pension Liabilities
Comment 2: Adjustment to General & Administrative Expenses
Comment 3: Arm's-Length Program Product Characteristic Variable Names
Comment 4: Level of Trade
Comment 5: Offsetting for U.S. Sales that Exceed Normal Value

Background

On November 7, 2007, we published in the Federal Register the preliminary results of the administrative review of carbon and certain alloy steel wire rod from Canada for the period October 1, 2005 through September 30, 2006. See Notice of Preliminary Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Canada, 72 FR 62816 (November 7, 2007) (Preliminary Results).

This review covers Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario (a division of Sivaco Wire Group 2004 L.P.) (collectively referred to as "Ivaco"). We invited parties to comment on our

Preliminary Results of this review. On November 29, 2007, we sent a supplemental questionnaire to Ivaco pertaining to level of trade. Ivaco submitted its response on December 13, 2007. Petitioners (Mittal Steel USA Inc. - Georgetown, Gerdau USA Inc., Nucor Steel Connecticut Inc., Keystone Consolidated Industries, Inc., and Rocky Mountain Steel Mills) provided comments on Ivaco's response on December 21, 2007. Ivaco responded to petitioners' comments on December 31, 2007.

On November 30, 2007, we informed Ivaco and petitioners that the deadlines for filing briefs and rebuttal briefs, and for requesting a hearing, were being extended to as yet undetermined times during the year 2008. On January 2, 2008, we informed parties that the deadline for briefs and for requesting a hearing was January 23, 2008, and that the deadline for rebuttal briefs was January 30, 2008.

Ivaco and petitioners submitted their briefs on January 23, 2008, and their rebuttal briefs on January 30, 2008. On January 23, 2008, Ivaco requested a hearing, which was held on February 27, 2008.

Discussion of the Issues

Comment 1: Adjustment to Pension Liabilities

Petitioners argue that Ivaco did not include certain adjustments to pension and post-retirement liabilities of Ivaco Rolling Mills 2004 L.P. (IRM) in its reported cost of production. Petitioners claim that the fact that this adjustment was not reflected on IRM's income statement is irrelevant, and that the increase in liabilities (and corresponding reduction in stockholders equity or retained earnings) justifies an upward adjustment to cost of production. Petitioners argue that the Department has previously determined that costs recorded as a reduction to stockholders equity or retained earnings should be included in the cost of production. Petitioners cite numerous instances in which the Department treated bonus payments or profit-sharing distributions to employees as costs of production, even though the distributions were through a company's retained earnings. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Review, 63 FR 33320, 33337 (June 18, 1998); Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 FR 8909, 8921-22 (February 23, 1998); Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Japan, 63 FR 40434, 40440-41 (July 29, 1998); Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") From Taiwan, 64 FR 56308, 56320-21 (October 19, 1999) (DRAMs From Taiwan); and Final Results of Determination Pursuant to Court Remand Alloy Piping Products, Inc., Flowline Division, Markovitz Enterprises, Inc., Gerlin, Inc., and Taylor Forge Stainless Inc., v. United States of America and the U.S. Department of Commerce, Slip Op. 04-134, Consol. Court No. 02-00124 (CIT October 28, 2004).

Finally, petitioners argue that the entire adjustment to the cost of production should be reflected for the time period in which the adjustment took place, citing DRAMSs From Taiwan, which stated that "the related compensation cost shall be recognized in the period in which it is granted," and that under U.S. generally accepted accounting principles, "it is appropriate to recognize the compensation cost, and thus value the compensation, when the stock bonus was granted." See DRAMs From Taiwan, 64 FR at 56321.

Ivaco argues that the amount in question does not involve costs, so there was nothing to omit from the submitted cost of production. Ivaco states that petitioners appear to accept that the amount is neither a cost nor an expense in accordance with generally accepted accounting principles (GAAP), and that no such expense was reflected on the audited income statements. Ivaco states that petitioners incorrectly equate an increase in liabilities with an expense. Ivaco acknowledges that compensation costs should be included in cost of production during the period in which the benefits are granted and the additional liabilities are recognized, but Ivaco states that no benefits were granted by Ivaco and no expenses were incurred during the period of review. Ivaco argues that the cases cited by petitioners are not on point because they all involve bonus payments or other forms of compensation to employees during the period of review. In contrast, according to Ivaco, IRM neither paid nor owes any new benefits or compensation to its employees but, rather, simply has recognized an increased liability as a result of a change to reflect a new accounting principle.

Department Position: The adjustment to IRM's future pension and post-retirement obligations was not recognized as an expense. Rather, IRM recorded the changes as an adjustment to retained earnings. While the cases cited by petitioners involve adjustments to retained earnings, employee compensation payments occurred during the periods in question. Pursuant to section 773(f)(1)(A) of the Tariff Act of 1930, as amended (the Act), there is no evidence on the record indicating this was not in accordance with GAAP, that any additional expenses associated with these future obligations were incurred during the period of review, or that any additional payments of pensions or other post-retirement obligations were made during the period of review. The Department concludes that there is no basis for adjusting Ivaco's reported costs to account for any portion of the accounting adjustment in question.

Comment 2: Adjustment to General & Administrative Expenses

Petitioners argue that the auditor adjustment removing certain selling, general and administrative expenses from inventory costs should be added to IRM's general and administrative (G&A) expenses. Petitioners state that Ivaco did not explain where this adjustment was included in its response and provided nothing to show that it had revised its reported costs to include these amounts. Petitioners state that the description of the accounting change in IRM's financial statements indicates that the adjustment should be reflected in revised G&A expenses but that, contrary to Ivaco's claims, the full fiscal year 2006 expenses submitted by Ivaco in Exhibit D-Supp.-1 of its October 3, 2007, supplemental questionnaire response do not appear to include any adjustment for the accounting change in question.

Ivaco states that it erred in its October 3, 2007, supplemental questionnaire response in stating that the expenses in question were accounted for in its revised 2006 G&A calculations. Ivaco states, however, that its cost submissions are based on actual manufacturing costs, and the expenses in question – an adjustment to the financial statement valuation of inventories based on Statement of Financial Accounting Standard 151, which provides rules for the allocation of indirect overhead costs for the valuation of inventories – should not have an impact on its reported unit cost of production. Ivaco claims that IRM's financial statements note that the implementation of the accounting change resulted in a write-down of the amount of inventory, and was reflected in an increase in cost of sales. Because Ivaco reports its manufacturing costs to the Department by allocating fixed costs over actual production rather than "normal expected capacity," there is no need to take the write-down separately into account.

Department Position: Ivaco's reported costs are based on the allocation of actual costs of production over tons produced. Consequently, the identified changes in inventory valuation, with corresponding changes to costs of goods sold, are not relevant with respect to the reporting of Ivaco's production costs, because the subsequent adjustment to inventory valuation did not affect the cost of manufacturing the merchandise during the period of review. Therefore, no adjustment to Ivaco's reported costs is needed as a result of the change in inventory valuation.

Comment 3: Arm's-Length Program Product Characteristic Variable Names

Ivaco states that the Department erred in its application of the arm's-length test. Ivaco notes that in setting up a list of product characteristic variable names, the Department did not distinguish the names of the fields for affiliated customer transactions from the names of the fields for unaffiliated customer transactions.

Petitioners did not comment on this issue.

Department Position: We agree with Ivaco, and have corrected the programming language in question.

Comment 4: Level of Trade

Ivaco argues that the Department's preliminary decision disregards the evidence on the record showing that Sivaco Ontario sells at a more remote marketing stage than IRM and provides substantially more selling services than IRM. Moreover, Ivaco argues that the Department's decision contradicts previous Department findings, which Ivaco claims were based on the same selling patterns and functions that existed in this administrative review period. Ivaco claims that the significant differences in the sales prices of IRM's and Sivaco Ontario's sales for the same products, as well as significant differences in the per-ton indirect selling expenses incurred by IRM versus Sivaco Ontario, are evidence of different levels of trade.

Petitioners argue that Ivaco's arguments concerning the level of trade findings in prior administrative reviews are not relevant to the analysis for this review because each review is a separate proceeding with unique facts. Petitioners argue that Ivaco's claims regarding differences in levels of trade are contradicted by various Ivaco statements and submitted data. Petitioners also state that Ivaco's claims regarding varying sales prices of IRM versus those of Sivaco Ontario are unfounded because they do not account for contemporaneity of sales or other possible sources of price differences and, in any case, would not be relevant because the Statement of Administrative Action (SAA) indicates that differences in prices are based upon "the actual functions performed by the sellers." See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, at 829. Petitioners argue that the differences in per-ton indirect selling expenses incurred by IRM versus Sivaco Ontario reflect factors unrelated to differences in selling functions. Petitioners also challenge Ivaco's claim that Sivaco Ontario's sales are at a more remote marketing stage than IRM's, noting that Sivaco Ontario is a processor that first purchases rod from IRM and then resells the wire rod.

Department Position: The Department has determined that IRM and Sivaco Ontario's sales were made at the same level of trade. While the Department's analysis has changed somewhat from its Preliminary LOT Memorandum, the final conclusion regarding the absence of distinct levels of trade amongst Ivaco's reported sales in both markets remains unchanged. While Sivaco Ontario performed more significant inventory functions than IRM with respect to the impact on shorter-term delivery lead times, there are many activities for which IRM selling functions were as significant, or in some instances more significant, than Sivaco Ontario: maintenance in inventory of merchandise desired by customers; delivery services; handling services; technical services; credit extension; personnel training; advertising; arrangements for packing; provision of rebate and cash discount programs; and warranty services.

Because much of the information in the briefs and elsewhere on the record that pertain to this issue is of a proprietary nature, the arguments presented by Ivaco and petitioners, and the Department's basis for its position, are discussed in full in a separate analysis memorandum. See "Level of Trade Issue Referenced in Final Results Issues and Decision Memorandum for Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P.: Carbon and Certain Alloy Steel Wire Rod from Canada (A-122-840) (May 5, 2008)."

Comment 5: Offsetting for U.S. Sales that Exceed Normal Value

Ivaco argues that the Department, in its preliminary results, improperly assigned a zero margin when export price exceeded normal value. Ivaco claims that such "zeroing":

- is not required by U.S. law, and in fact, is in violation of U.S. law;

- is prohibited by the World Trade Organization ("WTO") Appellate Body;

- is not a "regulation or practice" requiring certain consultative mandates (including U.S. Congressional review) before altering the methodology to be in compliance with the WTO Appellate Body ("AB") decisions and WTO Agreements; and

- is not justifiable because no basis exists for concluding that Ivaco engaged in "masked" dumping.

Ivaco notes that section 751(a)(2) of the Act instructs the Department to determine the normal value and export price of each entry of subject merchandise and the dumping margin for each entry, and that section 771(35)(A) of the Act defines dumping margin as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Ivaco claims that the amount by which normal value exceeds the export price does not have to be positive, citing Timken Co. v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004) (Timken); SNR Roulements et. al. v. United States, 341 F.Supp.2d 1334, 1345 (Ct. Int'l Trade 2004); and Corus Staal v. United States, 387 F.Supp. 2d 1291, 1297 (Ct. Int'l Trade 2005). In short, Ivaco argues, "zeroing" is not required by law. On the contrary, the actual language of section 771(35)(B), according to Ivaco, indicates that the U.S. Congress intended that all dumping margins for all U.S. sale transactions – both positive and negative – be aggregated in determining the weighted-average dumping margin:

> the term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

Ivaco claims that the WTO Appellate Body has prohibited "zeroing." Ivaco states that the zeroing methodology used by the Department is inconsistent with WTO rules as interpreted by the WTO's Appellate Body in the following decisions:

> Report of the Appellate Body on the Complaint of India Concerning European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linens From India, WT/DS141/AB/R (March 1, 2001);
>
> Report of the Appellate Body on the Complaint of Canada concerning United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, AB-2004-2 (August 31, 2004);
>
> Report of the Appellate Body on the Complaint of the European Communities concerning United States - Laws, Regulations and methodology for Calculating Dumping Margins, WT/DS294/AB/R (May 9, 2006); and
>
> Report of the Appellate Body on the Complaint of Japan concerning United States - Measures relating to Zeroing and Sunset Review, WT/DS322/AB/R (January 9, 2007).

Ivaco states that in the last of the aforementioned decisions, the ruling found the zeroing

methodology inconsistent with Articles 2.4 and 9.3 of the Antidumping Agreement and Article VI:2 of the General Agreement on Tariffs and Trade (1994) when applied in the context of administrative reviews.[1]

Ivaco also argues that the Department need not consult with the U.S. Congress to change the "zeroing" methodology because "zeroing" is not a recognized "practice." While 19 U.S.C. 3533(g)(1) requires consultation with the U.S. Congress before the Department changes a "regulation or practice" that a WTO panel has found to be inconsistent with the Antidumping Agreement, the SAA states that a "practice" is "a written policy guidance of general applicability." See SAA, at 352. Ivaco states that it is unaware of any such written policy guidance with respect to the Department's "zeroing" methodology, and notes that the Department itself recently stated that no such written policy guidance exists. See Carbon and Certain Alloy Steel Wire Rod from Canada, USA-CDA-2006-1904-04, at 32 (November 28, 2007).

Finally, Ivaco states that while Timken, citing two Court of International Trade decisions, advanced a policy rationale for "zeroing" in instances where "it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value," there is nothing on the record of this review indicating that Ivaco engaged in masked dumping.

Petitioners argue that the Department has recently considered, and rejected, the same arguments made by Ivaco. See Brake Rotors From the People's Republic of China: Final Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of the 2005-2006 Administrative Review, 72 FR 42386 (August 2, 2007), and accompanying Issues and Decision Memorandum, at Comment 7. Petitioners argue that it is the Department's (and the courts') responsibility to interpret the U.S. antidumping statute (as distinct from the WTO Antidumping Agreement), and the courts have long recognized the agency's attempts to interpret and apply the statute are entitled to special deference. See Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983). Petitioners state that the Department has long recognized that the statutory regime as a whole is best, and most fairly, effectuated when negative margins of dumping are treated as non-dumped sales, but not allowed to cancel out positive margins. Petitioners emphasize that it is not the responsibility of the Department to interpret and apply the WTO agreements or decisions of its dispute settlement bodies, and that 19 U.S.C. 3533 expressly prohibits this with respect to regulations or practices.

[1] Ivaco concludes its reference to the alleged WTO Appellate Body "prohibition" of "zeroing" with a reference to U.S. jurisprudence. Ivaco claims that because "zeroing" is in violation of international obligations of the United States and because section 771(35)(A) does not require "zeroing," the canon of statutory construction set forth in Charming Betsy renders "zeroing" impermissible. See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .").

Department Position: We have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for these final results of review.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied; 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) ("Corus I"). The respondent has cited WTO dispute-settlement reports ("WTO reports") finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. As an initial matter, the U.S. Court of Appeals for the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act ("URAA"). Corus I, 395 F.3d at 1347-49; accord Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); NSK, Ltd. V. United States, 510 F.3d 1375, ***, 2007 U.S. App. LEXIS 28917, at *8 (Fed. Cir. Dec. 14, 2007).

With respect to United States-Final Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004) (US-Softwood Lumber), the Appellate Body's finding only related to the denial of offsets in the Softwood Lumber from Canada antidumping investigation. That report, and the Department's implementation of that report, did not address the Department's denial of offsets in other antidumping investigations or in any administrative review. See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 FR 22636 (May 2, 2005). Moreover, ultimate resolution of that WTO dispute was achieved through a mutually agreed solution, and not through an elimination of the denial of offsets. See Notification of Mutually Agreed Solution, United States-Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/29/Add.1 (March 9, 2007).

With respect to United States-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (Apr. 18, 2006) ("US-Zeroing (EC)"), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006) ("Zeroing Notice"). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See id., 71 FR at 77724.

With respect to United States-Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (Dec. 15, 2003) ("US-Corrosion-Resistant Steel") and EC-Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (Mar. 1, 2001) ("EC-Bed Linens"), the Federal Circuit refused to find the Department's interpretation of the Act unreasonable on the basis of these reports. See, e.g., Corus I, 395 F.3d at 1348-49. As discussed above, the Federal Circuit found that WTO reports are without effect under U.S. law until they are implemented pursuant to the statutory scheme provided in the URAA. Id. Additionally, the Federal Circuit noted that in US-Corrosion Resistant Steel, the Appellate Body never made a finding regarding the Department's denial of offsets. Id. Further, the Federal Circuit noted that, in EC-Bed Linens, the United States was not a party to the dispute. Id.

With respect to United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007) ("US-Zeroing (Japan)"), and as discussed above, Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g); see, e.g., Zeroing Notice, 71 FR 77722 . With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to US-Zeroing (Japan), it is the position of the United States that appropriate steps have been taken in response to that report and those steps do not involve a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to US-Zeroing (Japan), the Federal Circuit has repeatedly affirmed the permissibility of denying offsets in administrative reviews. See Corus II, 502 F.3d at 1374-75; and NSK, 510 F.3d at ***, 2007 U.S. App. LEXIS 28917, at *7-10.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on export transactions that exceed normal value in this review.

The Federal Circuit explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate "masked dumping," before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d 1343; Corus II,502 F.3d 1370; and NSK, 510 F.3d 1375.

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 results of this review and the final dumping margin for carbon and certain alloy steel wire rod from Canada in the Federal Register.

AGREE _____ DISAGREE _____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date