UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-533-824
POR: 07/01/2009-06/30/2010
ITA/IA/OFC6: EB/TP
Public Document

DATE: December 5, 2011

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Issues and Decision Memorandum for the Final Results

I. Summary

We have analyzed the comments of the interested parties in the antidumping duty administrative review of polyethylene terephthalate film (PET Film) from India. As a result, we did not make any changes to the margin calculation for Ester Industries, Ltd. (Ester). However, we revised the adjustment to U.S. price in our margin calculations based on Ester's export subsidy rate that we calculated for the final results of the concurrent countervailing duty administrative review. This resulted in a change of the antidumping duty margin calculated for these final results of review.

.

We recommend that you approve the position described in the "Discussion of the Issues" section of this memorandum.

II. Background

On August 5, 2011, the Department of Commerce (the Department) published the preliminary results of administrative review of the antidumping duty order on polyethylene terephthalate film (PET Film) from India. See Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Antidumping Duty Administrative Review, 76 FR 47546 (August 5, 2011) (Preliminary Results). This review covers one producer/exporter of subject merchandise: Ester. The period of review is July 1, 2009, through June 30, 2010. Based on the results of our analysis of the comments received, we did not make any changes to the preliminary results.

The Department received a timely case brief from Ester on September 6, 2011. DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively, "Petitioners") filed a timely rebuttal brief on September 12, 2011. We received comments on zeroing from interested parties. Based on our analysis of the comments received, we did not make any changes to the weighted average margin for Ester calculated in the Preliminary Results.

III. Discussion of the Issues

Comment: Zeroing in Administrative Reviews

Ester states that, in the Preliminary Results, the Department continued its practice of assigning a margin value of zero to the CONNUM-specific negative-margin transactions. Ester argues that for the final results the Department should calculate its margin without zeroing non-dumped sales. Further, Ester recognizes that zeroing has been the Department's standard practice in reviews. However, in light of the zeroing proposal[1] and the CAFC's recent finding that the Department's use of zeroing in administrative reviews is an inconsistent statutory construction,[2] the Department should revise its practice and not apply zeroing in the final.

In Dongbu, Ester argues, the CAFC remanded the final results of an administrative review, in which zeroing was applied, for the Department to explain why its interpretation of section 771(35)(A) for administrative reviews differs from that for investigations.[3] According to Ester, the CAFC states that while the statute is ambiguous with respect to zeroing, the Department must explain and justify its inconsistent interpretation of the statute as applied to administrative reviews vs. investigations.[4] Ester explains that, as in Dongbu, the application of zeroing in Ester's margin calculation in the Preliminary Results, is inconsistent with the Department's interpretation of section 771(35)(A) in investigations. Ester argues that the Department did not explain why it interpreted the statute differently for this administrative review than for investigations. Therefore, Ester argues, the Preliminary Results are not in compliance with binding CAFC precedent.

In addition, Ester contends that the Department, in the Proposed Calculation Methodology, stated that it wants to eliminate its zeroing practice in administrative reviews, and plans to amend its regulations at 19 CFR 351.414 to this effect. Specifically, Ester claims, the Department expressed its intent to change its preference in administrative reviews from comparing average-to-transaction prices to the monthly average-to-average prices in its margin calculations.

The Department's Proposed Calculation Methodology, Ester argues, is in response to the many adverse WTO rulings, which found that zeroing in both investigations and administrative reviews is inconsistent with the Department's obligations under the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade.[5] In the Proposed Calculation Methodology, Ester concludes, the Department "recognized its obligation to change

---

[1] See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (December 28, 2010) (Proposed Calculation Methodology).
[2] See Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363, 1371-73 (Fed. Cir. 2011) (Dongbu); see also JTEKT Corp. v. United States, 768 F. Supp. 2d 1333 (Ct. Int'l Trade May 5, 2011) (JTEKT I).
[3] See Dongbu, 635 F.3d at 1371-73.
[4] Id. at 1372-73
[5] United States-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R, WT/DS294/AB/R, adopted May 9, 2006 ; United States -Measures Related to Zeroing and Sunset Reviews, WT/DS322/R, WT/DS322/AB/R, adopted Jan. 23 , 2007 ; United States-Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/R, WT/DS344/AB/R, adopted May 20 , 2008 ; United States -Continued Existence and Application of Zeroing Methodology, WT/DS350/R, WR/DS350/AB/R, adopted Feb. 19, 2009.

the practice."[6] Therefore, Ester asks the Department to modify its methodology in calculating weighted-average dumping margins, to include negative CONNUM specific margins.

Petitioners counter that Ester provides no legitimate basis for the Department to depart from its zeroing methodology in the final results. As an initial matter, Petitioners argue that the CAFC has repeatedly ruled that zeroing is a reasonable method for calculating dumping margins, as long as this practice is based on a reasonable interpretation of, and is consistent with, the statute.[7] Petitioners argue that in U.S. Steel,[8] the CAFC explained that it is not only bound by the Timken and Corus I decisions, but it agrees with those decisions. Thus, Petitioners contend, the Department "has the prerogative to zero in administrative reviews."[9]

In addition, Petitioners note that, in Dongbu,[10] the case Ester relies on in its argument, the CAFC upheld as a reasonable interpretation of the statute the Department's use of zeroing in margin calculations for both investigations and administrative reviews, because the statute itself is ambiguous.

Moreover, Petitioners continue, in Dongbu the CAFC reaffirmed the Department's right to use zeroing in administrative reviews, as long as this approach is supported by a reasonable interpretation of the antidumping statute.[11] Petitioners claim that Ester, by citing to the respective section of Dongbu, agrees with Petitioners that Dongbu implicitly permits the Department to apply zeroing in administrative reviews, as long as the Department shows how this practice is supported by the statute.

In Dongbu, Petitioners maintain, the CAFC specifically left open the possibility for the Department to explain why its interpretation of 771(35)(A) of the Tariff Act of 1930, as amended (the Act) is different for investigations and administrative reviews.[12] Thus, the CAFC did not provide a definitive decision as to whether the Department may zero in its margin calculations. Further, Petitioners point out that the Department sought public comment in the Proposed Calculation Methodology; however, at this point, no final rule has been adopted by the Department that would preclude it from using zeroing in administrative reviews. Therefore, the Department should continue using zeroing in its margin calculation, as it did for the Preliminary Results of this administrative review.

Department Position: We have not changed our calculation of the weighted-average dumping margin as suggested by Ester 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" (emphasis added). Outside the context of antidumping investigations involving average-to average

---

[6] See Ester's Case Brief, dated September 6, 2011.
[7] See Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken); see also, Corus Steel BV v. Dep't of Commerce, 395 F.3d 1343, 1347 (Corus I).
[8] See United States Steel Corp. v. United States, 621 F.3d 1351, 1361 (Fed. Cir. 2010) (U.S. Steel).
[9] See Petitioner's Rebuttal Brief, dated September 12, 2011.
[10] Dongbu, 635 F.3d at 1360-70.
[11] Id. at 1371-73.
[12] Id. at 1373.

comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value (NV) is greater than export price (EP) or constructed export price (CEP). We disagree with the respondents that the Department's "zeroing" practice is an inappropriate interpretation of the Act. Because no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of section 771(35) of the Act.[13]

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

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

The CAFC 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."[14] 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.[15]

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations.[16] With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the Uruguay Round Agreements Act (URAA) was specifically limited to address adverse

---

[13] See, e.g., Timken, 354 F.3d at 1342; Corus I, 395 F.3d at 1347-49; and SKF USA Inc. v. United States, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (SKF).

[14] See Timken, 354 F.3d at 1343.

[15] See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007); and NSK Ltd. v. United States, 510 F.3d 1375 (Fed. Cir. 2007).

[16] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Zeroing Notice).

WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department's interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word "exceeds" in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping margins used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping duty investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales, but rather at an "on average" level for the comparison. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable manner of aggregating the comparison results produced by this comparison method. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, and treated in the calculation of the weighted average dumping margin under section 771(35)(B) of the Act, it is reasonable for the Department to consider whether the comparison result in question is the product of an average-to-average comparison or an average-to-transaction comparison.

In U.S. Steel, the CAFC considered the reasonableness of the Department's interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act.[17] Specifically, in U.S. Steel, the CAFC was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring.[18] The Court then affirmed as reasonable the Department's application of its modified average-to-average comparison methodology in investigations in light of the Department's stated intent to continue zeroing in other contexts.[19]

In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of "zeroing" in the context of an administrative review completed after the implementation of the Zeroing Notice.[20] In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is consistent with the CAFC's recent decision in SKF.

---

[17] See U.S. Steel, 621 F.3d at 1351.
[18] See id. at 1363.
[19] Id.
[20] See SKF, 630 F.3d at 1365.

Furthermore, in Corus I, the CAFC acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.[21] That is, the Court explained that the holding in Timken – that zeroing is neither required nor precluded in administrative reviews – applies to antidumping duty investigations as well. Thus, Corus I does not preclude the use of zeroing in one context and not the other.

Moreover, we disagree with Ester that the CAFC's recent decision in Dongbu requires the Department to change its methodology in this administrative review, and that the Department failed to provide an adequate explanation of its differing interpretations of section 771(35)(B) of the Act for investigations and for reviews in the Preliminary Results. The holding of Dongbu, and the recent decision in JTEKT II,[22] was limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in neither Dongbu nor JTEKT II overturned prior CAFC decisions affirming zeroing in administrative reviews, including SKF, which we discuss above, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in Dongbu and JTEKT II, here the Department is providing additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Antidumping Investigations[23] – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT II, U.S. Steel, and SKF.

Further, the Proposed Calculation Methodology, as cited by Ester in its case brief, does not provide a basis for changing the Department's approach for calculating weighted-average dumping margins in the instant administrative review. Proposed regulations by their very nature are not binding to an agency.[24] The Proposed Calculation Methodology is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving Congressional committees, among others. See section 123(g)(1) of the URAA. It does not provide legal rights or expectations for parties in this administrative review. The Proposed Calculation Methodology further makes clear that, in terms of timing, any changes in methodology will be prospective only, and "will be applicable in . . . all {administrative} reviews pending before the Department for which a preliminary results is issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification." See Proposed Calculation Methodology, 75 FR at 81535. Additionally, the Proposed Calculation Methodology would not apply to the present administrative review because normally, "{a} final rule or other modification . . . may not go into effect before the end of the 60-day period

---

[21] See Corus I, 395 F.3d at 1347.

[22] JTEKT Corp. v. United States, 642 F.3d 1378 (CAFC June 29, 2011) (JTEKT II).

[23] See, e.g., Zeroing Notice and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 FR 3783 (June 26, 2007) (collectively, Final Modification for Antidumping Investigations).

[24] See Viraj Forgings Ltd. v. United States, 206 F. Supp. 2d 1288, 1293 (CIT 2002) (rejecting plaintiff's reliance on a proposed rule as basis for receiving a zero margin).

beginning on the date which consultations {between the Trade Representative heads of the relevant departments or agencies, and appropriate Congressional committees}. . . begin." See section 123(g)(2) of the URAA. Because the final results in this administrative review will be completed prior to the effective date of the final rule, any change in the treatment of non-dumped sales, pursuant to the Proposed Calculation Methodology (if implemented) would not apply to this administrative review.

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

IV. Recommendation

We recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of this review and the final dumping margins for all companies in the Federal Register.

Agree ✓ Disagree_____

Chi Tuck for Paul Piquado

Paul Piquado
Assistant Secretary
for Import Administration

12/5/11

Date