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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Gary Taverman 
Senior Advisor
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the 2010-2011
Administrative Review of Stainless Steel Bar from India

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on stainless steel bar from India. As a result of our analysis, the final results do not differ from the preliminary results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues for which we received comments and rebuttal comments by parties:

Comment 1: Whether to Use Zeroing Methodology in this Administrative Review
Comment 2: Whether the Department Should Have Selected Chandan as a Mandatory Respondent

BACKGROUND

On March 6, 2012, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order (the Order) on stainless steel bar from India.¹ The review covers shipments of subject merchandise to the United States for the period February 1, 2010, through January 31, 2011, by Mukand Ltd. (Mukand) and Chandan Steel Limited (Chandan).² Chandan requested individual review but was not selected.

¹ See *Stainless Steel Bar From India: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review*, 77 FR 13270 (Mar. 6, 2012) (*Preliminary Results*).

² As explained in the *Preliminary Results*, we rescinded the review in regard to Venus Wire Industries Pvt. Ltd. (Venus). See *id.*



DISCUSSION OF THE ISSUES

Comment 1: Whether or not to Use Zeroing Methodology in this Administrative Review

Mukand's Comments:

Mukand argues that the Department erred in the *Preliminary Results* because the Department zeroed negative margins. Mukand argues that the Department has not provided a sufficient explanation for why this methodology is used in this review and references two Federal Circuit Court decisions³ that it argues make this practice illegal as the Department no longer uses this methodology in investigations.

Petitioners' Rebuttal Comments:

Petitioners⁴ disagree with Mukand's claim that the Department's zeroing methodology was unlawful. Petitioners argue that the Federal Circuit held only that the Department needed to adequately explain its position to continue with its zeroing methodology in administrative reviews even while it discontinued its zeroing methodology in investigations. Additionally, Petitioners cite previous administrative reviews where the Department rejected arguments similar to Mukand's.⁵ Accordingly, Petitioners assert that the Department has provided adequate explanation of its different interpretations of zeroing in regard to investigations and administrative reviews and that the Court of International Trade (CIT) affirmed the Department's explanation.⁶ Petitioners argue that recent Federal Circuit decisions do not support Mukand's argument for the Department to abandon its zeroing methodology in the instant review. Petitioners also, separately, argue that the *Final Modification for Reviews*⁷ applies only to reviews for which the preliminary results are issued after April 16, 2012, and thus does not apply to this administrative review.

³ Although Mukand does not cite to the referenced Federal Circuit decisions, the Department assumes that Mukand refers to *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011)(*Dongbu*) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011)(*JTEKT*).

⁴ Carpenter Technology Corp.; Electralloy Co., (a division of G.O. Carlson, Inc.); Outokumpu Stainless Bar, Inc.; Universal Stainless & Alloy Products, Inc.; and Valbruna Slater Stainless, Inc. (collectively, Petitioners).

⁵ See, e.g., *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 77 FR 21527 (Apr. 10, 2012), and accompanying Issues and Decision Memorandum at 8; *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Results of the Countervailing Duty Administrative Review*, 77 FR 21734 (Apr. 11, 2012), and accompanying Issues and Decision Memorandum at 6; and *Certain Lined Paper Products From India: Notice of Final Results of Antidumping Duty Administrative Review*, 77 FR 14729 (Mar. 13, 2012), and accompanying Issues and Decision Memorandum at 8-9.

⁶ See *Union Steel v. United States*, Concol. Court No. 11-00083, Slip Op. 12-24 (Ct. Int'l Trade Feb. 27, 2012).

⁷ *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

Department's Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by Mukand, for these final results. Section 771(35)(A) of the Tariff Act of 1930, as amended (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). The definition of “dumping margin” calls for a comparison of normal value (NV) and export price (EP) or constructed export price (CEP). Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (averaging group).

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 {EPs and CEPs} of such exporter or producer.” The definition of “weighted average dumping margin” calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

The issue of “zeroing” versus “offsetting” involves how certain results of comparisons are treated in the aggregation of the numerator for the “weighted average dumping margin” and relates back to the ambiguity in the word “exceeds” as used in the definition of “dumping margin” in section 771(35)(A) of the Act. Application of “zeroing” treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the “weighted average dumping margin.” Application of “offsetting” treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the “weighted average dumping margin” to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that

examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department's interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether "zeroing" or "offsetting" is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the period of review (POR); the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between "zeroing" and "offsetting" reflects the ambiguity the Federal Circuit has found in the word "exceeds" as used in section 771(35)(A) of the Act.⁸ The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.⁹ For decades, the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the Federal Circuit and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.¹⁰ In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more

⁸ See *Timken Co. v. United States*, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (*Timken*).

⁹ See *PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (*PAM*) ("{The} gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce's methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute."); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996) (*Bowe Passat*) ("The statute is silent on the question of zeroing negative margins."); *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360 (CIT 1987) (*Serampore*) ("A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter's home market as having a zero percent dumping margin.").

¹⁰ See, *e.g.*, *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (*NSK*); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (*Corus II*); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (*Corus I*); *Timken*, 354 F.3d at 1341-45; *PAM*, 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); *Bowe Passat*, 926 F. Supp. at 1149-50; *Serampore*, 675 F. Supp. at 1360-61.

profitable sales. Commerce's interpretation is reasonable and is in accordance with law."¹¹ 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."¹² 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 applied 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.¹³

In 2005, a panel of the WTO Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.¹⁴ The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in antidumping duty investigations.¹⁵ The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123).¹⁶ Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities' arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.¹⁷

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO

¹¹ *Serampore*, 675 F. Supp. at 1361 (citing *Certain Welded Carbon Steel Standard Pipe and Tube From India: Final Determination of Sales at Less Than Fair Value*, 51 FR 9089, 9092 (Mar. 17, 1986)); see also *Timken*, 354 F.3d at 1343; *PAM*, 265 F. Supp. 2d at 1371.

¹² See *Timken*, 354 F.3d at 1343.

¹³ See, e.g., *Timken*, 354 F.3d at 1343; *Corus I*, 395 F.3d at 1343; *Corus II*, 502 F.3d at 1370, 1375; and *NSK*, 510 F.3d at 1375.

¹⁴ See Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R (Oct. 31, 2005) (*EC-Zeroing Panel*).

¹⁵ See *EC-Zeroing Panel*.

¹⁶ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Final Modification*, 71 FR 77722 (December 27, 2006); and *Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation: Change in Effective Date of Final Modification*, 72 FR 3783 (June 26, 2007) (collectively, *Final Modification for Investigations*).

¹⁷ See *EC-Zeroing Panel* at 7.284, 7.291.

report, to take any action beyond that necessary for compliance.¹⁸ Moreover, in *Corus I*, the Federal Circuit 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.¹⁹ In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations.²⁰ 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 URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.²¹

The Federal Circuit subsequently upheld the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.²² In upholding the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.²³ The Federal Circuit’s reasoning in upholding the Department’s decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department’s limited decision to cease zeroing only with respect to one

¹⁸ See *Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States*, 603 F.3d 928, 934 (Fed. Cir. 2010).

¹⁹ See *Corus I*, 395 F.3d at 1347.

²⁰ See *Final Modification for Investigations*.

²¹ See *id.* On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. See *Final Modification for Reviews*, 77 FR 8101. The *Final Modification for Reviews* makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the *Final Modification for Reviews* does not apply here.

²² See *U.S. Steel Corp. v. United States*, 621 F.3d. 1351, 1355 n.2, 1362-63 (Fed. Cir. 2010) (*U.S. Steel Corp.*).

²³ See *id.* at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).

comparison type.²⁴ The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.²⁵ The Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing.²⁶ In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that “{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist.”²⁷

We disagree with Mukand’s implication²⁸ that the Federal Circuit’s decisions in *Dongbu* and *JTEKT* require the Department to change its methodology in this administrative review. These holdings were 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 Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in *Dongbu* and *JTEKT* did not overturn prior Federal Circuit decisions affirming zeroing in administrative reviews, including *SKF v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (*SKF*), 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*, the Department provides in these final results additional explanation for its context-dependent interpretation of the statute subsequent to the *Final Modification for Investigations* – 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*, *U.S. Steel Corp.*, and *SKF*.

The Department’s interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,²⁹ the Department has maintained a long-standing, judicially-affirmed

²⁴ See *id.* at 1361-63.

²⁵ *Id.* at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act.

²⁶ See *U.S. Steel Corp.*, 621 F.3d at 1363.

²⁷ See *id.* (emphasis added).

²⁸ As noted above, in footnote 3, Although Mukand does not cite to the referenced Federal Circuit decisions, we assume that Mukand means to refer to *Dongbu* and *JTEKT*.

²⁹ The *Final Modification for Reviews* adopts this comparison method with offsetting as the default method for administrative reviews; however, as explained in footnote 21 this modification is not applicable to these final results.

interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the URAA for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department's *Final Modification for Investigations* to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the Federal Circuit in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act.³⁰ In the *Final Modification for Investigations*, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the *Charming Betsy* doctrine, to comply with certain adverse WTO dispute settlement findings.³¹ Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the *Charming Betsy* doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither Section 123 of the URAA nor the *Charming Betsy* doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of the Department's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review.³² These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

³⁰ See, e.g., *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1382 (Fed. Cir. 2008); *NSK*, 510 F.3d at 1379-1380; *Corus II*, 502 F.3d at 1372-1375; *Timken*, 354 F.3d at 1343.

³¹ According to *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” The principle emanating from the quoted passage, known as the *Charming Betsy* doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

³² See *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992).

Moreover, the Department's interpretation reasonably accounts for inherent differences between the results of distinct comparison methodologies. The Department interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, *see, e.g.*, section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product. In calculating the average EP or CEP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, *see, e.g.*, section 777A(d)(2) of the Act, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the POR. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping

for that sale in its aggregation of transaction-specific dumping margins.³³ Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are (1) implicitly granted when calculating average EPs and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We note that neither the CIT nor the Federal Circuit has rejected the above reasons. In fact, the CIT recently sustained the Department’s explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations.³⁴ Accordingly, the Department’s interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

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,

³³ As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

³⁴ See *Union Steel v. United States*, Consol. Court No. 11-00083, slip op. 12-24 (CIT Feb. 27, 2012).

the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

Comment 2: Whether the Department Should Have Selected Chandan as a Mandatory Respondent

Chandan's Comments:

Chandan asserts that it should have been selected as a mandatory respondent and assigned an individual margin. Chandan argues that the Department improperly failed to select it for individual review at two instances: (1) in June 2011, when Petitioners withdrew their review requests for the nine non-selected companies, leaving only three companies (Mukand, Venus, and Chandan) subject to the proceeding; and (2) in September 2011, when the Department partially rescinded the review for Venus subsequent to Venus's revocation from the Order. Chandan claims that the Department had ample time to conduct a review of Chandan. Thus, the Department improperly failed to select Chandan as a mandatory respondent.³⁵ Chandan states that this situation is analogous to *PC Strand From the PRC*,³⁶ where the Department selected a new mandatory respondent after one of the two previously selected respondents indicated it would not participate in the proceeding.

Chandan admits that it did not request to be treated as a voluntary respondent. Chandan asserts that the Department generally does not review responses submitted by voluntary respondents, thus, the burden of submitting a response to the questionnaire was not outweighed by the likelihood of individual review.

Petitioners' Rebuttal:

Petitioners argue that the Department should continue to assign Mukand's calculated dumping margin to Chandan. Petitioners note that no respondent, including Chandan, filed comments regarding the Department's respondent selection. Petitioners assert that Chandan failed to request to be reviewed as a voluntary respondent and, accordingly, Chandan failed to exhaust its administrative remedies in the instant review.³⁷

³⁵ See *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 637 F. Supp. 2d 1260, 1263 (CIT 2009)(Zhejiang).

³⁶ See *Prestressed Concrete Steel Wire Strand from the People's Republic of China; Postponement of the Preliminary Determination of the Antidumping Duty Investigation*, 74 FR 61104 (Nov. 23, 2009) (*PC Strand from the PRC*).

³⁷ Petitioners cite to *Thai I-Mei Frozen Foods Co. v. United States*, 477 F. Supp. 2d 1332, 1354 (CIT 2007) (holding that the plaintiff did not exhaust its administrative remedies); see also *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (stating that the CIT "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases").

Petitioners further argue that Chandan has failed to offer any legal justification for why it should be considered for individual examination. Petitioners note that Chandan's request for individual examination in its case brief comes more than one year after the Department's selection of mandatory respondents. Petitioners cite to *PET Film from the PRC*, and other cases, where the Department declined to select additional respondents at such a late stage in the administrative review.³⁸

Department's Position:

The Department agrees with Petitioners that we should continue to assign the review-specific average margin to Chandan, *i.e.*, the rate calculated for Mukand. The Department generally assigns the weighted average of the margins for the mandatory respondents, excluding zero and *de minimis* rates and rates based entirely on facts available, to respondents that were not selected for individual review.³⁹ Thus, assigning Chandan Mukand's rate is consistent with the Department's normal methodology for a company that is not selected for examination.

During the respondent selection process, the Department determined that it had the resources to review two of the twelve companies for which a review was requested. See Memorandum to Susan Kuhbach from Seth Isenberg, "Respondent Selection Antidumping Duty Administrative Review: Stainless Steel Bar from India" (April 19, 2011). Pursuant to section 777A(c)(2)(B) of the Act, we selected the two largest producers/exporters of subject merchandise from India during the POR for individual review, namely, Mukand and Venus. Petitioners' withdrawal of their review requests of nine companies did not change our determination that we could only review two mandatory respondents. Although only three companies were left in the pool of possible respondent companies, the Department's resources were such that it could still only examine two companies individually.

The Department revoked the Order with respect to Venus in September 2011; however, by that time our case load had increased due to new countervailing duty and antidumping duty investigations. It has been our longstanding experience with reviews of this Order that individual reviews are complex and resource intensive. For example, for Mukand, the Department needed to issue and analyze ten supplemental questionnaires during the course of this proceeding. In the Department's previous review of this Order, it needed to issue and analyze six supplemental questionnaires to Mukand; five supplemental questionnaires to Venus; and six supplemental questionnaires to our remaining respondent company. Given our

³⁸ See *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review*, 76 FR 9753 (Feb. 22, 2011) (*PET Film from the PRC*), and accompanying Issues and Decision Memorandum at Comment 10; *Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52065, 52068 (Sept. 12, 2007), and accompanying Issues and Decision Memorandum at Comment 5; *Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492 (July 15, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

³⁹ See, e.g., *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review*, 73 FR 8273 (Feb. 13, 2008) (unchanged in final results).

experience of the resource-intensive nature of this case, we determined that we could not select Chandan as a respondent at that late stage of the proceeding and complete the review within the statutorily mandated time period. In this regard, by the time the Order was revoked for Venus, the Department had already collected information in response to four questionnaires from both Mukand and Venus. Chandan submitted no voluntary responses during that time.

Moreover, other than filing its request for review, Chandan took no other action until it filed its brief. In order for the Department to have considered Chandan as a voluntary respondent, Chandan would have had to request voluntary respondent status and to submit questionnaire responses. *See* section 782(a) of the Act. Chandan did not request to be reviewed as a voluntary respondent, nor did it submit questionnaire responses in accordance with case deadlines. Our regulations require that potential voluntary respondents not wait to respond until after mandatory respondents have filed their responses: “If the additional voluntary respondents did not begin to prepare their questionnaire responses until after the Department received questionnaire responses from the selected respondents, the Department would not be able to complete the investigation or review within the statutory deadlines.” *See Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27310 (May 19, 1997). Had Chandan provided the Department with a questionnaire response according to the deadlines imposed on the mandatory respondents, and requested voluntary treatment, then Chandan would have preserved the possibility of receiving an individual margin. Because it did not do so, Chandan’s request for review at this late stage of the proceeding is both untimely and unreasonable.

Chandan cites to *PC Strand from the PRC* as an instance where the Department selected a new company after it conducted its respondent selection. However, the circumstances of *PC Strand from the PRC* differ, as the Department was notified very early in the proceeding, just two weeks after respondent selection, that one of the mandatory respondents would not participate.⁴⁰ Here, it was five months after respondent selection had occurred that the Department’s determination to revoke the order with respect to Venus became final and the Department rescinded this review, in part, for Venus. At that point the Department had already received four questionnaire responses from the respondents.

Chandan argues that in *Zhejiang*, the CIT found that the Department had sufficient time in which to examine an additional respondent company. The circumstances in *Zhejiang* are distinguishable. In the underlying review,⁴¹ Zhejiang requested individual review and was one of four companies that submitted quantity and value questionnaire responses for the POR at the beginning of the proceeding. After the Department selected the two companies that represented the largest total export volume under review, Zhejiang requested that the Department select it as either a mandatory or a voluntary respondent. Zhejiang renewed its request for individual treatment throughout the proceeding, after each of the two mandatory respondents withdrew months into the review and again in its case brief. The CIT found that the Department should

⁴⁰ *See PC Strand from the PRC*, 74 FR 61104.

⁴¹ *See Honey from the People's Republic of China: Final Results and Rescission, In Part, of Aligned Antidumping Duty Administrative Review and New Shipper Review*, 73 FR 42321 (July 21, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

have selected Zhejiang for review because Zhejiang filed responses until the Department notified it that it would not be accepted as either a voluntary or mandatory respondent.⁴² Key in the court's analysis was that "{the Department} did not leave open the possibility that it would consider Zhejiang as a voluntary respondent if Zhejiang timely filed its questionnaire responses, contrary to {the Department's} practice of not discouraging voluntary respondents."⁴³ Here, in contrast, the Department never discouraged Chandan from participating as a voluntary respondent and Chandan never requested voluntary respondent treatment, did not participate during the administrative review, and filed no questionnaire responses.

For all these reasons we disagree that the Department should have selected Chandan for review and instead, continue to assign Chandan the rate calculated for the mandatory respondent in this review, Mukand.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review and the final dumping margins in the Federal Register.

AGREE ✓ DISAGREE _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

20 JUNE 2012
Date

⁴² *Zhejiang*, 637 F. Supp. 2d at 1265.

⁴³ *Id.*