

MEMORANDUM TO: Joseph J. Jochum
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Final Results of the Ninth
Administrative Review of Certain Corrosion-Resistant Carbon Steel Flat
Products from Canada for Dofasco, Inc. and Sorevco, Inc.
(Collectively, Dofasco)

Summary

We have analyzed the case and rebuttal briefs of interested parties in response to Certain Corrosion-Resistant Carbon Steel Flat Products From Canada: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 53105 (September 9, 2003) (Preliminary Results). As a result of our analysis, we have made changes in the margin calculation for Dofasco. 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 in this administrative review for which we received comments and rebuttals by parties:

1. Classification of Dofasco's Channel 2 and Channel 3 Sales as EP or CEP Sales
2. Matching by Level of Trade Before Matching by Month
3. Deduction of Indirect Selling Expenses Incurred in the Country of Manufacture (DINDIRSU) from Constructed Export Price (CEP)
4. Inclusion of Further Processing Costs and Freight to the Further Processor in CEP Selling Expenses (CEPSELL)
5. Exclusion of Certain Home Market Sales from Analysis by Not Extending the Window Period to Two Months after the Last Sale Date of the U.S. Sales

6. Reclassification of U.S. Spot Sales Made Through Channel 3 as Export Price (EP) Sales
7. Claimed Inaccuracies in Verification Report
8. Home Market Sales of Non-Prime Products
9. Correction to Draft Liquidation and Cash Deposit Instructions
10. Prepaid Brokerage and Handling (PBROKU) for Certain U.S. Sales
11. Correction of Certain Ministerial Errors

Discussion of Comments

Comment 1:

Classification of Dofasco's Channel 2 and Channel 3 Sales as EP or CEP Sales

United States Steel Corporation (Petitioner) argues that the Department of Commerce (the Department) should classify all sales made through Dofasco's U.S. affiliate Dofasco U.S.A. (DUSA)-- i.e., channel 2 and channel 3 sales-- as constructed export price sales (CEP) sales. In the Preliminary Results, Petitioner claims that the Department treated all channel 2 sales as EP sales, and treated most channel 3 sales as CEP because of some of the functions DUSA performs.¹ Petitioner contends that the Department's preliminary analysis is based on the old "PQ Test," which focused on the selling functions performed by the U.S. affiliate reseller. Petitioner points out that, as Dofasco itself stated, AK

¹ The Department treated Dofasco's spot sales through channel 3 as EP sales. These were sales made pursuant to order acknowledgment.

Steel v. United States (AK Steel)² overturned the “PQ Test”--finding that the plain language of the statute bars the Department from considering whether the role of the U.S. affiliate is sufficiently minor that the sale passes the PQ Test. Petitioner states that both Petitioner and Dofasco believe that under AK Steel both channel 2 and channel 3 sales should be treated similarly in terms of their EP/CEP classification. Petitioner states that, under AK Steel, whether a sale must be classified as EP or CEP depends upon the location of the sale; EP classification is appropriate only if the sale occurs outside the United States.

Petitioner claims that, for both channel 2 and channel 3 sales, DUSA, which is located in the United States, is the seller of the merchandise to the unaffiliated U.S. customer. In support of this argument, petitioner refers to sales documentation on the record for channel 2 and channel 3 sales. A further discussion of this issue is included in the “Proprietary Memorandum: Classification of Dofasco’s sales as either EP or CEP,” January 6, 2004, (Proprietary Memorandum). Petitioner claims that there is no evidence on the record to show that Dofasco is the party contracting directly with the unaffiliated U.S. purchaser for sales made through channel 2 or channel 3. Petitioner further argues that, although Dofasco officials stated at verification “U.S. customers send payment to Dofasco via a lock box,” this applies, however, only for Dofasco’s direct sales through channel 1. Petitioner notes that DUSA accounting records and financial statements show that DUSA must receive payments for its sales of Dofasco-produced merchandise.

Secondly, Petitioner contests Dofasco’s argument that, under AK Steel, Dofasco must be

²AK Steel v. United States, 226 F.3d 1361, 1370 (Fed. Cir. 2000).

considered the seller for all sales through channel 2 and channel 3, and not “DUSA.” Petitioner argues that Dofasco’s argument that it has the sole authority for approving sales to certain U.S. customers and that all final decisions regarding price and quantity, and product breakdown are made by Dofasco in Canada, are irrelevant under AK Steel. In AK Steel, Petitioner argues, the critical issue is where the sale and the transfer of ownership to the unaffiliated customer take place. Petitioner notes that DUSA remains the legal seller of the merchandise and notes that the location at which the foreign parent company grants its “final approval” is not a factor to be considered under AK Steel.

Petitioner then states that Dofasco’s reliance on Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico, 67 FR 55800 (August 30, 2002) (Steel Wire Rod from Mexico), in which the Department classified EP sales transactions because the foreign producer had “the final say” is misplaced. In that case, Petitioner argues, the foreign producer, and not the U.S. affiliate, was the party entering into the sales contract with the unaffiliated U.S. customer, and there was no indication that the foreign producer’s U.S. affiliate took title to the merchandise. Petitioner claims that this is not the case with Dofasco. Accordingly, Petitioner cites to a Court of International Trade (CIT) ruling in which the court determined that EP classification is warranted when title is transferred directly from the foreign producer to the unaffiliated U.S. customer. See Corus Staal BV v. United States, 259 F. Supp. 2d 1253, 1258 (Ct. Int’l Trade 2003) (Corus Staal). Petitioner emphasizes that this is not the case with Dofasco. Petitioner also cites that in Pohang Iron & Steel v. United States, Consol. Court No. 98-04-00906, Slip Op. 00-77 at 14, n.7 (CIT July 6, 2000), the court ruled that under AK Steel, a party may not avoid CEP classification merely because the contract was signed outside the United States.

Lastly, Petitioner contends that the Department should not base a determination as to whether Dofasco's sales are EP or CEP upon whether the sale is pursuant to an order acknowledgment or a long-term contract--as it claims the Department did in the Preliminary Results. Accordingly, Petitioner argues that classification of Dofasco's spot sales through channel 3 as EP sales is misplaced. For a further discussion of this argument, see Proprietary Memorandum.

Dofasco disputes Petitioner's arguments and states that despite the minor difference derived from their description of these channels, the Department in its Preliminary Results treated most of Dofasco's channel 3 sales as CEP sales. Specifically, they note that the Department stated that "in the United States, sales of subject merchandise made through channel 3 to automotive customers pursuant to long-term contracts are CEP sales. All other sales of subject merchandise are export price (EP) sales." Accordingly, Dofasco argues that Petitioner's claim for the Department to classify Dofasco's channel 2 and channel 3 as CEP is wrong. In fact, they argue that the Department should treat all channel 2 and channel 3 sales as EP in accordance with past practice and applicable law.

Dofasco agrees with Petitioner that the Department applied the wrong legal standard in analyzing Dofasco's channel 3 sales. Dofasco claims that it reported CEP sales for channel 3 based on the Department's questionnaire instructions. Specifically, the instructions read that "sales through a U.S. affiliate must be reported as CEP sales 'unless the U.S. affiliate performs only clerical functions in connection with the sale.'³ Dofasco argues that this does not comport with the standard in AK Steel--

³ See Dofasco's Rebuttal Brief at 4.

which overturned the “PQ test.” Dofasco argues that the Federal Circuit Court in AK Steel: “the critical differences between EP and CEP sales are whether the sale or transaction takes place inside or outside the United States and whether it is made by an affiliate.” Dofasco points out that there is no language in AK Steel that discusses whether the U.S. affiliate’s involvement goes beyond clerical. Dofasco argues that it is clear that under AK Steel, Dofasco’s sales through channel 3 are in fact EP sales because of the locus of the transaction. Dofasco cites the Department’s verification report as providing evidence in its detailed discussion of the sales process through DUSA. See Memorandum to the File: Report on the Verification of Dofasco Inc. in the Ninth (2001-2002) Antidumping Duty Administrative Review for Certain Corrosion-Resistant Carbon Steel Flat Products from Canada (Sales Verification Report). For further details, see the Proprietary Memorandum.

Dofasco argues that as cited by Petitioner, a similar issue arose in Steel Wire Rod From Mexico, at Comment 1 of the accompanying Issues and Decision Memorandum, when petitioners in this case argued for sales to be CEP because the “customer’s only dealings were with CCC USA, and that the sales contract was between CCC USA and the customer and was executed in the United States.” Dofasco argues that Petitioner, with respect to that determination by the Department, claims that “. . . there is no indication in that case that the foreign producer’s U.S. affiliate ever took title to the merchandise,” and “it was the foreign producer--not the U.S. affiliate-- who entered into sales contracts with unaffiliated customers in the United States.” Dofasco argues that the decision memorandum in that case “explicitly repeats the claim made by Petitioners in that case that ‘because the customer’s only dealings are with CCC USA, the sales contract between two U.S. corporations, i.e., CCC USA and its customers, is executed in the United States.’” Dofasco argues that the Department

position in that case did not ever state that the foreign producer “entered into” the sales contract. See Steel Wire Rod From Mexico, Issues and Decision Memorandum at page 4. Dofasco argues that control over the execution of contracts does not equate with “entering into” contracts, and that a party may have control over a contract without being the actual party entering into a contract. Dofasco claims that this is the case with Dofasco’s channel 2 and channel 3 sales. Dofasco states that the Department’s position in this case states that CCC Steel in Germany had control over the execution of the contracts, and had the “final say in determining what terms of sale will be accepted,” even though Petitioner in that case claimed, and the Department did not refute, that the sales contract was between two U.S. corporations, CCC USA and its customer. See Wire Rod Decision Memorandum at Comment 1. For a further discussion, see the Proprietary Memorandum. Dofasco concludes that since Dofasco Inc. was the seller of the merchandise for both channel 2 and channel 3 sales, the locus of the transaction is Canada and, accordingly, these sales must be classified as EP sales.

Dofasco notes that it disagrees with Petitioner’s claim that there is no basis to classify spot sales as EP. Dofasco does, however, agree with Petitioner that the Department should not make a determination as to whether Dofasco’s sales are EP or CEP based on whether the sales are either long-term contracts or spot sales. Instead, Dofasco argues that channel 3 spot sales should be treated in the same manner as the other channel 3 sales because the only significant differences between spot sales in comparison to long-term contract sales are that the customer sometimes contacts only Dofasco regarding the purchase, and that the sale is made on a spot basis, rather than through a long-term contract. Despite the differences, Dofasco argues that spot sales are effectively the same as long-term contract sales. Dofasco claims that Petitioner’s notion that there is no evidence on the record to show

that spot sales are to be treated as EP is a result of Petitioner's misunderstanding of how the Department has distinguished between the legal transfer of title, and the identity of the seller for purposes of determining a sale as EP or CEP.

Dofasco claims that it is irrelevant that the order acknowledgment is between DUSA and the U.S. customer and that certain information is contained in the order acknowledgment; there is an invoice between DUSA and the U.S. customer; and that the customer is directed to pay DUSA. Dofasco argues that this information is irrelevant to the determination of whether to classify channel 2 and channel 3 sales as EP or CEP because, under AK Steel, the determining factor is the locus of the transaction. Dofasco argues that the locus of the transaction, in turn, is dependent on who the seller is. Dofasco claims that the Department has already determined that the seller is the party that executes the sales contracts. For a further discussion, see the Proprietary Memorandum.

Dofasco notes that Petitioner's citation to the recent Court of International Trade (CIT) ruling in Corus Staal, in fact, supports a determination that channel 2 and channel 3 sales must be treated as EP. Dofasco argues that Petitioner's reference to the court ruling that "back-to-back sales are necessarily CEP sales" and its assertion that the Department should consider Dofasco's channel 2 sales as CEP, is wrong. In fact, Dofasco states that unlike the instant case, the essential terms of past cases in which the Department has historically determined back-to-back sales as CEP were all established in the United States. Dofasco cites Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Final Results of Antidumping Duty Administrative Review and accompanying Issues and Decision Memorandum, 66 FR 65899 (December 21, 2001) at Comment 10, (Pipe Fittings From Taiwan) in which the Department determined that certain sales that were back-to-back sales were CEP sales. Unlike the

instant case, Dofasco states, in that case, the date of sale (date which the essential terms of sale were determined) was the date of invoice from U.S. affiliate to the U.S. customer. Also, in Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Mexico and accompanying Issues and Decision Memorandum, 65 FR 39358 (June 26, 2000) at Comment 10 (Large Diameter Seamless Pipe), the Department determined that back-to-back sales were CEP sales because the date of sale was determined by the sales acknowledgment, *i.e.*, the terms of sale were fixed in the United States. Again, Dofasco argues that, unlike the instant case, the terms of sale in Large Diameter Seamless Pipe were established in the United States. Dofasco argues that the Department has verified and accepted for its preliminary results information regarding the establishment of the essential terms of sale that contrasts with these cases. Moreover, Dofasco notes that Petitioner's citation to the CIT determination, in fact, supports the Department's determination of classifying these sales as EP. In its determination, Dofasco argues, the court stated that "there is evidentiary support for {the} conclusion" that "the terms of this sale were agreed upon prior to the shipment of the merchandise. . . . the sale was made by the producer 'outside of the United States.'" Specifically, Dofasco asserts that Petitioner has misrepresented the facts therein, and argues that the fundamental point of this case was that the court determined that "the sales terms were agreed upon prior to the shipment of the merchandise (*i.e.*, that the sale was made by the producer)." See Corus Staal at 1258. Dofasco argues that there is significant evidence on the record to show that for channel 2 and channel 3 sales, the sale terms were made by Dofasco and prior to the shipment of the merchandise.

Dofasco asserts that despite the location where the sales documentation is printed, the seller is

still Dofasco. It asserts that the Department must identify the party exercising control over the sales contract despite Petitioner's notion that the location where the documents were printed is irrelevant to the Department's determination of the location of the sale. Dofasco states that it would be "equally absurd for the Department to establish a policy wherein mere letterhead determines the classification of a sale" as Petitioner argues that it would be "absurd to base 'CEP/EP classification' on the location where sales documentation is printed." Based on evidence on the record of the 50 exhibits the Department took while at Dofasco and none from DUSA, Dofasco argues that for both channel 2 and channel 3 sales, it is evident that Dofasco sold the merchandise, regardless of DUSA letterhead.

Department Position:

We agree with Petitioner that the Department should classify all sales made through Dofasco's U.S. affiliate DUSA--channel 2 and channel 3-- as CEP sales, and we disagree with Dofasco that the Department should treat all channel 2 and channel 3 sales as EP. We determine that our preliminary classification of all of Dofasco's sales through channel 2 and spot sales through channel 3 as EP was incorrect. For these final results, the Department treats all of Dofasco's sales made through channel 2 as CEP sales, and all of Dofasco's sales made through channel 3, including spot sales, as CEP sales.

We note that Petitioner and Dofasco agree that the Department, under AK Steel, should treat all sales through both channel 2 and channel 3 as either CEP or EP sales. Petitioner argues for treatment as CEP sales, and Dofasco for treatment as EP sales, regardless of whether the sale was made pursuant to an order acknowledgment, long-term contract or spot sale. We agree with Petitioner and Dofasco that the central principle under AK Steel for classifying a sale to be EP/CEP is dependent

upon the “locus of the transaction” and whether it is made by an affiliate. In the Preliminary Results, the Department classified Dofasco’s sales through channel 2 and channel 3 as EP/CEP in light of the overall efforts of Dofasco and its affiliate. The Department agrees with Petitioner and Dofasco that AK Steel overturned the PQ Test, i.e., it found that the plain language of the statute bars the Department from considering whether a U.S. affiliate is more or less involved in negotiating sales than its foreign parent. In its place, the Court stated that the actual, final locus of a transaction is the critical factor to consider under the statute. See AK Steel at 1369. Thus, if the contracts identify the affiliate as the party to the contract, if the contracts are executed in the United States, and title actually transfers from the U.S. affiliate to the unaffiliated U.S. customer in the United States, then the sale will be treated as a CEP transaction. See AK Steel at 1375.

In this case, we determined that the record evidence demonstrates that both parties to the transaction of the U.S. sales at issue were located in the United States, and the transfer of ownership was executed in the United States. Because we determined that the locus of transaction was in the United States, the sales transactions for Dofasco’s channels 2 and 3 must be classified as CEP sales in accordance with AK Steel.

For a more detailed discussion of the Department’s decision, please refer to the Proprietary Memorandum.

Comment 2:

Matching by Level of Trade Before Matching by Month

Petitioner claims that, in the preliminary model-match program, the Department matches sales within the same month at different levels of trade (LOT) before matching sales at the same LOT within the 90/60 contemporaneity period (i.e., the period for three months before the month of the first U.S. sale to two months after the month of the last U.S. sale). Petitioner argues that this methodology is inconsistent with the statute, which requires the Department to match home market (HM) sales with U.S. sales, to the extent practicable, at the same LOT (see section 773(a)(1)(B)(i) of the Tariff Act of 1930, as amended (the Act)), whereas there is no statutory preference to match sales by month (see section 773(a)(1)(A) of the Act). Petitioner further points out that, because it is “practicable” to match HM sales and U.S. sales at the same LOT made during the contemporaneity period, it has been the Department’s consistent practice to do so. In support of this, Petitioner cites Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 61 FR 20216, 20222 (May 6, 1996) (DRAM Semiconductors Korea), Industrial Nitrocellulose from the United Kingdom: Final Results of Antidumping Administrative Review, 59 FR 66902, 66905 (December 28, 1994) (INC from the U.K.), and Stainless Steel Bar From Japan: Final Results of Antidumping Administrative Review, 64 FR 36333 (July 6, 1999) (SSB from Japan).

Petitioner argues that the Department concluded that its model-match program “correctly operates by exhausting all same LOT matches within the contemporaneity period before searching for a different LOT match,” in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From

Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews, 63 FR 63860

(November 17, 1998) (TRBs from Japan), Petitioner says that this Department policy was confirmed recently in NTN Bearing Corp. of Am.v. United States, 248 F. Supp. 2d 1256 (Ct. Int'l Trade 2003).

In addition, Petitioner claims that the issue also arose in the second administrative review of this proceeding, and that Dofasco argued in its case brief that the Department should have first attempted to match each U.S. sale with a “contemporaneous” home market sale at the same LOT, before matching the U.S. sale with a home market sale made within the same month at the next most similar level of trade. Petitioner states that the petitioning parties did not dispute Dofasco’s argument then (see Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada, 62 FR 18448, 18463 (April 15, 1997) (Canadian Steel Second Review)), and the Department changed its programming language, as suggested by Dofasco, to correct the error.

According to Petitioner, the Department used that programming language up until the present case. Further, Petitioner points out that in Sugiyama Chain Co. V. United States, 797 F. Supp.989 (Ct. Int'l Trade 1992), the Court found unreasonable a model match methodology that gave preference to the same month over the LOT. Petitioner suggested programming language to implement the suggested changes.

Dofasco did not comment on this issue.

Department's Position:

We agree with Petitioner that it is the Department's practice to match first to HM sales of identical or most similar merchandise made within the 90/60 day contemporaneity window and at the same LOT as the U.S. sale. Only if no such sale can be found will the Department match the U.S. sale to HM sales of identical or most similar merchandise at a different LOT within the 90/60 day contemporaneity window. Therefore, we corrected our programming language to reflect this practice.

Comment 3:

Deduction of Indirect Selling Expenses Incurred in the Country of Manufacture (DINDIRSU) from Constructed Export Price (CEP)

Petitioner claims that it is the Department's practice to deduct indirect selling expenses incurred in the foreign market (DINDIRSU) from CEP when those expenses relate to the sale to an unaffiliated purchaser. Petitioner points to Oil Country Tubular Goods, Other than Drill Pipe, from Korea: Final Results of New Shipper and Antidumping Duty Administrative Review, 68 FR 2313 (January 16, 2003) (OCTG from Korea), at Comment 2, arguing that the Department deducted DINDIRSU because it determined that the HM selling expenses incurred by the respondent were spent on "generating and supporting sales" from its affiliated U.S. reseller to unaffiliated customers - not on sales from the respondent to its U.S. affiliate.

Further, Petitioner argues that the Department deducted DINDIRSU from CEP in its most recent administrative review of Dofasco, and that there was no reason for the Department to change its

decision. In the ongoing review, Petitioner argues, Dofasco clearly states that it performs certain selling functions for the sales of its U.S. affiliate to certain unaffiliated customers through sales channels 2 and 3, rather than for its own sales to the affiliate. Therefore, Petitioner says, DINDIRSU should be deducted from CEP. Petitioner suggested programming language to implement the suggested changes.

Dofasco disagrees with the Petitioner that the Department should deduct DINDIRSU from the price of Dofasco's CEP sales to the United States. Dofasco argues that the Department should not deduct those expenses because they are not associated with commercial activity in the United States or related to the sale to an unaffiliated U.S. customer. Dofasco asserts the Department may deduct home market expenses from CEP if the expenses are incurred in the United States and relate to the sale to an unaffiliated customer. Dofasco refers to section 351.402(b) of the Department's regulations in arguing that, in order for the Department to deduct expenses from CEP, the expenses must be: 1) associated with commercial activities occurring in the United States; and 2) related to the sale to an unaffiliated purchaser. Dofasco argues that this is not the case with Dofasco because its reported expenses were incurred in Canada, and were not specifically associated with commercial activity in the United States. If the Department considers Dofasco's channel 2 and channel 3 to be CEP, Dofasco argues, DINDIRSU expenses should not be deducted because such expenses relate solely to the sale by Dofasco to DUSA.

Dofasco argues that it reported in the DINDIRSU field in its section C response expenses Dofasco incurred to pay for administrative services it performed for DUSA, such as invoicing. Dofasco argues that these expenses were incurred by Dofasco and in Canada, and not by a U.S. affiliate in the United States.

Dofasco cites the Antidumping Duties, Countervailing Duties: Final Rule, 62 FR 27296, 27351 (May 19, 1997) (Final Rule), where the Department determined that it “will deduct only expenses associated with a sale to an unaffiliated customer in the United States” and, in doing so, rejected comments from parties who argued that the Department should adjust for all expenses incurred on CEP sales, including expenses incurred in the foreign market. Dofasco further cites the Final Rule: “{The Department does} not believe such an approach is consistent with the statute. Although section 772(d)(1) is ambiguous on this particular point, section 772(f), which deals with the deductions of profit from CEP, refers to the expenses to be “United States expenses,” thereby suggesting that the coverage of section 772(d)(1) is limited to those expenses incurred in connection with a sale in the United States. In addition, the SAA makes clear that only those expenses associated with economic activities in the United States should be deducted from CEP. In discussing section 772(d)(1), the SAA states that the deduction of expenses in calculating CEP relates to “expenses (and profit) *associated with economic activities occurring in the United States.*” SAA at 823 (emphasis added).”

To demonstrate that this is the Department’s consistent practice, Dofasco cites Furfuryl Alcohol From the Republic of South Africa, 62 FR 61084, 61091 (November 14, 1997), where the Department stated “we do not deduct indirect selling expenses incurred in the home market on behalf of U.S. sales, except where such expenses are associated with economic activity in the United States.” Additionally, Dofasco refers to that in Certain Stainless Steel Wire Rods From France: Final Results of Antidumping Duty Administrative Review, 63 FR 30185 (June 3, 1998), where the Department disregarded arguments by Petitioners to deduct from CEP respondent’s home market indirect selling expenses and inventory carrying costs because the Department determined that “the inventory carrying

costs Petitioners refer to are expenses related solely to the sale to the affiliated importer (i.e., MAC).” Similarly, Dofasco claims, “the indirect selling expenses incurred in the home market do not represent expenses associated with economic activity in the United States.” Accordingly, Dofasco argues that these cases demonstrate that the Department deducts home market expenses from CEP only if such expenses relate to the economic activity in the United States and to a sale to an unaffiliated purchaser in the United States.

Should these expenses be associated with activity in the home market, Dofasco argues, the Department does not make such deductions. In fact, Dofasco asserts that, in Mitsubishi Heavy Industries, Ltd. v. United States, the CIT approved the Department’s policy not to deduct indirect selling expenses incurred in the home market when they are not generally related with the sale to an unaffiliated U.S. customer. See Mitsubishi Heavy Industries, Ltd. v. United States, 54 F. Supp. 2d 1183, 1187 (CIT 1999) (hereinafter “Mitsubishi II”).

Department Position:

We agree with both Petitioner and Dofasco, in part. We agree with Petitioner that it is the Department’s practice to deduct DINDIRSU from CEP when those expenses relate to a sale to an unaffiliated purchaser. As cited by Petitioner, in OCTG from Korea the Department deducted indirect selling expenses from CEP because it determined that the selling expenses incurred by the respondent were spent on generating and supporting sales from its affiliated U.S. reseller to unaffiliated customers. OCTG from Korea, at Comment 2. Further, the CIT has held that expenses incurred in the foreign market could still be associated with commercial activities in the United States, and that therefore the

Department may deduct those expenses from CEP (see Mitsubishi II at 1187). We further agree with Petitioner that the Department included DINDIRSU as part of the INDEXPU field which it deducted from CEP in the most recently completed administrative review of Dofasco under this order.

Nonetheless, we disagree with Petitioners that the Department should deduct all of these expenses from CEP in this case. While section 772(d)(1)(D) of the Act requires the Department to deduct from CEP any selling expenses deducted as commissions, direct selling expenses, or selling expenses that the seller pays on behalf of the purchaser, CEP deductions to expenses associated with economic activities occurring in the United States are limited. See Statement of Administrative Action, H. Doc. No. 103-316, 103rd Cong., 2nd Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI (SAA), at 823; 19 CFR 351.402 (b). See also Furfuryl Alcohol From South Africa; Mitsubishi Heavy Industries, Ltd. v. United States, 15 F. Supp. 2d 807, 819 (CIT 1998) (Mitsubishi I) (“indirect selling expenses must be associated with economic activity occurring in the United States”). “In the absence of record evidence to the contrary, it would be unduly punitive to presume that [certain expenses] were associated with economic activities occurring in the United States.” Mitsubishi II at 1187.

The information on indirect selling expenses incurred in the home market for U.S. sales provided on page C-50 and in Exhibit C-14 of Dofasco’s section C response of December 23, 2003 does not identify line items for the expenses covered by DINDIRSU, and does not identify who ultimately paid for each service, Dofasco or its U.S. affiliate. Some of the selling functions included in the indirect selling expense variable are listed in Exhibit A-13 of Dofasco’s December 3, 2002 section A response as applicable to channel 2 and channel 3 U.S. sales. Because

Dofasco reported its channel 3 sales as having been made on a CEP basis, at the very least the selling expenses applicable to those sales to unaffiliated parties in the United States must be included in the reported indirect selling expenses. However, the record does not indicate which indirect selling expenses are related to these and other sales to the first unaffiliated customer in the United States. It would be unreasonable to treat all of these items as general selling expenses, given that the record supports the conclusion that certain of these expenses are associated with economic activity in the United States. In the absence of information from DOFASCO that precisely distinguishes these expenses, section 776(a) of the Act provides that the Department may use facts otherwise available when information that is necessary to our calculations has not been provided on the record.

Accordingly, as neutral facts available, for these final results, we are accepting Dofasco's allocation of indirect selling expenses incurred in the home market to total sales, as reported in Attachment I.C-14 of Dofasco's December 23, 2002 questionnaire response, and deducting the allocated amount from CEP.

Comment 4:

Inclusion of Further Processing Costs and Freight to the Further Processor in CEP Selling Expenses (CEPSELL)

Petitioner argues that, in accordance with section 772d(1), (2), and (3) of the Act, the Department must deduct from CEP any further manufacturing expenses, as well as profit allocated to those expenses. Petitioner cites Stainless Steel Sheet and Strip in Coils From Italy: Final Results of Antidumping Administrative Review, 68 FR 6719 (February 10, 2003) (SSPC from Italy) in support of

its argument that the Department's practice is to include further manufacturing costs as part of CEPSELL,⁴ which is deducted from the U.S. price in the calculation of CEP. To further support its claim that it is the Department's practice to include those expenses in CEPSELL, Petitioner refers to Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews, 61 FR 13815, 13832 (March 28, 1996) (Canadian Steel 93/94) and Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18448, 18465 (April 15, 1997) (Canadian Steel 94/95), where the Department included another respondent's slitting services performed by unrelated parties prior to shipment or sale to its customers as further manufacturing expenses and included them in CEPSELL.

In addition, Petitioner claims that it is the Department's established practice to treat freight expenses to the U.S. further processor (in this case the variable INLFPWU) as further processing expenses. See Gray Portland Cement and Clinker From Japan: Final Results of Antidumping Duty Administrative Review, 60 FR 43761 (August 23, 1995) (Cement and Clinker from Japan), Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Cold-Rolled Carbon Steel Flat Products From Belgium, 67 FR 31195 (May 9, 2002) (CR from Belgium Prelim), and Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Belgium, (67 FR 62130 (October 3, 2002) (CR from Belgium Final)). Petitioner also cites the Department's antidumping questionnaire, which states that

⁴CEPSELL includes the direct and indirect selling expenses used to calculate CEP profit.

further manufacturing “costs include . . . all costs involved in moving the product from the U.S. port of entry to the further manufacturer.” See the Department’s “Request for Information,” section E, I. A, dated October 25, 2002.

Dofasco disagrees with Petitioner that the expenses reported in the variable INLFPWU should be included in the CEP selling expenses, since that variable contains movement expenses from the plant or warehouse in Canada to the unaffiliated U.S. warehouse as assigned by the customer. Referencing Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Final Results of Antidumping Duty Administrative Review, 65 FR 81827 (December 21, 2000) (Pipe Fittings Taiwan) and accompanying Issues and Decision Memorandum, Dofasco asserts that U.S. movement expenses are not included in the field for CEP selling expenses, either by themselves or as part of the aggregate movement variable.

Further, Dofasco claims that the Department’s questionnaire presumes that further manufacturing operations are performed by a U.S. affiliate, citing to page E-1 of the Department’s questionnaire. Thus, Dofasco argues that Petitioner’s citations to Cement and Clinker from Japan and CR from Belgium Final, where movement expenses to the affiliated manufacturer were included in the CEP selling expenses, are inapposite. Only where the respondent is affiliated with the further processor in the United States, Dofasco contends, is it the Department’s practice to include the U.S. movement expenses to that processor in the CEP selling expenses as part of further manufacturing.

Dofasco also contends that Petitioner erred in referencing the first and second administrative review of this order because there the Department did not face the issue whether to include movement expenses to the unrelated processor in CEP selling expenses. Dofasco states that in neither of those

reviews was there any indication that the movement expenses to the unaffiliated processor were included in the calculation of CEP selling expenses. The Department specifically stated then that the slitting operations were considered further manufacturing operations, whereas it did not state that the movement expenses associated with moving the material to the further processor were considered further manufacturing operations, Dofasco says. See Canadian Steel 93/94 at 13832 and Canadian Steel 94/95 at 18465.

In addition, Dofasco claims the Department specifically determined in the Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands, 66 FR 50408 (October 3, 2001), and accompanying Issues and Decision Memorandum at Comment 10 (HR from the Netherlands), that freight charges to the unaffiliated processor should not be included in the calculation of CEPSELL. In that case, Dofasco says, Petitioner, which was the same Petitioner as in the instant case, argued that tolling transactions conducted by outside processors in the United States constituted further-manufactured sales and that all expenses associated with further processing, including the cost of freight from the port to the toll, should be deducted from U.S. price. However, Dofasco claims, the Department specifically stated that it is not its practice to include movement expenses in the calculation of CEPSELL.

Dofasco argues it has already included some U.S. movement expenses in its reported further processing charges. Therefore, according to Dofasco, including those movement expenses in CEPSELL would result in over-reporting of movement expenses to the unaffiliated processor, and should not be included in CEPSELL.

In addition, Dofasco argues that, should the Department determine to include further processing

costs in CEPSELL, the Department should also include those further processing costs in total expenses for use in its CEP profit calculations, in accordance with section 772(f)(2) of the Act, which requires the Department to consider total expenses incurred when calculating CEP profit.

Department Position:

We agree with Petitioner that, in accordance with section 772d(1),(2), and (3) of the Act, further manufacturing expenses must also be included in the calculation of CEP profit. See SSPC from Italy and accompanying Issues and Decision Memorandum at Comment 9, and Canadian Steel 93/94 and Canadian Steel 94/95. We also agree with Dofasco that the further manufacturing expenses must also be included in the calculations of total expenses for use in the CEP profit calculations.

However, it is not the Department's current practice to treat freight expenses from the port to the U.S. further processor as further processing expenses. Irrespective of the decisions in Cement and Clinker from Japan and CR from Belgium Prelim and CR from Belgium Final, in the more recent HR from the Netherlands, as cited by Dofasco, the Department has determined that freight to warehouse charges are considered movement expenses by the Department. It is not the Department's normal practice to include such movement expenses within the calculation of selling expenses used to calculate CEP profit.

Comment 5:

Exclusion of Certain Home Market Sales from Analysis by Not Extending the Window Period to Two Months after the Last Sale Date of the U.S. Sales

Dofasco argues that the Department inadvertently excluded certain home market sales from its analysis by not extending the window period by two months. Dofasco argues that the Department's practice in administrative reviews is to compare U.S. sales to home market sales within the contemporaneous window period that extends from three months prior to the first sale date for U.S. sales to two months after the last sale date of the U.S. sales. The Department should, Dofasco contends, rectify the arm's length program, model match program, and margin program to reflect this change.

Petitioner did not comment on this issue.

Department Position:

The Department agrees with Dofasco that it is the Department's practice in administrative reviews to compare U.S. sales to sales made in the home market within the contemporaneous window period which extends from three months prior to the month of the first sale date for U.S. sales until two months after the month of the last sale date of the U.S. sales. For the final results, we have extended the window period to two months after the last U.S. sale date.

Comment 6:

Reclassification of U.S. Spot Sales Made Through Channel 3 as Export Price (EP) Sales

Dofasco asserts that the Department inadvertently failed to reclassify Dofasco's U.S. sales of subject merchandise through Channel 3 made as spot sales as EP sales. Dofasco argues that in the Department's preliminary analysis, the Department found that Dofasco's sales to its automotive customers made through Channel 3 and pursuant to a long-term contract are CEP and all other sales-- i.e., spot sales-- are EP sales. Dofasco asserts that for purposes of the final results, the Department should reclassify Dofasco's spot sales as EP sales.

Petitioners did not comment on this issue.

Department Position:

The Department agrees with Dofasco that in the preliminary analysis memorandum, the Department stated that Dofasco's spot sales through channel 3 are EP sales but did not treat them as such in the margin calculation. Because, for these final results, we have determined that Dofasco's spot sales through channel 3 are CEP sales, we have not changed their treatment in the margin calculations. See our response to Comment 1.

Comment 7:

Claimed Inaccuracies in Verification Report

Dofasco contends that the Department's verification report of August 27, 2003 contains two factual errors which the Department has not addressed. Dofasco filed a letter to the Department on September 2, 2003, outlining its concerns that there were certain inaccuracies in the verification report, and its brief reiterated these concerns. Specifically, Dofasco disagrees with the Department's findings at verification involving the issuance of order acknowledgments with respect to long-term contracts. Dofasco also disagrees with the Department's findings involving the issuance of invoices either before or following the receipt of payment.

Petitioner did not comment on this issue.

Department Position:

The Department will not modify the record as requested by Dofasco. The Department carefully analyzed Dofasco's concerns that there were certain inaccuracies in the verification report, as outlined in Dofasco's September 2, 2003 letter to the Department. The Department feels it has addressed Dofasco's concerns and made corrections as outlined in the Memorandum to the File: Amendment to "Report on the Verification of Dofasco Inc. in the Ninth (2001-2002) Antidumping Duty Administrative Review for Certain Corrosion-Resistant Carbon Steel Flat Products from Canada" released on August 27, 2003 (Memo Amendment to the Verification Report), dated October 8, 2003. The issues raised by Dofasco, in addition to those discussed in the Memo Amendment to the Verification Report, pertain to findings and facts not verified by the Department. Dofasco's claims may

or may not be true, but the Department relied on its own notes and records, and did not verify the claims made by Dofasco in its submissions to the Department following verification. (See Dofasco's Case Brief at 4 - 6). Dofasco's factual claims in its brief are considered new untimely factual information. Thus, the Department cannot adopt Dofasco's suggested "corrections" to the verification report, for these facts were not verified.

Comment 8:

Home Market Sales of Non-Prime Products

Petitioner contends that in the Department's preliminary analysis memorandum, the Department stated that Dofasco had no U.S. sales of secondary merchandise and, consequently, the Department excluded sales of secondary merchandise in its model-match program. However, Petitioner claims that this was not done, and states that the Department should correct this in the final results.

Dofasco disagrees with Petitioner and says that Petitioner has misinterpreted the Department's statement that it will exclude sales of secondary merchandise from its model-match program. Dofasco argues that Petitioner's proposed language improperly excludes all home market sales of non-prime merchandise from the Department's calculation of a dumping margin. Dofasco asserts that the Department should continue to include Dofasco's non-prime home market sales in its margin analysis.

Dofasco states that it is the Department's consistent practice to include comparison market sales of non-prime merchandise in its analysis, even when there are no non-prime sales in the U.S. market. Dofasco cites to Notice of Final Results of Antidumping Duty Administrative Review: Granular

Polytetrafluoroethylene Resin from Italy (Polytetrafluoroethylene Resin from Italy), 68 FR 2007 (January 15, 2003) and accompanying Issues and Decision Memorandum at Comment 4, where the Department determined that it is “the Department’s normal practice to include all sales of off-spec or non-prime merchandise in its calculation and restrict matches of non-prime sales in the United States to non-prime sales in the home market.” Similarly, Dofasco cites that in Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products from The Netherlands (Hot-Rolled Steel from The Netherlands), 66 FR 50408 (October 3, 2001) and accompanying Issues and Decision Memorandum at Comment 3, the Department also determined that non-prime sales should be included in the Department’s margin calculation. Dofasco states that the Department’s model match and margin calculation programs already correctly restrict matches of U.S. sales, which are all of prime merchandise, to sales of prime merchandise in the home market, and asserts that the Department should affirm its preliminary results and continue to include non-prime home market sales in its analysis but limit matches of U.S. sales to prime home market sales.

Department Position:

The Department agrees with Dofasco that it is the Department’s consistent practice to include comparison market sales of non-prime merchandise in its analysis, matching prime merchandise sold in the United States with prime merchandise sold in the home market, and matching non-prime merchandise sold in the United States with non-prime merchandise sold in the home market. See Polytetrafluoroethylene from Italy and Hot-Rolled Steel from The Netherlands. Consistent with past reviews, the Department in both the preliminary results and these final results, has matched prime

merchandise sold in the United States with prime merchandise sold in the home market. Furthermore, for these final results, we have adjusted the test for sales below the cost of production so that, for each CONNUM, separate tests are done for prime and non-prime merchandise. Because the arm's length test was already done on a CONNUM and prime/non-prime--specific basis for the preliminary results, no adjustment to the arm's-length test was necessary.

Comment 9:

Correction to Draft Liquidation and Cash Deposit Instructions

Dofasco asserts that the Department should correct its draft cash deposit and liquidation instructions in order to correct the names of parties listed (e.g., to eliminate the comma between company name and "Inc."). Dofasco also argues that the Department failed to include in the draft cash deposit instructions an entity that was reported as the producer of a number of sales reported in the section C database, and the sales of which have been included in the Department's margin calculations. Dofasco claims that the Department's cash deposit instructions should specifically inform Customs that entries of merchandise manufactured/exported by this entity are entitled to the same rate applicable to Dofasco and Sorevco.

Petitioner did not comment on this issue.

Department Position:

The Department agrees with Dofasco that the Department should correct its cash deposit and liquidation instructions to properly reflect the name of the parties involved. However, the Department

does not agree with Dofasco in its request for the Department to include a particular entity in the cash deposit instructions. Although Dofasco's Section C database indicates this entity as the producer of certain sales, in its Section C narrative response, Dofasco reported that "the only manufacturer was Dofasco." We made no determination that, contrary to Dofasco's narrative response, this entity was a producer. Even if we were to make such a determination, there would be no reason to apply Dofasco's cash deposit rate to items produced by that entity that are not exported by Dofasco.

Comment 10:

Prepaid Brokerage and Handling (PBROKU) for Certain U.S. Sales

Dofasco asserts that the Department improperly set the U.S. variable prepaid brokerage and handling (PBROKU) to zero except for one specific term of delivery in the margin calculation program. Dofasco argues that it properly reported all values for PBROKU, and states that, at verification, the Department confirmed that Dofasco had properly reported such variables. Dofasco argues that, for the final results, the Department should uphold its verification findings. Petitioner did not comment on this issue.

Department Position:

We agree with Dofasco that the value of prepaid brokerage and handling was properly reported and verified by the Department, and that the Department should set the value to reflect Dofasco's reported value. For these final results, the Department has properly set the value for PBROKU as it was reported.

Comment 11:

Correction of Certain Ministerial Errors

Petitioner points out that there are certain ministerial errors that the Department should correct. Petitioner states that the Department should exclude in its programming a product characteristic, “surface type,” Dofasco reported in its CONNUM which is not a model match criterion as outlined in the Department’s questionnaire. Petitioner contends that the Department states in the Preliminary Results that it based its model-match program solely on the characteristics listed in its questionnaire. Dofasco counters that the Department did not indicate that it was basing its matches solely on the characteristics listed in the questionnaire. Furthermore, Dofasco claims that the Department did not question the product characteristic in any of its supplemental questionnaires, or indicate an intention to disallow this characteristic. Further, Dofasco claims that the history of the model match hierarchy demonstrates that the Department is willing to alter a model match as industry advances.

Second, Petitioner argues that the Department made an error in its currency conversion by not setting variables in Canadian dollars to zero when the home market sale was in U.S. dollars, resulting in double counting of certain variables. To correct this error, the Department would have to make corrections to its calculations of net cost of production (NPRICOP) and revenue (REVENUH). In its rebuttal comments Dofasco noted that the aforementioned corrections with respect to double counting certain home market expenses would necessitate a correction in the calculation of the direct and indirect selling expenses (SELLCOP and ISELCOPI).

Third, Petitioner further points out that the Department erroneously had two negative signs preceding INDEXUS, the aggregate indirect expense variable, resulting in adding the expenses instead

of subtracting them.

Dofasco claims that Sorevco properly reported a G&A factor in its Section D questionnaire response. However, when the Department recalculated Sorevco's G&A expenses based on Sorevco's reported total COM, in the model match program, the Department inadvertently applied an incorrect G&A factor.

Dofasco states that it reported both U.S. and home market packing expenses in Canadian dollars and argues that the Department erroneously converted packing expenses for use in the calculation of constructed value and U.S. cost of goods sold for the CEP profit calculation from Canadian dollars to U.S. dollars. Dofasco claims that packing expenses should be expressed in Canadian dollars to be consistent with other variables used in these calculations. Petitioner did not comment on this issue.

Department Position:

We agree with Petitioner with respect to the product characteristic. The Department has not changed its model match criteria, and the additional product characteristic submitted by Dofasco is not a matching criterion as described in the Department's questionnaire. We inadvertently kept that product characteristic in our programming language for the preliminary results. For these final results we have eliminated the product characteristic in our programs.

We agree with Petitioner's comments with respect to currency conversions, and with Dofasco's comments regarding Petitioner's proposed language to correct the double counting. In addition, we added prepaid freight (PPAYFRTH) to the home market gross unit price (GRSUPRH)

when calculating revenue (REVENUH). We also removed the second negative sign preceding the variable INDEXUS in our calculations of U.S net price.

We also agree with Dofasco that the Department mistakenly entered the wrong digit into the programming when recalculating Sorevco's G&A expenses and have corrected this error accordingly. In addition, we revised our calculations for packing in the margin calculation program by not converting that expense into U.S. dollars.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of this administrative review, including the final weighted-average dumping margin for Dofasco, in the Federal Register.

Agree

Disagree

James J. Jochum
Assistant Secretary
for Import Administration

Date