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DATE: October 1, 2008

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

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

SUBJECT: Issues and Decision Memorandum for the Final Results in the Second Administrative Review of Certain Tissue Paper Products from the People's Republic of China

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SUMMARY:

We have analyzed the briefs and rebuttal briefs of interested parties in the second administrative review of certain tissue paper products ("tissue paper") from the People's Republic of China ("PRC"). As a result of our analysis, we have made certain changes from the preliminary results. See Certain Tissue Paper Products from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 18497 (April 4, 2008) ("Preliminary Results"). We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review:

General Issues
Comment 1: Reporting of Ink and Dye Consumption
Comment 2: Reporting Requirements for Ink and Dye
Comment 3: Steam Coal Surrogate Value
Comment 4: Labor Surrogate Value
Comment 5: Treatment of Negative Dumping Margins ("Zeroing")

Background

We published the preliminary results of the first administrative review in the Federal Register on April 4, 2008. See Preliminary Results. The period of review ("POR") is March 1, 2006 through February 28, 2007. On May 5, 2008, we received case briefs from respondent Max Fortune Industrial Limited (MFI) and Max Fortune (FETDE) Paper Products Co., Ltd. (MFPP) (collectively, "Max Fortune") and Seaman Paper Company of Massachusetts, Inc. ("Petitioner"). We received rebuttal briefs from Max Fortune and Petitioner on May 12, 2008.

DISCUSSION OF THE ISSUES:

Comment 1: Reporting of Ink and Dye Consumption

Petitioner argues that the Department should employ an adverse inference to the partial facts available ("FA") it applied to Max Fortune at the preliminary results of review with respect to inks and dyes. Specifically, Petitioner argues that the Department should find that, pursuant to sections 776(a)2 and (b) of the Tariff Act of 1930, as amended ("the Act"), Max Fortune failed to act to the best of its ability in tracking and reporting ink and dye consumption on a control number ("CONNUM")-specific basis. Petitioner contends that Max Fortune did not comply with the Department's notification in the preceding review that it would be required to provide ink and dye consumption on a CONNUM-specific basis for all future reviews. Petitioner further argues that, rather than stating it was unable to comply with the Department's request, Max Fortune claimed that it was unable to provide ink and dye data in the manner requested by the Department due to the relative timelines of the administrative reviews. Petitioner asserts that the Department previously assigned partial AFA to a respondent in the underlying investigation for an allegedly similar reporting failure.[1]

Petitioner contends that, since the underlying investigation, the Department has been explicit in its requirement for the reporting of ink and dye, which is to obtain accurate consumption of those inputs on a CONNUM-specific basis to ensure an accurate normal value ("NV") calculation, thus an accurate antidumping duty margin calculation. Petitioner argues that respondents have been on notice since the underlying investigation of the Department's requirement of reporting ink and dye consumption on a CONNUM-specific basis. Thus, Petitioner argues, no respondent may claim that it was unaware of the requirement to report ink and dye in the manner requested by the Department.[2]

In rebuttal, Max Fortune argues that the Department should reject Petitioner's argument that an adverse inference should be applied to it for not reporting CONNUM-specific ink and dye consumption. First, Max Fortune notes that it did not make sales of subject printed tissue to the United States during the POR. Thus, Max Fortune contends that ink consumption was not reported,[3] and Petitioner's request for the application of an adverse inference in selecting FA for ink consumption should be rejected. Max Fortune also argues that, with respect to dye consumption, the Department had already verified, in the preceding administrative review, that Max Fortune does not maintain its records in a manner that would allow for the reporting of dye

[1] Petitioner refers to Certain Tissue Paper Products and Certain Crepe Paper Products From the People's Republic of China: Notice of Preliminary Determinations of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination for Certain Tissue Paper Products, 69 FR 56407 (September 21, 2004) (where the Department stated that "China National did not act to the best of its ability by not attempting to provide adequate linkages between its ink and dye databases and the FOP databases to allocate dyes and inks on a CONNUM-specific basis"). Petitioner also notes that for the subsequent final determination, the Department applied total AFA to that respondent due to consistent reporting failures.

[2] Petitioner also cites to NSK Ltd. v. United States, 481 F.3d 1355, 1361 (Fed. Cir. 2007).

[3] Max Fortune cites to its Section D Questionnaire Response dated July 19, 2007, at 19 and Supplemental Questionnaire Response dated January 17, 2008, at 18-19.

and ink consumption on a CONNUM-specific basis.[4] Max Fortune claims that, as a result, the Department did not apply an adverse inference to the facts available on the record. Max Fortune contends that even though the Department requested that Max Fortune maintain its inventory records such that it is able to report ink and dye consumption on a CONNUM-specific basis, Max Fortune has not yet implemented the change in record-keeping systems for this proceeding due to the overlap in segments.[5]

Department's Position:

The Department disagrees with Petitioner that the application of an adverse inference in selecting partial FA is appropriate to Max Fortune. In the Preliminary Results, we noted that "Max Fortune has indicated that its records for dye and ink consumption in the papermaking and paper printing stages of production do not permit it to report the FOP data in a manner consistent with the Department's requests for specific consumption of dyes on a color specific basis." See Preliminary Results, 73 FR at 18500. We therefore stated that, "pursuant to section 776(a)(2)(B) of the Act,…and consistent with section 782(d) of the Act, the Department has determined it necessary to apply facts otherwise available." See id. Given that the information is necessary but unavailable, we have continued to apply FA for purposes of these final results.

The evidence on the record with respect to Max Fortune's explanation of its ink and dye accounting records does not support the application of an adverse inference. Max Fortune's business practice does not account for consumption of inks and dyes on a color-specific basis. Thus, the company is unable to provide the information requested by the Department. Therefore, we do not find that the application of an adverse inference, under section 776(b) of the Act is appropriate.

Thus, consistent with the Department's decision in the previous segment of this review and in the Preliminary Results, the Department continues to apply the average Indian import values for three dye types, which are commonly used in the production of tissue paper, to value the aggregate amount of dye consumed in the production of the subject tissue paper as FA pursuant to section 776(a) of the Act.

Comment 2: Reporting Requirements of Ink and Dye

In the Preliminary Results, the Department invited comments from interested parties regarding whether it should alter its requirements for reporting ink and dye consumption in future segments. See Preliminary Results, 73 FR at 18501.

Petitioner argues that the Department should not alter its requirements for reporting ink and dye consumption in this and future segments of the proceeding. Petitioner objects to a combining of colors and types of dye and ink within the CONNUM. Petitioner contends that there is no administrative burden placed on respondents (to report) or the Department (to value) regarding

[4] Max Fortune cites Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review, 72 FR 58642 (October 16, 2007) ("Tissue AR1") and accompanying Issues and Decision Memorandum at Comment 7.

[5] Max Fortune notes that the Department notified it to maintain records of ink and dye consumption on a CONNUM-specific basis in Tissue AR1, which occurred after the start of this review.

black ink and colored ink. Petitioner claims that the relative prices of black and colored inks can be significantly different. Petitioner argues that, given the history of the antidumping duty order on tissue paper, respondents have had sufficient time in which to begin recording ink and dye consumption on a color-specific basis. Petitioner further contends that a change to the CONNUM would result in less accurate dumping margins. Additionally, Petitioner claims that respondents in this review, Max Fortune and Guilin Qifeng, chose not to keep their records in such a way as to report ink and dye on a color-specific basis, rather than stating that they are unable to do so. Petitioner also notes that the Department does not require companies to keep their records based on the CONNUM. Rather, Petitioner argues, the Department requires a company to report the data needed to calculate an accurate dumping margin. Petitioner concludes that a change in this reporting requirement would result in less accurate dumping margins.

Max Fortune argues that the Department should amend the CONNUM to eliminate the requirement to report ink and dye consumption on a CONNUM-specific basis. Max Fortune notes that, in both the Preliminary Results and in Tissue AR1, as neutral facts available, the Department applied the average Indian import values to three dye types, commonly used to produce tissue paper, to value Max Fortune's aggregate consumption of dye to produce subject merchandise. Max Fortune contends that this methodology was applied because it has reported to the Department that its records for dye and ink consumption in the paper-making and printing stages of production do not allow for reporting consumption of those inputs in the manner requested by the Department. Max Fortune argues that the Department should continue to apply neutral facts available for ink and dye consumption because its records do not permit reporting data on a color-specific basis. Moreover, citing to Olympics Adhesives, Inc. v. United States, 899 F.2d 1565 (Fed. Cir. 1990), Max Fortune contends that an adverse facts available determination is not permissible where a respondent's inability to provide information is due to the fact that the respondent does not have that information.

Additionally, Max Fortune argues that including ink and dye color product characteristics in the CONNUM does not lead to increased accuracy in the antidumping analysis. Max Fortune notes that in the Preliminary Results, the Department's calculation of the normal value shows that its consumption of inks and dyes is less than one percent of total cost of direct materials and an even smaller percentage of the total cost of manufacturing.[6] Max Fortune claims that if the Department were to assign costs to inks and dyes based on color, the percentages of direct materials cost and cost of manufacturing would not change significantly.[7] Lastly, Max Fortune argues that under section 777A(a)(2) of the Act and section 351.413 of the Department's regulations, the Department has the authority to disregard adjustments that have an insignificant effect on the calculation of normal value.

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[6] Max Fortune cites to Memorandum to the File, through Scot T. Fullerton, Program Manager, AD/CVD Operations, Office 9, from Bobby Wong, Senior International Trade Analyst, AD/CVD Operations, Office 9, re: Second Antidumping Administrative Review of Certain Tissue Paper from the People's Republic of China: Max Fortune Industrial Limited and Max Fortune (FETDE) Paper Products Co., Ltd., Analysis Memorandum for the Preliminary Results of Review, dated March 31, 2008 ("Max Fortune Prelim Analysis Memo").

[7] Max Fortune cites to Memorandum to the File, through James C. Doyle, Director, Office 9, and Scot T. Fullerton, Program Manager, AD/CVD Operations, Office 9; from Michael Quigley, Senior International Trade Analyst, AD/CVD Operations, Office 9, re; Antidumping Duty Administrative Review of Certain Tissue Paper from the People's Republic of China: Factors of Valuation for the Preliminary Results, dated March 31, 2008 ("Prelim Factor Valuation Memo").

In rebuttal, Petitioner argues that, with respect to Max Fortune's argument that inks and dyes do not exceed one percent of total direct material cost (or less than half a percent of total manufacturing cost), Max Fortune fails to consider the defined threshold of considering differences in cost elements as immaterial set forth in section 777A(a)(2) of the Act.[8] Petitioner also reiterates the importance of differentiating black from colored dyes and inks because of the relative differences in surrogate values. Petitioner argues that the variation in prices of various colored inks and dyes are significant and indicate the importance of specificity in complete and accurate reporting of ink and dye by color to determine appropriate surrogate values. Moreover, Petitioner argues that Max Fortune's data in this review are not representative of dye and ink consumption because Max Fortune did not consume ink in this review. Petitioner also notes that Max Fortune's arguments regarding relative cost of ink and dye with respect to the NV is the experience of only one company and cannot represent a universal benchmark to measure the importance of ink and dye valuation. Lastly, Petitioner reiterates its argument that Max Fortune has had ample opportunity since the underlying investigation to implement a change in record-keeping such that reporting ink and dye consumption would satisfy the Department's requirements.

Department's Position:

The Department disagrees with Max Fortune with respect to revising the product characteristics related to reporting ink and dye on a color-specific basis within the CONNUM. The Department has, in past cases, stated that it will not revise model-match criteria unless there is evidence demonstrating that (1) the current model-match criteria are not reflective of the subject merchandise in question, (2) there have been industry-wide changes to the product that merit a modification, or (3) there is some other compelling reason to change the current model-match criteria (Department's model-match criteria). See, e.g., Notice of Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea 71 FR 7513 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 1; Notice of Final Determination of Sales at Less Than Fair Value: Steel Wire Rope from Malaysia, 66 FR 12759 (February 28, 2001), and accompanying Issues and Decision Memorandum at Comment 3.

Inherent in this practice is the notion that the model-match criteria should be consistent across reviews so that parties may have a predictable means of determining possible product matches in current as well as future administrative reviews. See Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, from Japan: Final Results of Antidumping Duty Administrative Review, 56 FR 41508 (August 21, 1991), and accompanying Issues and Decision Memorandum at Comment 1. We find that the record evidence does not demonstrate that the model-match criteria are not reflective of the subject merchandise, there has been a change in industry practice or there is some other compelling reason to warrant revision to the model-match methodology. We further note that there is no reason to conclude that respondents in future segments would be unable to report ink and dye on a CONNUM-specific basis, notwithstanding the fact that previous respondents have been unable to do so, based on the manner in which they chose to maintain their records. Lastly, we note that Max Fortune's arguments with respect to the relative

[8] Section 777A(a)(2) of the Act and section 351.413 of the Department's regulations state that the Department may ignore any individual adjustment having an ad valorem effect of less than 0.33 percent, or any group of adjustments having an ad valorem effect of less than 1.0 percent, of the export price, constructed export price, or normal value, as the case might be.

cost of inks and dyes within the NV are not substantiated by record evidence and the Department is unable to conclude whether the relative cost of ink and dye within the NV is significant or not within the context of justifying a model-match revision.

With respect to Max Fortune's argument regarding the relative cost of ink and dye within the NV, citing section 777A(a)(2) of the Act, we note that this section of the Act is relevant to adjustments to sales. It is not designated to determine whether certain FOP's consumed in small quantities ought to be excluded from the NV calculation. See section 777A(a)(2) of the Act, and section 351.413 of the Department's regulations. Accordingly, neither the statutory or regulatory provision applies in this case.

Therefore, for the reasons stated above, we will not make any changes, at this time, to the model-match criteria and continue to require that companies in future segments report ink and dye consumption on a CONNUM-specific basis.

Comment 3: Steam and Coal Surrogate Values

Petitioner argues that the coal surrogate value used in the Preliminary Results is subsidized, not contemporaneous with the POR, and lacks reliable indicia of quantity and volume. In contrast, Petitioner contends that the surrogate value it submitted is contemporaneous, world market price responsive, and obtained from a superior source. Petitioner further argues that the Department has, in a past case, rejected the use of coal prices from Coal India Ltd. Petitioner cites to Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 FR 9508 (March 2, 2007) ("Activated Carbon") and accompanying Issues and Decision Memorandum at Comment 17, to support its argument for using WTA Indian import statistics for factor valuation purposes. Additionally, Petitioner claims that the Department has repeatedly determined that the World Trade Atlas ("WTA") containing Indian import statistics represents the best information available because the prices are broad-market averages within the POR, are product-specific, and tax-exclusive. Petitioner concludes that, following Department practice and to avoid distortions caused by monopolistic and subsidized coal sales by Coal India Ltd., the Department should use Indian import statistics to value coal in the final results.

In rebuttal, Max Fortune argues that the Department should continue to value coal using prices obtained from Coal India Ltd. Max Fortune contends that Petitioner has not cited to any record evidence supporting the claim that Coal India Ltd.'s prices are subsidized or monopolized. Max Fortune argues that, contrary to Petitioner's assertion, the Department did not reject or even refer to Coal India Ltd. within the coal surrogate value discussion in Activated Carbon. Max Fortune contends that, in any case, the Department chose the correct coal surrogate value in the Preliminary Results. Specifically, Max Fortune argues that the coal surrogate value submitted by Petitioner is a generic coal value from a basket category under the Harmonized Tariff Schedule of the United States ("HTSUS") absent any distinctions or differences among types of coal. Max Fortune notes that it reported to the Department specific information regarding the type and grade of coal used during the POR, along with supporting documentation such as sample test reports showing chemical composition and heat value.[9] Thus, Max Fortune argues that the coal value used in the Preliminary Results represents grades and types of coal more specific to the input used by Max Fortune.

[9] Max Fortune cites to its Supplemental Questionnaire Response dated February 22, 2008 at Exhibit 10.

Department's Position:

The Department agrees with Max Fortune regarding the valuation of coal. In valuing the FOPs, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market economy country. The Department's criteria for selecting surrogate value ("SV") information are normally based on the use of publicly available information ("PAI"), and the Department considers several factors when choosing the most appropriate PAI, including the quality, specificity, and contemporaneity of the data. See Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 47587 (August 14, 2008) ("Hangers") and accompanying Issues and Decision Memorandum at Comment 4.

Additionally, it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs on a case-by-case basis. See Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006) ("Mushrooms"), and accompanying Issues and Decision Memorandum at Comment 1 (articulating this practice); Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002) and accompanying Issues and Decision Memorandum at Comment 2. As there is no hierarchy for applying the above-mentioned principles, the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" available SV is for each input. See Mushrooms, 71 FR 40477 at Comment 1.

In the Preliminary Results, we stated that:

> Based on the Department's preference to use more specific information where available, the Department has preliminarily valued coal using the prices provided by Coal India Limited and reported by the Indian Minerals yearbook 2005. The Department notes that the data represents the 2004–2005 average prices for seven grades of coal specifications from various mines throughout India…the Department has taken the average price of each different coal grades and applied the price to value coal accordingly...Furthermore, the Department found that Coal India Limited also periodically reports the value of grade-specific coal from various mines throughout India. For these preliminary results, the Department has determined to apply the reported coal prices for December 12, 2007, as reported by Coal India Limited.

See Prelim Factor Valuation Memo.

As we have stated in prior proceedings, we note that "the Department does not place more weight on contemporaneity above the other surrogate value selection criteria."[10] Therefore,

[10] See, e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 52273 (September 9, 2008) ("Vietnam Shrimp AR2") and accompanying Issues and Decision Memorandum at Comment 2; Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the First Administrative Review, 71 FR 14170 (March 21,

Petitioner's argument that the Coal India Ltd. prices are not as contemporaneous as the WTA data is not a conclusive and deciding factor in selecting one source over another. In any event, the Department applied a simple average of two WPI adjusted, publicly available prices reported by Coal India Limited data representing 1) 2004–2005 average prices for seven grades of coal specifications from various mines throughout India and 2) the prices of grade-specific coal from various mines throughout India from December 12, 2007, as reported by Coal India Limited. Additionally, there is no record evidence supporting Petitioner's assertion that the prices within Coal India Ltd. are subsidized or monopolized. In this case, we selected the Coal India Ltd. prices as a surrogate value because we deemed the data more specific to the input in question. Unlike the facts in Activated Carbon,[11] Max Fortune provided specific information with respect to the grade and type of coal that it consumed during the POR. See Max Fortune's Supplemental Questionnaire Response, dated February 22, 2008, at Exhibit 10.

With respect to Petitioner's argument that it is Department practice to use WTA data to value FOPs, we note that, in a recent determination, we selected a surrogate value from an Indian source other than the WTA because the prices for the input at issue (steel wire rod) consisted of specific grade and sizing. Moreover, we also explicitly stated that "while the Department commonly uses Indian import statistics to value inputs, we do not have a practice of always choosing this one source over other sources. Rather, we seek to use the best available information for each input."[12] Therefore, for all of the foregoing reasons, consistent with our practice in past proceedings, we find that the coal prices from Coal India Ltd. represent the best available information on the record for valuing the specific coal input reported by Max Fortune in this review. Accordingly, we will continue to use the Coal India Ltd. data to value coal for the final results.

Comment 4: Labor Surrogate Value

Petitioner argues that, for the final results, the Department should update the labor surrogate value with the recently updated wage rates for non-market economies published by the Department. However, Petitioner further suggests that, for purposes of contemporaneity, the Department should select a new labor surrogate value from a different source.

Max Fortune did not comment on this issue.

Department's Position:

2006) ("Vietnam Fish AR1") and accompanying Issues and Decision Memorandum at Comment 3A; Hebei Metals & Minerals Import & Export Corporation And Hebei Wuxin Metals & Minerals Trading Co., Ltd., v. United States, 366 F. Supp. 2d 1264, 1275 (CIT 2005) ("Hebei Metals") (where the CIT found that "while contemporaneity of data is one factor to be considered by Commerce...three months of contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the POI.").

[11] See Activated Carbon, at Comment 17 (where the Department stated that "Jacobi does not specify in its case brief to which type of coal its proposed surrogate value should be applied. Therefore, the Department has relied on Jacobi's July 25, 2006, submission, where it referred to the U.S. price as 'energy coal.'").

[12] See Hangers, at Comment 4; see also Helical Spring Lock Washers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 4175 (January 24, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

For these final results, we will value labor using the revised 2007 wage rate. In May 2008, the Department published the 2007 Wage Rates, notifying the public of the finalized NME wage rates and informing the public that those wage rates would be "in effect for all antidumping proceedings for which the Department's final decision is due after the publication of this notice."[13]

For the final results, we will continue to use regression-based wage data, but will use US $1.04 as the revised wage for the PRC in the final results, which continues to be based on the reported experience of several countries, but applies the more recent 2007 calculations, which are based on 2005 wage rate data. We find that a larger number of countries' data maximizes the accuracy of the regression results, minimizes the effects of the potential year-to-year variability among the various countries, and provides predictability and fairness. The economic comparability is established in the regression calculation through the gross national index of the PRC and ensures that the result represents a wage rate for a country economically comparable to the PRC.

Comment 5: Treatment of Negative Dumping Margins ("Zeroing")

Max Fortune argues that the Department should not employ its practice of setting negative margins to zero (i.e., "zeroing") in calculating the final results weighted-average dumping margin, to comply with the findings of the Appellate Body of the World Trade Organization ("WTO"). Max Fortune notes that the WTO Appellate Body recently found that zeroing in administrative reviews is inconsistent with the WTO Antidumping Agreement.[14] Max Fortune claims that U.S. law does not require the Department not to reconsider its zeroing practice, thus Max Fortune argues that, where the Department has authority to interpret the statute, the Department may reassess its policies and apply new policy in accordance with the Appellate Body of the WTO. See Max Fortune's Case Brief dated May 5, 2008 at 3-4. Max Fortune also argues that the U.S. Court of Appeals for the Federal Circuit ("CAFC") has held that the Department's policy of zeroing is not statutorily required, but a result of the Department's interpretation of the statute.[15]

In rebuttal, Petitioner argues that the Department should continue its practice of zeroing in administrative reviews. Petitioner contends that Max Fortune's assertion that the Department ought to revise its zeroing practice in administrative reviews to confirm to the WTO's findings is inconsistent with the statutory scheme for implementing such findings as well as court and Department precedent. Petitioner further contends that these arguments have been repeatedly submitted and rejected by the Department in other proceedings.[16] Petitioner notes that the CAFC

[13] See http://ia.ita.doc.gov/wages/05wages/05wages-051608.html; see also Corrected 2007 Calculation of Expected Non-Market Economy Wages, 73 FR 27795 (May 14, 2008).

[14] See, i.e., United States - Measures Relating to Zeroing and Sunset Reviews, Appellate Body Report, WT/DS322/AB/R (January 9, 2007) (adopted January 23, 2007).

[15] See id., at footnote 1. Max Fortune also cites to various cases where the Department has applied changes with respect to Department policy or practice following changes in statutory interpretations or to maintain consistency with international treaty obligations.

[16] As a recent example of the Department's rejection of the same zeroing argument, Petitioner cites to Brake Rotors From the People's Republic of China: Final Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of the 2005-2006 Administrative Review, 72 FR 42386 (August 2, 2007) and accompany Issues and Decision Memorandum at Comment 7, and Polyethylene Terephthalate Film, Sheet, and Strip

has recently affirmed the Department's interpretation of the antidumping statute as permitting zeroing in administrative reviews as reasonable.[17] Lastly, Petitioner notes that, even if the Department had not already rejected identical arguments in other recent proceedings, the primacy of the statute governing the Department's implementation of all practices governs this issue. Petitioner argues that the Department may not modify its current practice of zeroing in administrative reviews until it completes the notification and comment process required by the Uruguay Round Agreements Act ("URAA") under sections 123 and 129 and allowing parties to comment before modifications are enacted. See 19 U.S.C. §§ 3533, 3538. Petitioner argues that, as the Department has not invited public comment on its zeroing practice, it must continue its practice in the instant review.

Department's Position:

We disagree with Max Fortune and have not revised our calculation of the weighted-average dumping margins for the final results of this review with respect to the treatment of non-dumped transactions. Section 771(35)(A) of the Act, defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. See Certain Frozen Warmwater Shrimp from Ecuador: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39945 (July 11, 2008) and accompanying Issues and Decision Memorandum at Comment 1.

Additionally, the CAFC has held that this is a reasonable interpretation of the statute. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied; 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006) ("Corus I"). Max Fortune has cited WTO dispute-settlement reports finding the denial of offsets by the United States to be inconsistent with the WTO Antidumping Agreement. As an initial matter, the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act ("URAA"). See Corus I, 395 F.3d at 1347-49; accord Corus Staal BV v. United States, 502 F.3d, 1370, 1375 (Fed. Cir. 2007) (Corus II); NSK Ltd. v. United States, 510 F.3d 1375 (Fed. Cir. 2007).

While the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006).

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from the Republic of Korea: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Duty Order, 73 FR 18259 (April 3, 2008) and accompany Issues and Decision Memorandum at Comment 6.

[17] See Petitioner's Rebuttal Brief dated May 12, 2008, at footnote 4.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act as described above, the Department has continued to deny offsets to dumping based on export transactions that exceed the normal value in this review. Consequently, we have not changed the methodology employed in calculating the respondent's weighted-average dumping margin for these final results.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation programs accordingly. If accepted, we will publish the final results of the review and the final weighted-average dumping margins in the Federal Register.

AGREE_____ DISAGREE_____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date