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September 30, 2010

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Susan H. Kuhbach
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the 2008-2009 Administrative Review of the Antidumping Duty Order on Certain Circular Welded Carbon Steel Pipes and Tubes from Taiwan

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2008-2009 administrative review of the antidumping duty order on certain circular welded carbon steel pipes and tubes from Taiwan. As a result of our analysis and as discussed below, we have not made any changes to the margin assigned to the respondent. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comment from parties:

Comment 1: Date of Sale for U.S. Sales
Comment 2: Zeroing

Background

On June 10, 2010, the Department published the preliminary results of this review for the period May 1, 2008, to April 30, 2009. See Preliminary Results of Antidumping Duty Administrative Review: Circular Welded Carbon Steel Pipes and Tubes From Taiwan, 75 FR 32911 (June 10, 2010). In response to the Department's invitation to comment on the Preliminary Results, respondent Yieh Phui Enterprise Co., Ltd. (Yieh Phui) filed its case brief on July 12, 2010. Domestic producer Allied Tube & Conduit Corporation submitted a rebuttal brief on July 19, 2010.

Discussion of the Issues

Comment 1: Date of Sale for U.S. Sales

Yieh Phui notes that the Department used invoice date as the date of sale for U.S. sales, and argues that the Department should instead use contract date as the date of sale for U.S. sales because substantial record evidence demonstrates that the contract date better reflects the date on which Yieh Phui established the material terms of sale.

Yieh Phui acknowledges that invoice date is the presumptive date of sale, but notes the Department has the discretion to select another date as date of sale if that alternative date better reflects the date on which the material terms of sale are set. Yieh Phui notes the Court of International Trade (CIT) has held that the presumption of using the invoice date is merely a rebuttable assumption and "one that has been successfully rebutted in numerous cases in the past." See Nucor Corp. v. United States, 612 F. Supp. 2d 1264, 1304 (CIT 2009) (Nucor).

Yieh Phui states the Department has found contract date to be the proper date of sale in numerous cases when it better reflected the date on which the material terms were established by the parties, and cites the following examples: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 63 FR 32833, 32833-32836 (June 16, 1998) (Korean Pipe); Certain Welded Carbon Steel Pipes and Tubes from Thailand; Final Results of Antidumping Duty Administrative Review, 65 FR 65910 (October 13, 2000) and accompanying Issues and Decision Memorandum at Comment 1 (Thai Pipe); Notice of Final Determination of Sales at Less Than Fair Value; Sulfanilic Acid from Portugal, 67 FR 67219 (September 25, 2002) and accompanying Issues and Decision Memorandum at Comment 1 (Sulfanilic Acid); and Final Results of Redetermination Pursuant to Court Remand in Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States, Slip Op. 07-167 (November 15, 2007), September 8, 2009, at 45 (Habas Remand).

Yieh Phui notes that in Nucor, the CIT found that the Department must "undertake a factual analysis of the expectations and conduct of the contracting parties, to ascertain when they reached a true meeting of the minds on the material terms of sale." Nucor at 1309. Yieh Phui argues that the Department's data analysis in its preliminary results was incorrectly based on a selective review of sales documents whereas the record evidence demonstrates that Yieh Phui had an extraordinarily low percentage of changes after the final contract date for its U.S. sales.

Yieh Phui also argues that substantial evidence shows the contract date better reflects the date on which the parties had a true "meeting of the minds" for Yieh Phui's U.S. sales given that the sales process of U.S. sales is markedly different from that of home market sales. Yieh Phui states that the decision in Korea Pipe to use contract date as date of sale was based in part on differences in the sales process between home market sales (for which the respondent proposed invoice date as date of sale) and U.S. sales (for which the respondent proposed contract date as date of sale). Yieh Phui identified several differences in the sales process between the home market (for which Yieh Phui proposed invoice date as date of sale) and the U.S. market (for which Yieh Phui proposed contract date as date of sale), and states the Department did not

properly analyze or consider in its preliminary results in determining the proper basis for date of sale for U.S. sale. These differences include: no written contracts were used for home market sales, but they always were used for U.S. sales (and a new contract was made if there were revisions to the initial contract terms); most home market sales were in small quantities, while U.S. sales generally had larger volumes per order; most home market sales involved products made to local specifications, while most U.S. products were custom-made to a specification not usually ordered by home market customers; most home market sales were made from inventory, while most U.S. sales were made to order and, due to this, the U.S. sales database shows a lag between final contract date and invoice date of a few months for most U.S. sales; home market sales were made directly to customers, but U.S. sales were typically made through paid commission agents; and all of Yieh Phui's U.S. sales were made on delivery terms that required significant activities by Yieh Phui, and that "these actions were necessary to complete a U.S. transaction and this course of conduct was not the behavior of a producer that would believe it was free to change or breach its contracts."

With respect to sample sales for which sales documentation were provided, Yieh Phui states that the Department's preliminary analysis overlooked the original sample sale for which it had provided such documentation, so that the frequency of changes should have been two out of six, rather than two out of five.

Allied Tube & Conduit Corporation argues that the Department's Preliminary Analysis Memorandum accurately described the frequency of changes to the material terms of contract. It states that it is not unreasonable to infer that if full sales documentation had been provided for all U.S. transactions, a far greater percentage of contractual changes would have been observed than those reported by Yieh Phui in its questionnaire response, given that there were changes in two out of the five sample transactions reviewed by the Department.

Allied Tube & Conduit Corporation also disagrees with Yieh Phui that the objective of the Department's date of sale analysis is to ascertain when the parties had a meeting of the minds as to the quantity and price. Allied Tube & Conduit Corporation notes the Department's regulations state that the Department should identify as the date of sale the date that "better reflects the date on which the exporter or producer establishes the material terms of sale" (see 19 CFR 351.401(i)). Allied Tube & Conduit Corporation states that even if the parties had reached a meeting of the minds as to the quantity and price at the time of the initial contract, the fact that the contract terms changed after the initial contract up to the date of the invoice establishes the invoice date as the date that the material terms of sale were established.

Department's Position:

The Department's regulations state that "the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." See 19 CFR 351.401(i). The regulation also states that, "in identifying the date of sale of the merchandise under consideration or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the normal course of business." Id. The CIT has noted

that a "party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to 'satisfy' the Department that 'a different date better reflects the date on which the exporter or producer establishes the material terms of sale.' " Allied Tube & Conduit Corp. v. United States, 132 F. Supp. 2d at 1090 (CIT 2001) (quoting 19 CFR 351.401(i)).

In Sahaviriya, the Court of International Trade (CIT) noted that in determining which date better reflects the date on which the material terms of sale are set, the Department's practice has evolved to include analysis of various material terms of sale, including price and quantity. Sahaviriya Steel Industries Public Company Limited v. United States, Slip Op. 10-68 * 34 (CIT 2010) (Sahaviriya).[1] In Sahaviriya, the CIT noted the Department has interpreted material terms of sale to include the specification of an aggregate quantity tolerance level because the aggregate quantity tolerance level may be viewed as specifying the amount or quantity of the merchandise to be shipped. Id., citing Nakornthai Strip Mill Public Co. v. United States, 558 F. Supp. 2d 1319, 1327 (2008). In other words, if shipped and invoiced quantities collectively vary from the overall quantity in the underlying contract by more than is allowed by the quantity tolerance in the underlying contract, then the quantity is considered to have changed in a material way from that in the contract.

Much of the Department's analysis of Yieh Phui's claims regarding the data on the record that pertain to U.S. date of sale and changes in material terms of sale appears in a separate memorandum because some of the analysis involves proprietary information. See "Final Analysis Memorandum for Yieh Phui Enterprise Co., Ltd. (Yieh Phui): Circular Welded Carbon Steel Pipes and Tubes from Taiwan (A-583-008), May 1, 2008 – April 30, 2009" (Final Analysis Memorandum). Yieh Phui acknowledges that there were changes in material terms of sale (i.e., price and quantity) not only after the reported initial contract date, but also after the reported final contract date. See Yieh Phui's case brief, at 5. Also, analysis of the information cited by Yieh Phui indicates that such changes were somewhat more frequent than described by Yieh Phui in its brief. See Final Analysis Memorandum, at 3-4. Furthermore, the sales documentation for sample sales indicates that, contrary to Yieh Phui's assertion the information cited by Yieh Phui does not identify all instances in which material terms of sale changed after the reported final contract date. Id., at 4. Further, the Department is unaware of evidence demonstrating that the material terms of sale such as price and quantity changed after the invoice date. For these reasons, which are further discussed in the Final Analysis Memorandum, the Department has determined that it is appropriate in this instance to employ invoice date as the date of sale consistent with its regulatory presumption. See 19 CFR 351.401(i).

The fact pattern on the record of this review differs from those in the cases cited by Yieh Phui. In Korean Pipe, the Department found that the material terms of sale for U.S. transactions "are set on the contract date and any subsequent changes are usually immaterial in nature or if

[1] Sahaviriya also noted that the Department has considered delivery terms and payment terms. Yieh Phui stated "{m}inor details, such as delivery dates or shipping destinations may change sometimes but do not affect the terms of sale." See Yieh Phui's August 31, 2009 Section B-D response, at 42. In any case, Yieh Phui provided no evidence regarding the prevalence of changes in delivery terms or payment terms after contract dates.

material, rarely occur," and that "there is no information on the record indicating that the material terms of sale change frequently enough on U.S. sales so as to give both buyers and sellers any expectation that the final terms will differ from those agreed to in the contract." See Korean Pipe at 32836. In contrast, there is no basis on the record of this review for concluding that the changes in material terms of sale after either reported contract date (initial or final) were rare and, in fact, the Department notes that the information cited by Yieh Phui is incomplete and, as a result, understates the frequency with which the material terms of sale changed after the reported final contract date. See Final Analysis Memorandum, at 3-4. With respect to the reported final contract date, the instant review, as in Sahaviriya, "involves multiple changes exceeding the contract tolerances of multiple contracts, representing multiple sales to multiple customers." See Sahaviriya, at 35, in which the CIT recently cited in favor of reliance on invoice date over contract date under such circumstances.[2]

In Thai Pipe, while the Department stated that "most of the changes {in quantity} were within the overall weight tolerance agreed to by respondents and customers in each contract" (thereby indicating some were not), the Department concluded that "the evidence on the record...shows that there were no changes in prices and overall quantity set forth in the contract for all subject merchandise that was shipped and invoiced." See Thai Pipe, at Issue 1 of accompanying Issues and Decision Memorandum. The fact pattern described in Thai Pipe (i.e., "no changes in prices and overall quantity set forth in the contract for all subject merchandise that was shipped and invoiced") does not exist in the instant review, not only with respect to changes in quantity between reported final contract and shipment, but also with respect to changes in prices. See Final Analysis Memorandum, at 3-4.

In Sulfanilic Acid, the Department used various contract amendment dates as the date of sale for certain shipments because prices changed on those dates, but used the original contract date for date of sale of other shipments because the Department was satisfied those shipments were made subject to the terms of the underlying agreement. See Sulfanilic Acid, at Issue 1 of the accompanying Issues and Decision Memorandum. In other words, in that case, the Department used as sale date what amounted to a final contract date, after which terms of sale were not changing: for some sales, the initial contract dates were determined to have been final contract dates, while for other sales, the date of contract amendments were determined to be the final

[2] No customer information was included in Exhibit 19 of Yieh Phui's August 31, 2009, Section B-D questionnaire, which Yieh Phui cites as the source of quantity changes after the reported final contract, and which the Department analyzes in the Final Analysis Memorandum. However, the contract and invoice information in that exhibit tie to such information for individual sale observations in the final U.S. sales database (submitted as part of Yieh Phui's May 14, 2010 supplemental questionnaire response), and those sale observations, in turn, contain customer codes (field CUSCODU). Exhibit 16 of Yieh Phui's December 8, 2009 supplemental questionnaire response identifies the names of customers by customer code. Collectively, this information demonstrates that the multiple changes involved multiple customers. Furthermore, analysis of the sample sales for which sales documentation was provided indicates that analysis of Exhibit 19 and the final U.S. sales database alone underestimates the frequency of changes after the reported final contract date. See Final Analysis Memorandum at 3-4. This information, in conjunction with the sample sales documentation, demonstrates that Exhibit 19 does not record all the changes to material terms of sale which occurred after the reported final contract date. Id., at 4.

contract dates. However, in the instant review, as noted above, material terms of sale were changing not only after the reported initial contract dates, but also after the reported final contract dates. See Final Analysis Memorandum, at 3-4. Furthermore, the record demonstrates that the respondent's identification of the percentage of contracts for which material terms of sale changed after contract date is incomplete and understates those instances. Id.

In Habas Remand, the Department on voluntary remand changed the date of sale from invoice date to contract date when it recognized that the single instance of change in material terms that it had identified - - a billing adjustment – was in fact directly related to a clause in the contract. This decision was later upheld. See Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States, Court No. 05-00613, Slip Op. 07-167 at 59 (November 15, 2007). In contrast, in the instant review there were changes in material terms of sale after the reported contract dates. See Final Analysis Memorandum, at 3-4.

Furthermore, other claims regarding its issuance of contracts for U.S. sales are unsupported by the record. Yieh Phui claimed that it issues revised contracts when essential terms of sale change. See, e.g., Yieh Phui's September 18, 2009 supplemental questionnaire response at 49, and Yieh Phui's December 8, 2009 supplemental questionnaire response, at 50. Yieh Phui's own data analysis, however, acknowledges that was not always the case. See Yieh Phui's Case Brief at 5 (noting instances where material terms of sale changed after final reported contract date). Moreover, Yieh Phui's analysis is incomplete and understates the extent to which the material terms of sale changed after reported final contract date. See Final Analysis Memorandum, at 3-4.

Yieh Phui has also referred to differences in sales processes as supporting use of contract date as date of sale for U.S. sales, in contrast to invoice date for its home market sales, and references the discussion of these factors in Korean Pipe. More recently, though, in Sahaviriya, the CIT noted the importance the Department attributes to changes in material terms of sale when it stated that "{i}n choosing a date of sale, Commerce weighs the evidence presented and determines the significance of any changes to the terms of sale involved." See Sahaviriya, at 34. As discussed below, Yieh Phui has not provided evidence that the variations in sales processes support use of a date other than invoice date as the date of sale, the presumptive sale date under the Department's regulations.

Yieh Phui states that "{n}o written order confirmation or written contract was used between Yieh Phui and its home market customers while the formal order confirmation and the written contract were always used between Yieh Phui and its U.S. customers, and a new contract was made if there were revisions to the initial contract terms." See Yieh Phui case brief, at 8. However, record evidence indicates that Yieh Phui did not always issue revised contracts when terms of sale changed. See Final Analysis Memorandum, at 3-4. In any case, as noted above, the existence of formal order confirmations and written contracts did not prevent subsequent changes to material terms of sale.

Yieh Phui states that "{m}ost of Yieh Phui's home market sales were made in relatively small quantities, while the U.S. sales generally had larger volumes per order." See Yieh Phui case

brief, at 8. This argument presumes that each U.S. order (meaning the merchandise reflected in an entire contract) constitutes a distinct sale transaction; if, instead, the sale transactions are defined based on individual invoices and shipments, then the volumes of individual U.S. sales are considerably smaller because, as is evident from Exhibit 19 of Yieh Phui's August 31, 2009 Section B-D response and from the final U.S. sales database, a single contract is typically associated with multiple shipments and invoices. In any case, irrespective of the sizes of U.S. sales, there were changes to material terms of sale (involving both price and quantity) after the reported final contract dates.

Yieh Phui states that "{m}ost of Yieh Phui's home market sales involved products made mainly pursuant to local specifications..., while almost all the products sold to the U.S. were custom-made pursuant" to a U.S. specification, one "which was not usually ordered by home market customers." See Yieh Phui case brief, at 8. Yieh Phui does not explain why products made to U.S. specifications are any more "custom-made" than products made to "local specifications," and references to both appear throughout Yieh Phui's product brochure. See Exhibit 26 of Yieh Phui's July 31, 2009 Section A response. More importantly, as noted above, there were changes to material terms of sale (involving both price and quantity) after the reported final contract dates, irrespective of whether there were any sales involving "custom-made" products.

Yieh Phui states that "{m}ost of Yieh Phui's home market sales were made from inventory while most of Yieh Phui's U.S. sales were made to order." See Yieh Phui case brief, at 9. As is the case for Yieh Phui's argument regarding the relative size of U.S. orders as compared to home market sale orders (see above), this claim that U.S. sales are "made-to-order" starts with assuming the conclusion, and presumes that individual U.S. orders constitute distinct sale transactions; if the sale transactions are instead defined based on individual shipments and invoices, then the U.S. sales are actually made from merchandise that already exists. More importantly, as noted above, there were changes to material terms of sale (involving both price and quantity) after the reported final contract dates.

Yieh Phui states that "{d}ue to the made-to-order nature of Yieh Phui's U.S. sales, the U.S. sales database shows" a lag of months "between the final contract date and the invoice date." See Yieh Phui case brief, at 9. Yieh Phui argues that the Department found in Korean Pipe that lag time between contract date and invoice date supports using contract date as the date of sale. However, a key aspect of the Department's analysis in Korean Pipe was that, "{i}f we were to use invoice date as the date of sale for both markets, we would effectively be comparing home market sales in any given month to U.S. sales **whose material terms were set months earlier** – an inappropriate comparison for purposes of measuring price discrimination...." See Korean Pipe, at 32836 (emphasis added). As noted, in the instant review, material terms of sale for multiple sales continued to change after the reported final contract date. Thus, the inappropriate comparison referenced in Korean Pipe is not pertinent in this review.

Yieh Phui states "{m}ost U.S. sales were made through a selling agent and, for those sales, Yieh Phui incurred commission on a transaction-by-transaction basis," but it "paid no commission for any of its home market sales because the sales were made directly to the customers and not through selling agents." See Yieh Phui brief, at 9. A commission was paid, however, only if the

merchandise was shipped, as "the commission was always collected by the agent after the shipment from Yieh Phui had been made." See Yieh Phui's March 10, 2010 supplemental questionnaire response, at 75. Based on Yieh Phui's description of the commission process, if there were no sale, there would be no commission, and because shipment was necessary in order for there to be a commission, the key date for commissions was not contract date, which preceded shipment date. In any case, material terms of sale were changing after the reported final contract date. Regardless of the fact that commission payments were made for many U.S. sales, material terms of sale, such as price and quantity, were not only subject to change after the initial and final contracts, but did in fact change.

Yieh Phui states that for all U.S. sales, "Yieh Phui had to deliver the merchandise from its factory to the seaport, arrange and pay a broker for handling customs declarations, and make arrangements for marine insurance and a vessel to transport the merchandise to the United States," and "{a}ll of these actions were necessary to complete a U.S. transaction and this course of conduct was not the behavior of a producer that would believe it was free to change or breach its contracts." See Yieh Phui brief, at 9. The actions listed above were not completed as of the time of the reported final contract date, but were completed by the time of shipment and invoicing. Furthermore, irrespective of Yieh Phui incurring these transportation expenses, material terms of sale changed after the reported final contract date.

The Department employs invoice date as the date of sale unless a party demonstrates that the material terms of sale were established on another date (or if the Department itself, based on the record evidence, so determines). As noted above, Yieh Phui has indicated in its case brief that the material terms of sale were established by the time of the final contract date. However, by Yieh Phui's own admission, there are sales for which the material terms of sale, specifically quantity, changed after the reported final contract date, though Yieh Phui claims that these sales only represent "an extraordinarily low percentage of U.S. sales. See Yieh Phui case brief, at 10. Yieh Phui does not establish why the percentage should be considered "extraordinarily low" and, as in Sahaviriya, there were changes for "multiple contracts, representing multiple sales to multiple customers." See Sahaviriya, at 35. Furthermore, as discussed above, and in the Final Analysis Memorandum, the Department finds that Yieh Phui's analysis of the sales data was incomplete and underestimated the number of instances in which there were changes after the reported final contract date. See Final Analysis Memorandum, at 3-4. In short, "it cannot be gainsaid that changes to the material terms of sale occurred after execution of the final sales contract." See Sahaviriya, at 36.

In conclusion, the Department has determined, after reviewing the totality of the evidence on the record, that this evidence does not support diverging from the presumptive date of sale (invoice date) in this review, and continues to find that the invoice date is the appropriate date of sale for U.S. sales.[3]

[3] The Department has a long-standing practice of finding that, where invoice date is the presumptive date of sale, but shipment date precedes invoice date, shipment date should be used as date of sale. See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 73 FR 55036 (September 24, 2008), and accompanying Issues and Decision Memorandum at Comment 1; and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From

Comment 2: Zeroing

Yieh Phui states that in its preliminary results, the Department utilized zeroing in its margin calculation. In zeroing, the Department compares the prices of individual export transactions with monthly weighted-average normal values and excludes any amounts by which the export prices exceed the normal values when aggregating the results of the comparisons to calculate a margin. Yieh Phui states that the Department should abandon its standard zeroing practice in this review because it is inherently biased, distortive, and ultimately unlawful with respect to the United States' commitments as a member of the World Trade Organization (WTO). Yieh Phui maintains the Department should instead include all negative margin transaction amounts in Yieh Phui's margin calculations and duty assessments in the final results.

Yieh Phui states the WTO Appellate Body ruled against the Department's zeroing methodology in United States – Laws, Regulations, and Methodology for Calculating Dumping Margins (U.S.-Zeroing (EC)), WT/DS294/AB/R (April 18, 2006), at paragraph 133. While this ruling applied to the specific reviews under appeal, Yieh Phui states that in a subsequent decision the WTO Appellate Body considered a broader challenge to the zeroing methodology in administrative reviews "as such." See United States – Measures Relating to Zeroing and Sunset Reviews, WT/DC322/AB/R (January 9, 2007) (U.S.-Zeroing (Japan)). Yieh Phui states the WTO Appellate Body found in that case that the use of zeroing in administrative reviews both "as such" and "as applied" was inconsistent with the requirements set forth in Articles 2.4, 9.3, and 9.5 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994. See U.S.-Zeroing (Japan) at paragraphs 166 and 169. Yieh Phui indicates the WTO Appellate Body, in a later ruling, emphasized it "see{s} no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the Antidumping Agreement for disregarding the results of comparisons where the export price exceeds the normal value when calculating the margin of dumping for an exporter." See United States – Final Antidumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (April 30, 2008) (U.S.-Zeroing (Mexico)).

Yieh Phui notes the Department continued to use the zeroing methodology in administrative reviews after the aforementioned rulings. Yieh Phui further notes the WTO Appellate Body later affirmed a WTO Panel finding that "the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by applying simple zeroing in 29 administrative reviews." See United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (February 4, 2009) (U.S.-Continued Zeroing).

Yieh Phui concludes that, in light of these WTO decisions, the Department should abandon its zeroing practice when calculating a margin for Yieh Phui in the final results of this review.

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the Republic of Korea, 64 FR 30664 (June 8, 1999), at Comment 5. Therefore, for the final results, we are continuing to assign the shipment date as date of sale in instances in which the shipment date precedes the invoice date.

Department's Position: We have not changed our methodology of calculating Yieh Phui's weighted-average dumping margin as suggested by respondent 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 and 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 NV is greater than export price (EP) or constructed export price (CEP). As 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 U.S. Court of Appeals for the Federal Circuit has also held that this is a reasonable interpretation of the statute. See Timken Co. v. United States, 354 F.3d 1334, 1342 (Federal Circuit 2004) (Timken); see also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Federal Circuit 2005) (Corus Staal I).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which 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 out the dumping margins found on other sales.

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

The 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." See, Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner 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. See, e.g., Timken, 354 F.3d at 1343; Corus Staal I, 395 F.3d at 1347-49; Corus Staal BV v. United States 502 F.3d 1370, 1375 (Federal Circuit 2007) (Corus Staal II); and NSK Ltd. v. United States, 510 F.3d 1375 (Federal Circuit 2007) (NSK).

The respondent has cited WTO dispute-settlement reports (WTO reports) finding the denial of offsets by the United States to be inconsistent with the WTO Antidumping Agreement. As an initial matter, the U.S. Court of Appeals for the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. See Corus Staal I, 395 F.3d at 1347-49; accord Corus Staal II, 502 F.3d at 1375; NSK, 510 F.3d at 1375. Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 U.S.C. 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g); see, e.g., Antidumping Proceedings: Calculation of Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Zeroing Notice). With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

With respect to U.S.-Zeroing (EC), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Zeroing Notice. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. Id. at 77724.

With respect to U.S.-Zeroing (Japan) and U.S.-Zeroing (Mexico), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

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 described above, in the event that any of the export 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 to other transactions.

RECOMMENDATION

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

Agree _____ Disagree _____

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Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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Date