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

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

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

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from Taiwan for the Period May 1, 2009, through April 30, 2010

SUMMARY

We have analyzed the case brief of an interested party in the administrative review of certain polyester staple fiber from Taiwan covering the period May 1, 2009, through April 30, 2010. As a result of our analysis, we have made one change to the preliminary results with respect to comments received. We recommend that you approve the positions described in the "Discussion of Issues" section of this memorandum. Below is a complete list of the issues in this review for which we received comments from an interested party:

Comment 1: Zeroing
Comment 2: G&A Ratio

BACKGROUND

On April 21, 2011, the Department of Commerce (the Department) published in the *Federal Register* the preliminary results of the administrative review of the antidumping duty order on certain polyester staple fiber (PSF) from Taiwan.[1] The period of review is May 1, 2009, through April 30, 2010. We invited interested parties to comment on the *Preliminary Results*.

[1] See *Certain Polyester Staple Fiber From Taiwan: Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 22366 (April 21, 2011) (*Preliminary Results)*.

We received a case brief from the sole respondent, Far Eastern New Century Corporation (FENC).

DISCUSSION OF ISSUES

Comment 1: Zeroing

FENC states that, in the *Preliminary Results*, the Department did not use sales with negative dumping margins to offset positive dumping margins and instead treated negative dumping margins as dumping margins of zero percent. The respondent argues that the Court of Appeals for the Federal Circuit (CAFC) found the practice of "zeroing" to be contrary to law in *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363, 1367 and 1382 (CAFC 2011) (*Dongbu)*. FENC states that the *Dongbu* court concluded that in the underlying proceeding the Department had not provided a reasonable explanation for why the antidumping statute allows an inconsistent interpretation of section 771(35) of the Tariff Act of 1930, as amended (the Act), concerning the definition of dumping margin and weighted-average dumping margin depending on whether the antidumping proceeding is an investigation (in which the Department does not employ zeroing) compared to administrative reviews (in which the Department employs zeroing). FENC argues that the Department made the same error in the *Preliminary Results* and requests that the Department revise the calculations accordingly for the final results.

Department's Position:
We have not changed our calculation of the weighted-average dumping margin, as suggested by the respondent, in these final results.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value (NV) is greater than export price (EP) or constructed export price (CEP.) We disagree with the respondent that the Department's "zeroing" practice is an inappropriate interpretation of the Act. Because no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of section 771(35) of the Act. See, *e.g.*, *Timken Co. v. United States*, 354 F.3d 1334, 1342 (CAFC 2004) (*Timken*), *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347-49 (CAFC 2005), *cert. denied*, 546 U.S. 1089 (2006) (*Corus I*), and *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (CAFC 2011) (*SKF*).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies this section by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term "aggregate dumping margins" in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular

"dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel the dumping margins found on other sales.

This does not mean that non-dumped transactions are disregarded in calculating the weighted-average dumping margin. It is important to recognize that the weighted-average margin will reflect any non-dumped transactions 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 transactions is included in the numerator. Thus, a greater amount of non-dumped transactions results in a lower weighted-average margin.

The CAFC explained in *Timken* that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." 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 I*, 395 F.3d at 1343, and *NSK Ltd. v. United States*, 510 F.3d 1375 (CAFC 2007).

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006), and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins In Antidumping Investigations; Change in Effective Date of Final Modification*, 72 FR 3783 (January 26, 2007) (collectively, *Final Modification*). With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the Uruguay Round Agreements Act was specifically limited to address adverse World Trade Organization (WTO) findings made in the context of antidumping investigations using average-to-average comparisons. The Department's interpretation of the statute was unchanged in other contexts.

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

methodology. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, and treated in the calculation of the weighted average dumping margin under section 771(35)(B) of the Act, it is reasonable for the Department to consider whether the comparison result in question is the product of an average-to-average comparison or an average-to-transaction comparison.

In *U.S. Steel*, the CAFC considered the reasonableness of the Department's interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act.[2] Specifically, in *U.S. Steel*, the CAFC was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring. See *U.S. Steel*, 621 F.3d at 1363. The Court then affirmed as reasonable the Department's application of its modified average-to-average comparison methodology in investigations in light of the Department's stated intent to continue zeroing in other contexts. *Id*.

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

Furthermore, in *Corus I*, the CAFC acknowledged the difference between antidumping duty investigations and administrative reviews and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations. See *Corus I*, 395 F.3d at 1347. That is, the Court explained that the holding in *Timken* – that zeroing is neither required nor precluded in administrative reviews – applies to antidumping duty investigations as well. Thus, *Corus I* does not preclude the use of zeroing in one context and not the other. We also disagree with the respondent that the CAFC's recent decision in *Dongbu* requires us to change its methodology in this administrative review. The holding of *Dongbu*, and the recent decision in *JTEKT Corporation v. United States*, 642 F.3d 1378 (CAFC 2011) (*JTEKT*), were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations *versus* administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in neither *Dongbu* nor *JTEKT* overturned prior CAFC decisions affirming zeroing in administrative reviews, including *SKF*, in which the Court affirmed zeroing in administrative reviews

[2] See *U.S. Steel Corp. v. United States*, 621 F.3d 1351 (CAFC 2010) (*U.S. Steel*).

notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in *Dongbu* and *JTEKT*, the Department here is providing additional explanation for its changed interpretation of the statute subsequent to the *Final Modification* - whereby it interprets section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. When using average to average comparisons, for all these reasons, we find that our determination is consistent with the holdings in *Dongbu*, *JTEKT*, *U.S. Steel*, and *SKF*.

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 does not offset the dumping found in respect of other transactions.

Comment 2: **G&A Ratio**

FENC states that, in calculating the cost of production in the *Preliminary Results*, the Department did not use the ratio for revised general and administrative expenses (G&A ratio) FENC reported in its response to the first supplemental questionnaire. FENC requests that the Department use the revised figure.

***Department's Position*:**
We have examined the record and have determined that we made an error in using the original G&A ratio in the *Preliminary Results*. Although FENC submitted a revised G&A ratio that was calculated according to the Generally Accepted Accounting Principles (GAAP) of Taiwan relevant to the period of review to replace its original submitted G&A ratio which did not conform with Taiwanese GAAP, we neglected to incorporate it in our calculations for the *Preliminary Results*. For the final results, we have used the revised G&A ratio to calculate the cost of production.

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 this administrative review in the *Federal Register*.

Agree _____ Disagree _____

_____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

_____
Date