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Administrative Review
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DATE: February 1, 2009

MEMORANDUM TO: Carole A. Showers
Acting Deputy Assistant Secretary
for Policy and Negotiations

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Stainless Steel Sheet and Strip in Coils from Taiwan – July 1, 2007, through June 30, 2008

Summary

We have analyzed the comments of the interested parties in the 2007-2008 administrative review of the antidumping duty order covering stainless steel sheet and strip in coils (SSSSC) from Taiwan. After analyzing the comments received from interested parties, we have made no changes to our preliminary results.

We recommend that you approve the position described in the "Discussion of the Issue" section of this memorandum. The only issue on which we received comments from the parties is that of potential middleman dumping.

Background

On August 5, 2009, the Department published in the Federal Register the preliminary results of administrative review of the antidumping duty order on SSSSC from Taiwan. See Stainless Steel Sheet and Strip in Coils From Taiwan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 74 FR 39055 (Aug. 5, 2009) (Preliminary Results). The period of review (POR) is July 1, 2007, through June 30, 2008.

We invited parties to comment on our preliminary results of review. In September 2008, we received a case brief from the petitioners[1] and a rebuttal brief from Ta Chen Stainless Pipe Co., Ltd. (Ta Chen). The only issue raised by the parties is related to potential middleman dumping by Ta Chen. On September 29, 2009, we held a hearing at the request of the petitioners. Based on our analysis of the comments received, we have not changed the results from those presented in the preliminary results.

Discussion of the Issue

Comment: *Middleman Dumping*

In August 2008, the Department initiated this administrative review with respect to 20 Taiwanese producers/exporters of SSSSC, one of which was Ta Chen. See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 73 FR 50308, 50309 (Aug. 26, 2008) (Initiation Notice). Subsequently, Ta Chen reported to the Department that it made no U.S. shipments or sales of SSSSC during the POR. Nonetheless, in the same submission, Ta Chen stated that its U.S. affiliate, Ta Chen International (TCI), imported SSSSC during the POR from Tung Mung Stainless Pipe Co., Ltd. (Tung Mung), a company whose exports of SSSSC are excluded from this antidumping duty order.

In October 2008, the petitioners alleged that Ta Chen was engaged in middleman dumping of Tung Mung -produced merchandise via TCI, and they requested that the Department collect sufficient data from TCI to conduct a middleman dumping analysis. The petitioners renewed these requests in June and July 2009. After analyzing each of these submissions, as well as information provided by Ta Chen on this issue, the Department made a preliminary finding that there was no basis to treat TCI as a middleman solely by virtue of its affiliation with Ta Chen. Accordingly, we preliminarily determined it was appropriate to rescind the review for Ta Chen. See Preliminary Results, 74 FR at 39057-58.

In their case brief, the petitioners argue that the Department has no choice but to reverse its position, given that: 1) the Department determined during the less-than-fair value (LTFV) investigation that Ta Chen acted as a middleman with respect to U.S. shipments from Tung Mung; and, 2) TCI has now assumed this role by virtue of the fact that it is Ta Chen's wholly-owned subsidiary. According to the petitioners, the fact that TCI is in the United States should not be controlling as to whether the Department finds TCI to be Tung Mung's middleman during the POR.

At the heart of the petitioners' argument are the affiliation principles set forth in section 771(33) of the Tariff Act of 1930, as amended (the Act), which the petitioners use to argue that Ta Chen and TCI are a single entity because they are affiliated. Moreover, the petitioners assert that

[1] The petitioners are Allegheny Ludlum Corporation, AK Steel Corporation, United Auto Workers Local 3303, United Steelworkers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization.

section 772 of the Act further directs the Department to base U.S. price on the sale to the first unaffiliated purchaser, which in this case would be TCI's customer. According to the petitioners, because these directives are inviolable, the Department does not have the discretion to ignore them.

The petitioners argue that their interpretation of the Act has been confirmed by the U.S. Court of Appeals for the Federal Circuit (CAFC), when it issued its decision in AK Steel Corp. v. United States, 226 F3d 1361 (Fed. Cir. 2000) (AK Steel). The petitioners claim that in AK Steel the CAFC rejected the respective roles played by a foreign exporter and its U.S. affiliate in the U.S. sales process when determining whether a sale was properly classified as export price (EP) or constructed export price (CEP), finding instead that the mere signing of a contract by a U.S. affiliate is sufficient grounds to classify sales made pursuant to it as CEP. From this ruling, the petitioners infer that the status of parties as affiliates trumps their individual actions under U.S. law. The petitioners contend that the Department should apply this principle to the area of middleman dumping for purposes of the final results and find that Ta Chen's and TCI's affiliation trumps Ta Chen's absence from the formal sales process.

In any event, the petitioners disagree that Ta Chen is completely uninvolved in the transactions at issue. As an initial matter, the petitioners maintain that Ta Chen made these transactions possible by agreeing to amend the contract that was in place with Tung Mung during the LTFV investigation so that TCI became the ostensible party in "contractual privity" with Tung Mung in this review. Moreover, the petitioners assert that Ta Chen's financial position was affected by these transactions, given that Ta Chen consolidates its revenues and expenses with TCI. Finally, the petitioners speculate that Ta Chen "almost certainly" incurred expenses related to these transactions, a fact which the petitioners claim Ta Chen has not disproven.

According to the petitioners, Ta Chen's restructuring of its transactions with Tung Mung occurred for the sole purpose of allowing Ta Chen to avoid antidumping duties which would arise via a middleman dumping inquiry. The petitioners contend that permitting this restructuring to go unchallenged would not only elevate form over substance, but it would also be contrary to the principles set forth in a recent opinion handed down by the Supreme Court, United States v. Eurodif S.A., 129 S.Ct. 879 (2009) (Eurodif). According to the petitioners, Eurodif stands for the proposition that reliance on the principles of contract law is "uncalled for in dealing with international tariffs."[2] Thus, the petitioners conclude that the absence of a contract here cannot prohibit the Department from finding that a de facto contractual arrangement existed, given that Ta Chen effectively was the party that effectuated the U.S. resales of Tung Mung's merchandise.

[2] See Eurodif, 129 S. Ct at 888. The petitioners also cite Industries, Inc. v. United States, 625 F.Supp.2d 1377, 1383 (CIT 2009), where the Court stated that it could "see no reason . . . to import principles of contract law into the arena of administrative law."

The petitioners concede that, on remand in the litigation challenging the final determination in the LTFV investigation,[3] the Department excluded Tung Mung from the antidumping duty order on SSSSC from Taiwan based on a finding that Tung Mung did not sell SSSSC to TCI at dumped prices in the LTFV investigation. The petitioners note that, instead, the Department assigned Tung Mung and Ta Chen a combination rate for exports made through Ta Chen, finding that it would be unfair to penalize Tung Mung for selling at fair value to TCI when there was no evidence that Tung Mung was aware that Ta Chen was acting as a middleman (and thus engaging in dumping for its own account).[4]

The petitioners contend that these facts stand in stark contrast to those present today, because now the Department has a middleman dumping finding in place against Ta Chen. Thus, the petitioners conclude that it is no longer unfair to give Tung Mung the benefit of the doubt with respect to its sales to TCI, because TCI is the very company that effectuated the middleman dumping with Ta Chen during the LTFV investigation.[5]

The petitioners contend that finding that TCI is a middleman would be relatively easy at this stage of the proceeding because the Department does not have a settled practice with respect to middleman dumping. According to the petitioners, an initial agency interpretation is not instantly carved in stone, and thus the agency is free to reevaluate and further define its middleman practice. As support for this assertion, the petitioners cite Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863-864 (1984). Indeed, the petitioners assert that the Department acknowledged this fact in its remand redetermination on this issue when it stated that "the Department must determine on a case-by-case basis the appropriate methodology to apply in middleman dumping cases." See Remand Redetermination at 11. The petitioners argue that, in light of the decision by the Department not to promulgate regulations on middleman dumping, despite explicit approval from Congress for doing so (see H.R. Rep. No 317, 96th Cong., 1st Sess. 75 (1979) and S. Rep. No. 249, 96th Cong., 1st Sess. 94 (1979)), it is important that the Department act in the spirit of Chevron by taking stock and revising past middleman decisions in order to enforce the antidumping duty law effectively and to keep with Congressional intent.[6] The petitioners further argue that this position is supported by the

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[3] See Final Results of Redetermination Pursuant to Court Remand, Tung Mung Development Co., Ltd. v. United States, Consol. Court No. 99-06-00475 (Nov. 28, 2001) (Remand Redetermination).

[4] The petitioners also contend that the Department's decision to not treat Tung Mung's direct sales to TCI as middleman sales in the LTFV investigation may have been due to the relatively small number of such sales.

[5] Indeed, the petitioners take issue with the Department's decision to assign a combination rate in the LTFV investigation, arguing that this assignment has not been conducive to encouraging fairly-traded imports in this case. Specifically, the petitioners point to our Remand Redetermination, at 7-8, where they claim the Department calculated a combination rate for Tung Mung/Ta Chen both to avoid penalizing Tung Mung for dumping on the part of Ta Chen, and to encourage Tung Mung to sell through other channels. The petitioners assert that, in excluding Tung Mung's sales to TCI from antidumping coverage in this review, the Department is serving neither of these aims.

[6] The petitioners also argue that the legislative history supports their position because it: 1) recognizes the

Department's decision in Antidumping; Fuel Ethanol From Brazil; Final Determination of Sales at Less Than Fair Value, 51 FR 5572, 5577 (Feb. 14, 1986) (Ethanol from Brazil), where the Department indicated it was not barred "from looking at all facets of a transaction" in a middleman dumping context.

The petitioners maintain that a finding of no middleman dumping in the final results simply because it was inconsistent with the approach taken in the remand redetermination is insufficient as a matter of law. According to the petitioners, there is no rule to the effect that a party must be located outside the united states in order to be a middleman, and there have been too few completed middlemen cases to support such a proposition (and the Department has not stated this proposition, even in the instant proceeding). The petitioners also argue that this case is one of first impression.

Moreover, the petitioners maintain that it is also insufficient as a matter of law not to find TCI a middleman because both TCI and Tung Mung relied on the Department's determination in the LTFV investigation that Ta Chen acted as a middleman. The petitioners contend that the Department made an explicit disclaimer in the Remand Redetermination that it was making no determination with respect to the geographical location of the middleman, and thus both parties were on notice that the Department had not resolved this issue definitively. Moreover, the petitioners maintain that, were Tung Mung to wish to continue to sell through TCI without the specter of a middleman dumping inquiry, the appropriate vehicle for removing it would have been a changed circumstances review (CCR). The petitioners allege that the statutory provision governing CCRs can reasonably be construed to allow the Department to evaluate the impact of the changed contractual arrangement between the parties. However, the petitioners claim that, because neither Tung Mung nor Ta Chen availed itself of this procedure, neither can reasonably protest a finding of middleman dumping now.

Finally, the petitioners maintain that it is insufficient to find no middleman dumping here due to a concern of a spillover effect into other cases involving U.S. resellers owned by foreign companies. The petitioners contend that this situation differs from one in which there is no prior history of middleman dumping.

Given the Department's decision to handle middleman dumping situations on a case-by-case basis and the history of middleman dumping in this case, the petitioners request that the Department treat Tung Mung's sales to TCI as Ta Chen middleman sales, and suspend liquidation of the corresponding entries accordingly.

Ta Chen disagrees, contending that the petitioners requested relief is contrary to the statutory scheme, the Department's established middleman dumping analysis, and the Department's prior determinations. Therefore, Ta Chen argues that the Department should continue to find that

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importance of the concept of affiliation by referring to the first unrelated purchaser; and 2) is open to multiple interpretations as far as the issue of the middleman's geographical location is concerned.

Tung Mung's direct sales to TCI are not subject to the antidumping duty order for purposes of the final results.

As a threshold matter, Ta Chen maintains that the shipments in question cannot be subject to a middleman dumping inquiry because there is no "middleman" present in the transactions. Specifically, Ta Chen notes that Tung Mung (a foreign producer/exporter) sold the merchandise at issue directly to TCI (a U.S. purchaser unaffiliated with Tung Mung), without the involvement of a third party exporter. According to Ta Chen, the Department itself recognized that a foreign exporter was necessary when, on remand, it excluded Tung Mung's direct sales to TCI from its middleman dumping analysis[7], instead focusing on only those sales where Ta Chen had an active role. Because the facts are identical in this segment of the proceeding, Ta Chen contends that the Department should reach an identical result.

Given that the Department found that Ta Chen acted as a middleman, whereas TCI did not, Ta Chen concludes that the geographical location of the purchaser is dispositive in determining whether a middleman dumping investigation is warranted. Ta Chen asserts that this interpretation is supported by the legislative history of the Act, contained in Senate Report No. 96-249 at 94 (1979). Specifically, Ta Chen notes that Congress directed the Department to issue regulations requiring the examination of sales between the foreign producer and middlemen "before sale to the first unrelated U.S. purchaser." Id. From this, Ta Chen infers that Congress intended the sale to the first unrelated purchaser to be outside the scope of middleman dumping. Ta Chen maintains that this interpretation is echoed both in Chapter 7 of the Department's Antidumping Manual, at II.D (which indicates that the middleman must be located in either the exporting country or a third country) and in the Department's amended final determination in the LTFV investigation (which defines middleman dumping by reference to a foreign exporter).

Ta Chen notes that the petitioners argue that geography is irrelevant in middleman dumping decisions. However, Ta Chen maintains that accepting this position would result in an unwarranted expansion of the antidumping law to cover resales by U.S. subsidiaries of purchases from the country of their parent. Ta Chen argues that such an expansion is not only wholly without basis in the statute, but it is also absurd.

Ta Chen argues that the petitioners' additional arguments are similarly unavailing. First, Ta Chen disagrees that it restructured its sales to route all purchases through TCI, thereby changing the form of its transactions but not their "economic reality." Ta Chen notes that its lack of involvement in TCI's direct sales during the POR was identical to its lack of involvement in the LTFV investigation, as was its practice of consolidating TCI's financial results with its own. Because the facts have not changed, Ta Chen contends that the Department should continue to find that TCI did not act as middleman here, as it did on remand.

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[7] Ta Chen disagrees that the Department excluded Tung Mung's direct sales to TCI from its middleman analysis merely because of their "small number." Ta Chen argues that the Department did not state any sort of "de minimis" exception for small quantity shipments, but rather it focused on the fact that these sales were "direct."

Second, Ta Chen argues that the Department's statements in the Remand Redetermination that the Department did not intend to announce a "settled practice" and that it would examine middleman situations on a "case-by-case" basis are also not relevant here, because those statements related to whether to apply a single cash deposit rate or a combination rate (and not to whether particular sales were subject to middleman dumping analysis).

Third, Ta Chen disagrees with the petitioners' argument that its affiliation with TCI is controlling here. Ta Chen maintains that, in contrast, this affiliation is irrelevant because Ta Chen played no role in the sales process during the POR. Ta Chen notes that the Department explicitly addressed this question in its amended final determination, when it stated that "Tung Mung made sales to Ta Chen, not directly to TCI." See LTFV Final, 64 FR at 30624. As with the issue of geographical location, Ta Chen argues that acceptance of the petitioners' position would result in an unwarranted and unsupported expansion of the antidumping duty law, and this approach is wholly without basis in the Act.

Finally, Ta Chen contends that the petitioners' reliance on Eurodif and AK Steel is misplaced because neither of those cases relates to middleman dumping. Ta Chen argues that, unlike Eurodif, there is no "legal fiction" present in this case because Tung Mung sold directly to TCI with no Ta Chen involvement. Regarding AK Steel, Ta Chen contends that the affiliation principles discussed in AK Steel relate to the determination of whether to use EP or CEP as U.S. price, and that analysis is irrelevant to determining if a foreign middleman is involved in the transactions at issue. Moreover, citing to LTFV Final, 64 FR at 30624 and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Taiwan, 64 FR 15493 (Mar. 31, 1999) (SSPC Final), Ta Chen maintains that the Department rejected the application of the EP/CEP analysis in the LTFV investigation.

In conclusion, Ta Chen maintains that the Department's preliminary decision not to treat TCI as a middleman was correct. Ta Chen asserts that the petitioners have failed to present any evidence that middleman dumping occurred during the POR, as required by Department practice in order to initiate a middleman dumping investigation, and thus Ta Chen argues that the Department should affirm its preliminary decision in the final results.

Department's Position:

We continue to find that TCI, an importer unaffiliated with the excluded producer/exporter Tung Mung, is not a middleman for purposes of the final results. Moreover, because SSSSC produced and exported by Tung Mung is excluded from the antidumping duty order covering SSSSC from Taiwan, TCI's direct purchases from Tung Mung are not subject merchandise.

As noted above, in September 2008 Ta Chen reported to the Department that it made no U.S. shipments or sales of SSSSC during the POR, but that its U.S. affiliate, TCI, imported SSSSC during the POR from Tung Mung, for its own account. Subsequently, the petitioners alleged that Ta Chen was engaged in middleman dumping of Tung Mung-produced merchandise via TCI,

and they requested that the Department collect sufficient data from TCI to conduct a middleman dumping analysis. In response to this allegation, on October 1, 2008, we requested that Ta Chen describe its role in the transactions at issue, as well as identify who acted as the exporter and importer of record for them.

On October 7, 2008, Ta Chen responded to this questionnaire stating that it played no role in the transactions. Specifically, Ta Chen stated that TCI negotiated directly with Tung Mung and paid Tung Mung directly, and that Tung Mung acted as the exporter of record and TCI acted as the importer of record for the sales in question. The petitioners responded to this submission on October 24, 2008, claiming that Ta Chen's submission provided an insufficient basis to not find TCI a middleman, given that Ta Chen and TCI are the same entity. On November 4, 2008, Ta Chen expanded on its October 7, 2008, rationale as to why TCI was not a middleman, and it provided additional documentation to support its claim. We subsequently confirmed the fact that Ta Chen acted as neither the exporter nor importer in these transactions, and that all sales documentation referenced only TCI and Tung Mung, by examining Customs and Boarder Protection (CBP) entry documentation for each TCI import of Tung Mung merchandise. See the January 14, 2009, Memorandum to the File from Henry Almond, Analyst, entitled, "2007-2008 Administrative Review of Stainless Steel Sheet and Strip in Coils from Taiwan: Entry Documents from U.S. Customs and Border Protection" (CBP Entry Documentation Memo).

The petitioners reasserted their position in submissions made in June and July 2009. After analyzing each of these submissions, as well as information provided by Ta Chen on this issue, we made a preliminary finding that there was no basis to treat TCI as a middleman solely by virtue of its affiliation with Ta Chen. Accordingly, we preliminarily determined it was appropriate to rescind the review for Ta Chen.

In their case brief, the petitioners essentially repeat their arguments made prior to the Preliminary Results. Although the petitioners characterize this issue as one of first impression, this exact issue was present in both the SSSSC and SSPC LTFV investigations, and in both the Department declined to treat TCI as a middleman when it purchased directly from Tung Mung.[8]

Specifically, in the LTFV investigation, we stated:

> Here, the verified evidence establishes that YUSCO and Tung Mung made sales to Ta Chen, not directly to TCI (although Tung Mung did have a small number of direct sales to TCI, we are not considering them to be subject to our middleman investigation).

[8] In the only other instance where the Department found middleman dumping, Ethanol from Brazil, the Department was not faced with the specific issue of how to treat affiliated importers in a middleman context. Nonetheless, the Department clearly limited its middleman treatment to the middleman's (Interbras') operations in Brazil, noting that Interbras acquired the ethanol in Brazil and acted as the exporter, and calculating a dumping margin for Interbras as a "Manufacturer/producer/exporter." See Ethanol from Brazil, 51 FR 5572, 5573, 5579.

See LTFV Final, 64 FR at 30624 (emphasis added).[9]

Although the petitioners attempt to classify the LTFV finding as some sort of de minimis exception because the Department described Tung Mung's direct sales to TCI as a "small number" of sales, there is no indication that these sales were excluded from our middleman analysis because they were few in number. Rather, these sales were excluded from our middleman inquiry because Ta Chen was not involved in the transactions and did not act as an exporting middleman when Tung Mung dealt exclusively with TCI and exported directly to TCI (i.e., because they were "direct" sales).

Similarly, the Department disagreed with a request by the petitioners in SSPC Final to include TCI in Ta Chen's cash deposit rate because of identical middleman dumping concerns.[10] In that case, we determined that Ta Chen acted as a middleman by reselling merchandise purchased from YUSCO through TCI. In determining not to include TCI in Ta Chen's cash deposit rate, the Department stated the following:

> We disagree with petitioners. Although in antidumping investigations we do assign channel-specific deposit rates on occasion, these are producer-exporter specific rates. While we believe that a rate including both YUSCO and Ta Chen is appropriate, as discussed in other sections of this notice, we do not believe it is appropriate to include TCI, because TCI is an importer. . . Therefore, for the final determination, we will continue to assign a deposit rate to 'Ta Chen' with the understanding that this refers to only Ta Chen Stainless Pipe Co., Ltd.

See SSPC Final, 64 FR at 15505 (emphasis added). [11]

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[9] In the LTFV Final, we found Ta Chen to be a middleman for its re-sales of SSSSC purchased from both YUSCO and Tung Mung.

[10] Specifically, SSPC Final summarizes the petitioners' argument as follows:

> Petitioners argue that the language should remain the same because the reference to "Ta Chen'" is inclusive of both Ta Chen Stainless Pipe, Ltd. and TCI. Petitioners assert that this is appropriate given that these two companies are affiliated and that section 772 of the Tariff Act directs the Department to "examine sales from the foreign producer to middlemen (trading companies) and any sales between middlemen before sale to the first unrelated U.S. purchaser to avoid below cost sales by the middlemen."

See SSPC Final, 64 FR at 15504.

[11] Although this channel-specific treatment was challenged in litigation, it was ultimately upheld by the CIT and the CAFC. See Final Results of Redetermination Pursuant to Court Remand, Allegheny Ludlum Corporation, et al. V United States, Consol. Court No. 99-06-00369 (Nov. 28, 2001) and Tung Mung Development Co., Ltd. v. U.S., 354 F.3d 1371 (CAFC Jan. 15, 2004)

Thus the Department addressed the petitioners' identical claim that we should treat Ta Chen and TCI as a single entity by explicitly declining to extend middleman treatment to TCI.

We disagree with the petitioners that the facts in this segment of the proceeding differ in any material way from those in the LTFV investigation involving this product. Contrary to the petitioners' assertions, there is no evidence on the record that Ta Chen is involved in the sales at issue. Indeed, all of the documents on the record show that TCI negotiated the sales directly with Tung Mung, took legal title to the merchandise, received the invoice for the products, recorded the sale in its accounting records, and paid Tung Mung directly. See Ta Chen's November 4, 2008, submission at pages 4-5 and Exhibit 1 and the CBP Entry Documentation Memo (containing complete customs entry documentation packets for each TCI import of Tung Mung merchandise).

These facts contrast those present in the LTFV investigation in this proceeding. In that segment, Ta Chen was heavily involved in the sales process when it purchased and exported SSSSC produced by Tung Mung. Specifically, in the LTFV investigation, we stated:

> . . . Ta Chen did take legal title to the merchandise. Even though YUSCO and Tung Mung shipped the merchandise fob to TCI at a port in Taiwan, a purchaser need not take physical possession of merchandise to have legal title. Here, Ta Chen negotiated the sale with YUSCO and Tung Mung, signs {sic} a sales contract with YUSCO and Tung Mung, was invoiced by YUSCO and Tung Mung, paid YUSCO and Tung Mung for the merchandise, entered these sales into Ta Chen's book {sic}, and undertook various other activities involved in exporting and transporting the merchandise. See Exhibits 6 and 8 of Tung Mung's Verification Report dated April 12, 1999, page A-10 of Tung Mung's questionnaire response dated September 8, 1998. See also pages 5, 13 and Exhibit 9 of YUSCO's Sales Verification report dated April 12, 1999. Thus, the evidence is sufficient to establish that Ta Chen was acting as a middleman within the meaning of the antidumping law.

See LTFV Final, 64 FR at 30624.

Identical facts notwithstanding, the petitioners argue that the Department should now treat TCI as a middleman based solely on its affiliation of with Ta Chen. In support of this argument, the petitioners cite sections 771(33) of the Act, as well as sections 772(a) and (b).[12] However, we disagree that these provisions apply here. Specifically, section 771(33) of the Act outlines the conditions under which the Department may find parties to be affiliated. Sections 772(a) and (b) of the Act direct the Department to use the price to an unaffiliated purchaser as the starting price

[12] The petitioners' attempt to classify Ta Chen and TCI as a "single entity" appears to conflate the Department's practice of collapsing related producing/exporting parties into one price-setting producer/exporter with the Department's affiliation evaluation under section 771(33) of the Act.

in any dumping analysis.[13] Despite the petitioners' assertions to the contrary, neither of these provisions require the Department to treat affiliates as a single entity under the circumstances present here.

We further disagree with the petitioners that the circumstances present in this case are unique solely by virtue of the fact that the Department has already found Ta Chen to be a middleman, and that, as a consequence, the Department need not be concerned about spillover into other proceedings. The petitioners' argument appears to be, in essence, that the Department should establish a "middleman rule," whereby all affiliates of known middlemen are deemed middlemen exclusively because of their affiliation. However, the Act does not establish one set of affiliation rules for middlemen and another for traditional producers/exporters, nor does the legislative history indicate that the Department was to develop such a rule in capturing "below cost sales by middlemen." See H.R. Rep. No 96-317 at 75 (1979). Thus, if the Department were to accept the argument that a U.S. affiliate is the same entity as its foreign parent, it would effectively require the Department to accord exporter status to every U.S. affiliate of a person outside of the United States who is not affiliated with the respondent, which could potentially subject them to a middleman inquiry simply by virtue of their corporate family's foreign presence. Such an outcome is untenable.

Additionally, we find that the petitioners' reliance on AK Steel is misplaced. Specifically, the issue under consideration in that case was whether the Department properly classified sales as EP, rather than CEP, where the Korean producer sold merchandise to its affiliated exporter, which then sold to its affiliate in the United States. In reversing the CIT, the CAFC held that the plain language of section 772 of the Act required a "structural approach" for determining how to classify the sales: where the sale took place, and whether the parties are affiliated. In that case, because the first sale with an unaffiliated party took place inside the United States, and between affiliated parties, the CAFC held that the sales should have been classified as CEP. In contrast, in this case, there is no evidence of participation of affiliated parties, since, as discussed above, we found no indication that Ta Chen has any involvement in the sales between Tung Mung and TCI. Moreover, the CAFC did not mandate that all sales involving a U.S. affiliate be classified as CEP sales (the expected outcome were the petitioners' interpretation to be valid). Indeed, in Nucor Corp. v. United States, 612 F. Supp. 2d 1264, 1281 (CIT 2009), the CIT affirmed Commerce's determination to classify sales as EP where a Turkish respondent sold merchandise through its U.S. affiliate to an unaffiliated U.S. customer, because the sales took place outside of the United States, and the sales were made between unaffiliated U.S. customers and the U.S. affiliate's employees located outside the United States. In other words, the fact that two parties were affiliated did not mean that the sales had to be classified as CEP, since the Court focused on both where the sale took place, and which parties participated in the sales transaction. In this case, because it was Tung Mung and TCI which participated in the sales, not Ta Chen, the

[13] Thus, the affiliation principles look downstream to determine which U.S. sale to evaluate against normal value, and not upstream from the U.S. purchase to determine which foreign party qualifies as a producer or exporter under section 777A(c)(1) of the Act.

affiliation of Ta Chen and TCI is irrelevant to our analysis. Thus, while the CAFC in AK Steel did address the respective roles of affiliates in the sales process (focusing on which party conducted the price negotiations and where those negotiations took place), AK Steel does not stand for the proposition that the status of the parties as affiliates is paramount, as the petitioners claim.

Further, we also disagree with the petitioners that, while Ta Chen's name may not appear on any sales documents, the "economic reality" is that Ta Chen continues to function as a de facto middleman because it is TCI's parent company, and as such its financial position is affected by TCI's actions. While we acknowledge that TCI's actions may have an impact on Ta Chen's bottom line in general, we disagree that this fact in isolation is significant or that, in the absence of any specific action on the part of Ta Chen, it is sufficient to deem Ta Chen a middleman. Moreover, these facts were present during the LTFV investigation, and we find no reason to accord them more weight here.

As to the petitioners' argument that Ta Chen modified its contractual arrangement with Tung Mung to permit TCI to become the party in "contractual privity" with it (and, by implication, to circumvent the antidumping duty order by routing all shipments through TCI), we find that there is no evidence on the record to support such an allegation. As an initial matter, we note that the record contains no evidence of a previous long-term contractual arrangement between Tung Mung and Ta Chen[14] or a current arrangement between Tung Mung and TCI, nor do the petitioners cite to any such evidence. Thus, the petitioners' reliance on Eurodif is misplaced since there is no element of contractual manipulation designed to avoid antidumping duties. See Eurodif, 129 S. Ct. at 888.

Based upon the foregoing, we disagree with the petitioners that TCI should be treated as a middleman as a consequence of its affiliation with Ta Chen. Accordingly, we are affirming our preliminary finding of no middleman dumping on the part of TCI. Moreover, because we confirmed Ta Chen's statement that it made no shipments of SSSSC to the United States during the POR,[15] we are rescinding the review with respect to Ta Chen.

[14] Indeed, the only evidence that a contract between Tung Mung and Ta Chen existed at any point is the statement in the LTFV Final that "Ta Chen . . . signs {sic} a sales contract with . . .Tung Mung." See LTFV Final, 64 FR at 30624. There is no indication in this statement that the sales contract was long-term in nature, nor that it covered multiple shipments.

[15] See the September 9, 2008, memorandum to the file from Henry Almond, Analyst, titled "Release of Additional Customs Entry Data" (showing no entries of subject merchandise exported by Ta Chen).

Recommendation

Based on our analysis of the comments received, we recommend adopting the above position. If this recommendation is accepted, we will rescind the review for Ta Chen. We will also publish the final weighted-average dumping margin for the remaining reviewed firm in the Federal Register.

Agree____ Disagree____

_____
Carole A. Showers
Acting Deputy Assistant Secretary
for Policy and Negotiations

_____
(Date)