

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

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Proceeding Under Section 129 of the Uruguay Round Agreements
Act: Antidumping Measures on Diamond Sawblades and Parts
Thereof from the Republic of Korea

Summary

This memorandum addresses issues briefed in the proceeding under section 129 of the Uruguay Round Agreements Act (URAA) with respect to the antidumping duty investigation on diamond sawblades and parts thereof (diamond sawblades) from the Republic of Korea (Korea) in response to the World Trade Organization (WTO) panel report in *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea* (WT/DS402/R) (January 18, 2011) (*Panel Report*). Below is a complete list of the issues in this proceeding for which we have received comments from the parties:

1. Whether the Department of Commerce (Department) has authority to revoke the antidumping duty order.
2. Whether the Department should reset the cash deposit rates to zero in lieu of revocation

Background

The Department issued its preliminary results in this proceeding on July 20, 2011. See Memorandum from Gary Taverman to Ronald K. Lorentzen entitled “Preliminary Results Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Diamond Sawblades and Parts Thereof from the Republic of Korea” (Preliminary Results). Since the issuance of the Preliminary Results, we received a case brief from the petitioners in the underlying proceeding, the Diamond Sawblades Manufacturers’ Coalition (the petitioners). We received rebuttal briefs from Shinhan Diamond Industrial Co., Ltd. and SH Trading, Inc. (collectively, Shinhan) and Ehwa Diamond Industrial Co., Ltd. (Ehwa).

Discussion of Issues

1. Whether the Department has authority to revoke the antidumping duty order.

The petitioners claim that the Department currently lacks the authority to revoke the antidumping duty order on diamond sawblades from Korea. The petitioners contend that after the Department made its less than fair value (LTFV) determination,¹ both the petitioners and the respondents to the investigation appealed that decision to the U.S. Court of International Trade (CIT). See, e.g., *The Diamond Sawblades Manufacturers' Coalition v. United States*, CIT Ct. No. 06-248 (summons filed July 25, 2006); *Ehwa Diamond Industrial Co., Ltd. v. United States*, CIT Ct. No. 09-508 (summons filed December 4, 2009). According to the petitioners, the precedent of both the CIT and the Court of Appeals for the Federal Circuit (CAFC) demonstrates that, where a court has taken jurisdiction over an appeal of an agency determination, the agency may not alter the results of that determination in the absence of judicial permission. As support, the petitioners cite to *Zenith Electronics Corporation v. United States*, 884 F.2d 556 (Fed. Cir. 1989) and *Zenith Electronics Corporation v. United States*, 699 F. Supp. 296 (CIT 1988) (*Zenith*) where the CIT explained:

the need to obtain the approval of the Court in order to change the administrative result is simply a recognition of the Court's jurisdiction over the action. ...When a party to a judicial action contemplates doing anything to directly alter the subject matter of the judicial proceeding, a proper regard for the authority of the Court requires that the permission of the Court be obtained." *Zenith*, 699 F. Supp. at 297.

Similarly, the petitioners cite *Hyosung D & P Co. v. United States*, CIT Slip Op. 2010-26 (March 11, 2010) (*Hyosung*) at 6, which states that, "once a lawsuit has been commenced in this Court, Commerce is no longer authorized to amend its determination."

The petitioners further maintain that revocation would be premature at this time because it would interfere with the courts' jurisdiction over the appeals and cause irreparable harm to the petitioners by depriving them of a remedy in ongoing litigation. The petitioners contend that while the preliminary recalculation of the margins in this proceeding has resulted in zero margins, further changes made pursuant to the appeals have the potential of resulting in above *de minimis* margins. The petitioners claim that, if the order were to be revoked before the court has rendered a conclusive judgment on the claims, then the court would be deprived of its ability to consider arguments that would tend to raise the margins and award appropriate relief. The petitioners cite to *Hosiden Corp. v. United States*, 85 F.3d 589 (Fed. Circ. 1996), in which the CAFC vacated a CIT ruling that ordered the Department to revoke an antidumping duty order, as revocation would have permitted entries to liquidate duty-free despite ongoing litigation over entries that would otherwise have been subject to the order. Likewise, the petitioners refer to

¹ See Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 FR 29310 (May 22, 2006), as amended by Amended Final Determination of Sales at Less Than Fair Value: *Diamond Sawblades and Parts Thereof From the Republic of Korea*, 75 FR 14126 (March 24, 2010) (*Amended Final Determination*).

NSK Corp., et. al v. United States, CIT Slip Op. 07-176 (December 10, 2007), and *NMB Sing. Ltd. v. United States*, 120 F. Supp. 2d 1134, 1140 (CIT 2000), where the CIT recognized that liquidation of entries subject to administrative review would cause the plaintiff irreparable harm by depriving the plaintiff of the right to relief in its appeal of the sunset results.

Shinhan's and Ehwa's Rebuttal

Shinhan and Ehwa (collectively, the respondents) rebut the petitioners' contention that the mere existence of pending CIT appeals precludes the Department from revoking the order pursuant to the section 129 determination. According to the respondents, the petitioners' reference to *Zenith* and *Hyosung* is misplaced, as these two decisions are wholly unrelated to the present situation, which involves the statutory requirement that the Department implement an adverse finding of the WTO dispute settlement panel or Appellate Body. The respondents claim that section 129 provides that:

{n}otwithstanding any provision of the Tariff Act of 1930..., the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action...not inconsistent with the findings of the panel or the Appellate Body. See 19 U.S.C. 3538(b)(2).

The respondents note that the Statement of Administrative Action, URAA, H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA), refers to such a determination by the Department as a "new," "separate," and "different" determination. See SAA at 1025, 1027. Shinhan cites to 19 U.S.C. 1516a(a)(2)(B)(vii), which states that "the new determination is subject to judicial review separate and apart from the judicial review of the Department's original determination." The respondents argue that the administrative actions which result from an adverse WTO decision are distinct from other provisions under the Tariff Act of 1930, as amended (the Act), including judicial review of Department determinations in original investigations, and the Department is mandated by Congress to implement such actions within the prescribed time period. Therefore, claim the respondents, the Department does not need to seek judicial permission to issue its new section 129 determination.

According to Ehwa, the petitioners have overlooked precedent in which the Department has maintained that section 129 determinations are discrete decisions that can and must be implemented notwithstanding any pending federal court cases arising out of the same underlying determination. See *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled, Flat-Rolled Carbon-Quality Steel Products from Japan*, 67 FR 71936 (December 3, 2002) (*Hot-Rolled Steel from Japan*). Ehwa maintains that in *Hot-Rolled Steel from Japan*, parties contested various aspects of the Department's final determination at the CIT and later at the CAFC. Ehwa contends that despite the pending court appeals, the Department fully implemented the WTO's findings through a section 129 determination.

Shinhan contends that the petitioners' claims relating to the LTFV investigation are entirely outside the scope of issues that the Department may address in a section 129 proceeding. Shinhan cites *Thyssenkrupp Acciai Specialli Terni S.p.A. v. United States*, 603 F.3d 928 (Fed. Cir. 2010). In that case, the court rejected an appellant's argument that the Department must consider other claims of calculation errors that were raised in judicial action separate from its section 129 proceeding.

Shinhan further asserts that federal courts have consistently held that domestic petitioners that are challenging a final negative determination by the Department or U.S. International Trade Commission (ITC) can rarely demonstrate the existence of "irreparable harm" that would form the basis for a court to consider issuing injunctive relief. Shinhan cites to *FMC Corporation vs. United States*, 16 CIT 378, 381, 792 F. Supp. 1285, 1288 (1992), in which the CIT stated that although the domestic producer may suffer harm through continued liquidation of entries, this potential harm is not irreparable because the domestic producer will still have the possibility of prospective relief in regard to future entries if it is successful on the merits of its case.

Department Position:

Section 129 of the URAA governs the nature and effect of determinations issued by the Department to implement findings by WTO dispute settlement panels and the Appellate Body. Specifically, section 129(b)(2) provides that "notwithstanding any provision of the Tariff Act of 1930, within 180 days of a written request from the Office of the United States Trade Representative (USTR), the Department shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body." See 19 U.S.C. 3538(b)(2). The SAA variously refers to such a determination by the Department as a "new," "second," and "different" determination. See SAA at 1025 and 1027. After consulting with the Department and the appropriate congressional committees, USTR may direct the Department to implement, in whole or in part, the new determination made under section 129. See 19 U.S.C. 3538(b)(4). Pursuant to section 129(c), the new determination shall apply with respect to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which USTR directs the Department to implement the new determination. See 19 U.S.C. 3538(c). The new determination is subject to judicial review separate and apart from judicial review of the Department's original determination. See 19 U.S.C. 1516a(a)(2)(B)(vii).

In the *Panel Report*, adopted by the WTO Dispute Settlement Body (DSB) on February 24, 2011, the Panel found that the Department acted inconsistently with the obligations of the United States under the first sentence of Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) by using zeroing in calculating certain margins of dumping in three investigations involving Korean products, including the investigation of diamond sawblades. Subsequently, USTR submitted a written request to the Department to implement the findings of the *Panel Report* by issuing determinations as necessary to render the determinations in the investigation not inconsistent with the DSB recommendations and rulings. In its Preliminary Results, the Department

preliminarily determined to recalculate the weighted-average dumping margins at issue by applying the calculation methodology described in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006) (*Final Modification*). As a result of the changes to the calculations, we determined that no dumping margins would exist for companies for which a company-specific weighted-average dumping margin was calculated in the *Amended Final Determination*, and that as a result, the All Others rate would also be zero. Accordingly, the Department determined in its Preliminary Results that, if all dumping margins remained at zero for the final recalculation, the order would be revoked upon implementation.

With regard to the petitioners' argument that: (1) the Department lacks authority to revoke the order because the court currently has jurisdiction over the LTFV final determination and revocation would interfere with that jurisdiction; and (2) revocation of the antidumping duty order would be premature and cause irreparable harm to the petitioners because litigation over the LTFV final determination may result in above *de minimis* margins. First, the section 129 determination is a "new," "second," and "different" determination, which is subject to judicial review separate and apart from judicial review of the Department's LTFV final determination. See SAA at 1025 and 1027; see also 19 U.S.C. 1615a(a)(2)(B)(vii). Moreover, the section 129 determination will have prospective effect only, *i.e.*, it will apply to unliquidated entries of diamond sawblades from Korea that are entered, or withdrawn from warehouse, for consumption on or after the date on which USTR directs the Department to implement the determination. See 19 U.S.C. 3538(c); see also SAA at 1026. Entries made prior to the date of implementation will remain subject to potential duty liability. See SAA at 1026. Therefore, revocation of the antidumping duty order would not interfere with the court's jurisdiction over the LTFV final determination. Second, the SAA provides that if USTR directs the Department to implement the section 129 determination, the Department "may do so even if litigation is pending with respect to the initial agency determination." SAA at 1025. Moreover, because the LTFV final determination margins have not been overturned by the court, they are presumed to be accurate and the Department may make its section 129 determination based upon those margins. See *D & L Supply Co. v. United States*, 113 F.3d 1220, 1224 (Fed. Cir. 1997). Therefore, the Department has the authority to make the section 129 determination and to revoke the antidumping duty order irrespective of the pending litigation over the LTFV final determination.

2. Whether the Department should reset the cash deposit rates to zero in lieu of revocation

The petitioners assert that if the Department believes that some alteration of the current order is required by its section 129 process, then the Department should seek the CIT's permission to alter the margins and set the cash deposit rates going forward to zero while leaving the order in place pending a resolution of the LTFV litigation. The petitioners state that reducing the cash deposit rates to zero would allow duties to be later recouped should judicial review establish that margins for the investigation are above *de minimis* even in the absence of zeroing.

Further, the petitioners claim that even if the investigation margins remain at zero following

litigation, the Department should not revoke the order. The petitioners maintain the Department's original margin calculations and subsequent issuance of an antidumping duty order were valid under U.S. law. The petitioners note that 19 U.S.C. 3538 (c)(1)(B) indicates that the section 129 proceedings are to be prospective only and not have retrospective effects. Therefore, the petitioners claim that the Department should simply reset the cash deposit rate to zero in this case, without revocation, as this would be consistent with the requirement under 19 U.S.C. 3538 (c)(1)(B) that any alteration of a prior decision in reaction to an adverse WTO ruling be prospective only.

Finally, the petitioners maintain that a decision to revoke would not comport with traditional notions of equity. At the time of the original investigation, zeroing was the standard methodology employed by the Department in LTFV investigations. The petitioners claim that they developed their arguments, both prior to their petition filing and in the course of the investigation, with reliance upon the zeroing methodology. The petitioners contend that revocation would fundamentally impair the right of the domestic industry to relief that it fought for and obtained pursuant to lawful processes.

Shinhan's and Ehwa's Rebuttal

Shinhan and Ehwa contest the petitioners' argument that the Department should continue to suspend liquidation under the antidumping duty order at a zero cash deposit rate. Shinhan points out that the Department's authority to maintain an antidumping order, including the suspension of liquidation, rests on reaching the statutory determination that foreign merchandise is being, or is likely to be, sold at LTFV. When the Department finalizes its conclusion in this section 129 proceeding that the original *Amended Final Determination* should correctly show zero (or *de minimis*) dumping margins by all respondents, the requisite affirmative determination of sales at LTFV is non-existent and, therefore, no lawful basis exists for maintaining the antidumping duty order on the products.

Shinhan claims that the petitioners have no legal right to benefit from commercial disruption and the imposition of potential liability on importers that an antidumping duty order and suspension of liquidation create. Shinhan notes that, in cases where a petitioner seeks judicial review of a negative final LTFV determination, no antidumping duty order or suspension of liquidation exists pending litigation. Shinhan states that the petitioners have failed to demonstrate "irreparable harm" or demonstrate any lawful basis for continuation of the antidumping duty order or suspension of liquidation, in the event that the Department issues a final determination of zero or *de minimis* dumping margins

Shinhan maintains that this is the very essence of earlier holdings in the court action that the petitioners lodged against the ITC's original negative determination in this antidumping case. Shinhan contends that, only after there were affirmative final determinations that had been issued by both the Department and the ITC, were the petitioners entitled to seek suspension of liquidation and demand issuance of an antidumping duty order. *See Diamond Sawblades Manufacturers Coalition v. United States*, Court Nos. 2010-1024-1090 (Fed. Cir. 2010).

Ehwa maintains that the petitioners' arguments overlook many prior section 129 determinations in which the Department has revoked an antidumping duty order, either in whole or in part, when the recalculations undertaken to bring the original determination into compliance with the WTO's findings resulted in zero or *de minimis* weighted-average dumping margins. *See, e.g., Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Polyethylene Retail Carrier Bags From Thailand*, 75 FR 48940 (August 12, 2010) (*Bags from Thailand 129*) (revoking the order with regard to the respondent whose recalculated margin was zero); *Implementation of the Findings of the WTO Panel in United States--Antidumping Measure on Shrimp From Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp From Thailand*, 74 FR 5638 (January 30, 2009) (revoking the order in part for two respondents whose recalculated margins were *de minimis*); *Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador*, 72 FR 48257 (August 23, 2007) (*Shrimp from Ecuador 129*) (revoking the order in whole because the weighted-average dumping margins were *de minimis* for all mandatory respondents as a result of the section 129 recalculations).

Department Position:

We disagree with the petitioners that the Department should set the cash deposit rates going forward to zero while leaving the order in place pending a resolution of the LTFV investigation litigation. Because the recalculated dumping rates for the period of investigation are zero, there is no basis to sustain the order after USTR directs us to implement our finding. Additionally, revocation is consistent with the Department's practice in previous section 129 determinations that involved revised zero or *de minimis* margins. *See, e.g., Bags from Thailand 129 and Shrimp from Ecuador 129.*

We also disagree with the petitioners that even if the investigation margins remain at zero following litigation, the Department should not revoke the order because a section 129 determination is prospective only and should not have retrospective effects. As discussed above, we agree that the section 129 determination will apply prospectively only. As such, it is unclear why the petitioners believe that revocation in this context would have any retrospective effect.

We further disagree that the decision to revoke the antidumping duty order does not comport with traditional notions of equity. The calculations for the LTFV determination were premised upon a zeroing methodology that has been found inconsistent with our international obligations. The petitioners' suggestion that it would be more equitable to involved parties for the Department to continue an order that would not otherwise have been instated is unreasonable.

Therefore, consistent with the Preliminary Results, we intend to revoke the order in whole if directed to do so by USTR.

Final Antidumping Margins

The recalculated margins, unchanged from the Preliminary Results, are as follows:

| <u>Manufacturer/Exporter</u> | <u>Amended Final Determination Margins²</u> | <u>Re-calculated Margins³</u> |
|-----------------------------------|--|--|
| Ehwa Diamond Industrial Co., Ltd. | 8.80% | 0.00 % |
| Shinhan Diamond Industrial Co. | 16.88% | 0.00% |
| Hyosung Diamond Industrial Co. | 6.43% | 0.00% |
| All Others | 11.10% | 0.00% |

All-Others Rate

As a result of the changes to the margin calculations which result in zero margins for the three mandatory respondents, the All Others rate would also be *zero*. Therefore, this order would be revoked upon implementation.

Revocation

Upon recalculation, none of the three mandatory respondents listed above has a dumping margin. Therefore, if directed to implement this section 129 determination, the Department will revoke the order in whole effective on the date upon which USTR directs the Department to implement its final results. Accordingly, we would instruct U.S. Customs and Border Protection (CBP) to liquidate without regard to antidumping duties entries of the subject merchandise which were entered, or withdrawn from warehouse, for consumption on or after that date and to discontinue the collection of cash deposits for estimated antidumping duties.

Recommendation

In light of the Panel’s findings, we recommend issuing this determination which, if implemented, would render our original determination not inconsistent with the recommendations and rulings

² See *Amended Final Determination*, 75 FR at 14127.

³ See Memorandum to the File entitled “Preliminary Recalculation of the Weighted-Average Margin for Diamond Sawblades and Parts Thereof from the Republic of Korea for Ehwa Diamond Industrial Co., Ltd. (“Ehwa”) pursuant to the Preliminary Section 129 Determination in the Implementation of Findings of the WTO Panel;” Memorandum to the File entitled “Preliminary Recalculation of the Weighted-Average Margin for Diamond Sawblades and Parts Thereof from the Republic of Korea for Shinhan Diamond Industrial Co. (“Shinhan”) pursuant to the Preliminary Section 129 Determination in the Implementation of Findings of the WTO Panel;” and Memorandum to the File entitled “Preliminary Recalculation of the Weighted-Average Margin for Diamond Sawblades and Parts Thereof from the Republic of Korea for Hyosung Diamond Industrial Co., Ltd. (“Hyosung”) pursuant to the Preliminary Section 129 Determination in the Implementation of Findings of the WTO Panel,” all dated July 20, 2011.

of the Dispute Settlement Body by applying the methodology in *Final Modification*, and adopting the recalculated weighted-average dumping margins as outlined above.

Agree_____ Disagree_____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date