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December 11, 2008

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

FROM: Gary Taverman
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the 2006-2007 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 2006-2007 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 no changes to the preliminary margin calculation. 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: Level of Trade
Comment 2: Offsetting for U.S. Sales that Exceed Normal Value

Background

On July 10, 2008, 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, 2006 through September 30, 2007. See Notice of Preliminary Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Canada, 73 FR 39646 (July 10, 2008) (Preliminary Results).

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

Ivaco submitted its case brief (Ivaco Case Brief) on August 11, 2008, and petitioners, ISG Georgetown Inc., Gerdau Ameristeel U.S. Inc., Nucor Steel Connecticut Inc., Keystone Consolidated Industries, Inc., and Rocky Mountain Steel Mills (Petitioners), submitted their rebuttal brief on August 18, 2008.

***Comment 1: Level of Trade***

Ivaco argues that the Department's preliminary decision to deny a level of trade (LOT) adjustment disregards the evidence on the record showing that Sivaco Ontario sells at a more remote marketing stage than IRM. Ivaco also argues that the Department's preliminary decision disregards evidence that Sivaco Ontario provides substantially more selling services than IRM, many of which are impacted by the typically smaller volumes of individual orders and shipments associated with Sivaco Ontario transactions as compared to IRM's transactions. 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 LOTs.

Petitioners argue that Ivaco's arguments concerning the LOT 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 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. Petitioners believe the Department's Preliminary Results analysis of selling functions demonstrated that there are no significant differences in the selling functions provided by IRM and Sivaco Ontario. See "Level of Trade Analysis 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), October 1, 2006 – September 30, 2007," at 1-12 (July 2, 2008) (Preliminary LOT Memorandum). Petitioners state that Ivaco's claims regarding varying sales prices of IRM versus those of Sivaco Ontario are unfounded because such differences may reflect factors other than differences in LOT. Also, Petitioners note that sale size, in and of itself, is not relevant for LOT analysis.

**Department Position:** The Department has determined that IRM and Sivaco Ontario's sales were made at the same LOT. While the Department's analysis has changed somewhat from that described in its Preliminary LOT Memorandum, the final conclusion regarding the absence of distinct LOTs amongst Ivaco's reported sales in both markets remains unchanged. While Sivaco Ontario performed more significant inventory function activity 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. This includes the maintenance in inventory of merchandise desired by customers, delivery services, handling services, technical services, credit extension, advertising, arrangements for packing,

provision of rebate and cash discount programs, and warranty services.

Many of Ivaco's descriptions of selling functions are based at least in part on the argument that Sivaco Ontario transactions typically are of smaller quantities than those of IRM. The Department has noted in prior cases that transaction size, in and of itself, should not be taken into account when determining LOTs. For example, the Department denied a LOT offset because the differences between the respondent's "direct factory sales and downstream sales by its affiliated resellers are related to differences in quantities sold and production operations, rather than selling functions, as required by the statute and the Department's regulations. See section 773(a)(7)(A) of the Act; 19 C.F.R. 351.412(c)(2)." See Grain-Oriented Electrical Steel From Italy: Final Results of Antidumping Administrative Review, 66 FR 14887 (March 14, 2001), and accompanying Issues and Decision Memorandum, at Comment 2. The Department explained in another case that it does "not take transaction size or unit value of sales into account in determining level of trade because these are not selling activities." See 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 Pasta From Italy, 67 FR 300 (January 3, 2002), and accompanying Issues and Decision Memorandum, at Comment 6.

Aggregate differences in prices between sales channels do not demonstrate different LOTs, nor do differences in reported indirect selling expenses for different sales channels necessarily reflect different LOTs. Rather, pursuant to 19 CFR 351.412(c)(2), to determine whether comparison market sales were at a different LOT than sales to the United States, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated (or arm's length) customers.

With respect to Ivaco's claim that Sivaco Ontario's sales are at a more remote marketing stage than IRM's sales, the transactions between IRM and Sivaco Ontario are completed prior to the beginning of the sales process between Sivaco Ontario and its customers, and Sivaco Ontario further processes wire rod it obtains from IRM prior to resale, so very little if any of IRM's selling activities, with respect to its sales to Sivaco Ontario, pertain to selling services provided to Sivaco Ontario's customers.

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 a separate analysis memorandum. See "Carbon and Certain Alloy Steel Wire Rod from Canada (A-122-840): Level of Trade Issue Referenced in 2006/2007 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," December 11, 2008.

***Comment 2: 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" (i) is not required by U.S. law; (ii) is prohibited by the World Trade Organization's (WTO) Appellate Body; (iii) 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 decisions and WTO Agreements; (iv) is a violation of section 771 of the Tariff Act of 1930, as amended (the Act); and (v) 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, and permits the Department to comply with the letter and spirit of the recent WTO dispute settlement rulings.

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:

> Appellate Body Report, European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linens From India, WT/DS141/AB/R (March 1, 2001);
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> Appellate Body Report, United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (August 31, 2004);
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> Appellate Body Report, United States - Laws, Regulations and methodology for Calculating Dumping Margins, WT/DS294/AB/R (May 9, 2006); and
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> Appellate Body Report, 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]

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[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 under the WTO Antidumping Agreement and because section 771(35)(A) of the Act 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. 64, 118 (1804) ("an act of Congress ought never to be construed to

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 Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.Doc. No 103-316, Vol 1 (1994) (SAA) states that a "practice" is "a written policy guidance of general applicability." See SAA at 1021. Ivaco claims it is unaware of any such written policy guidance with respect to the Department's "zeroing" methodology, and notes the Department recently stated before a NAFTA panel 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).

Ivaco argues that "zeroing" violates section 771(35)(B) of the Act, which states "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 argues that the word "aggregate" means "all," so it is evident that 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.

Finally, Ivaco states that while Timken 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,"[2] 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 insist 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. Petitioners aver the courts have

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violate the law of nations if any other possible construction remains. . .").

2 Ivaco Case Brief, at 23 (citing to the decisions of the Court of International Trade in Serampore Industries Pvt. Ltd. v. U.S. Dep. of Commerce, 675 F. Supp. 1354, 1360-1361 (CIT 1987); and Bowe Passat Reinigungs-Und Waschereitechnik Gmbh v. U.S., 926 F. Supp. 1138, 1150 (CIT 1996)).

repeatedly held that the Department should base its determination of the best interpretation of the antidumping law on its own assessment of the purposes and goals of the statute, rather than deferring to how WTO panels and the Appellate Body have interpreted the WTO Antidumping Agreement.

**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, 354 F.3d at 1342; 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 (January 9, 2006) (Corus I).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "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." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which export price or constructed export price exceeds the normal value permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the period of review, i.e., the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

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, 1380 (Fed. Cir. 2007) (NSK).

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 (April 18, 2006), 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 (December 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 (March 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 (January 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 U.S.C. § 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 U.S.C. § 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 U.S.C. § 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 1380. 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.

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 adopted 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. 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.

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