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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Gary Taverman
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea for the Period of Review February 1, 2010, through January 31, 2011

## Summary

We have analyzed the comments filed in the administrative review of the antidumping duty order on certain cut-to-length carbon-quality steel plate (CTL plate) from the Republic of Korea (Korea) for the period of review (POR) February 1, 2010, through January 31, 2011. We recommend that you approve the position described in the Discussion of the Issue section of this memorandum. The sole issue in this administrative review for which we received comments and rebuttal comments by parties is related to zeroing.

## Background

On January 13, 2012, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on CTL plate from Korea. *See Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review*, 77 FR 2032 (January 13, 2012) (*Preliminary Results*).

We invited interested parties to comment on the *Preliminary Results*. On February 13, 2012, we received a case brief from Dongkuk Steel Mill Co., Ltd. (DSM). On February 21, 2012, we received a rebuttal brief from Nucor Corporation (Nucor).

## Discussion of the Issue

### *Zeroing*

Comment: DSM argues that, for the final results, the Department should recalculate the antidumping duty margin for DSM without zeroing (setting negative transaction-specific dumping margins to zero percent) in accordance with requirements of *Dongbu Steel Co., Ltd.*

v. *United States*, 635 F.3d 1363 (Fed. Cir. 2011) (*Dongbu*) and *JTEKT Corp.* v. *United States*, 642 F.3d 1378, 1383-85 (Fed. Cir. 2011) (*JTEKT*). According to DSM, as stated in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006) (*Final Modification for Investigations*), the Department does not zero negative dumping margins in less-than-fair-value investigations. Citing *Dongbu* and *JTEKT*, DSM explains that U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that the Department's continued use of zeroing in administrative reviews but not in investigations constitutes an unreasonable interpretation of section 771(35) of the Tariff Act of 1930, as amended (the Act). DSM contends that the Department has not identified any reasonable basis for construing the statutory term "weighted average dumping margin" in section 771(35)(B) of the Act differently in administrative reviews than in investigations with respect to the issue of zeroing.

DSM argues further that *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, RIN 0625-AA87[1], in which the Department decided to harmonize its treatment of investigations and administrative reviews prospectively by abandoning the use of zeroing in administrative reviews "in a manner that parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations," underscores the unreasonableness of the Department's position concerning zeroing. DSM expressly recognizes that the *Final Modification for Reviews* will not apply to this review because of the effective date provision of the *Final Modification for Reviews*. Nevertheless, DSM contends that, with the issuance of the *Final Modification for Reviews*, the Department has no plausible basis to construct an interpretation that the statute provides for zeroing in administrative reviews but not in investigations.

Nucor claims that, because the Department's continued use of zeroing in administrative reviews after its publication of the *Final Modification for Investigations* has been upheld by the U.S. Court of International Trade (CIT) and Federal Circuit in, *e.g.*, *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (*SKF*), the Department's use of zeroing in the *Preliminary Results* was proper. Nucor contends that *Dongbu* and *JTEKT* did not declare the Department's use of zeroing in administrative reviews unlawful. Nucor argues that *Dongbu* and *JTEKT* simply require the Department to explain why the differences between comparison methodologies used in investigations and in administrative reviews justify the continued use of zeroing in administrative reviews but not in original investigations.

According to Nucor, in *Dongbu*, the Department did not explain why it continued to use zeroing in administrative reviews. Nucor explains that, at the oral argument for *Dongbu*, the Department of Justice's rationale for the continued use of zeroing in administrative reviews was that the Department's decision to end the use of zeroing in investigations was a response to an adverse WTO decision. Nucor states that the Federal Circuit held in *Dongbu* that "the government's

[1] DSM cited the signed but not published version of this notice in its February 13, 2012, case brief. This notice was published on February 14, 2012. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

decision to implement an adverse WTO report standing alone does not provide sufficient justification for the inconsistent statutory interpretations."

According to Nucor, in *JTEKT*, the Department claimed that an investigation determines whether an antidumping duty order will be imposed on subject merchandise while an administrative review decides the amount of antidumping duties to be assessed but the Department did not provide additional analysis or explanation. Nucor states that the Federal Circuit held that the Department "must explain why these (or other) differences between the two phases {original investigations and administrative reviews} make it reasonable to continue zeroing in one phase, but not the other."

Nucor explains that, in the Department's recent remand determinations responding to the Federal Circuit's decisions in *Dongbu* and *JTEKT*, the Department explained why it is reasonable to continue to interpret the statute as permitting zeroing in administrative reviews as follows: (1) the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act whereby it does not consider sales at above fair value as dumping; (2) the decision in the *Final Modification for Investigations* to limit the end of the use of zeroing to the comparisons of weighted average normal values (NVs) to weighted average U.S. prices (average-to-average) in investigations is consistent with the *Charming Betsy* doctrine and reflects the United States' measured response to a decision by a WTO Panel, not a haphazard, unreasonable interpretation of section 771(35) of the Act; (3) continued use of zeroing in administrative reviews accounts for the differences between the average-to-average comparisons and the comparisons of weighted average NVs to transaction-specific individual U.S. prices (average-to-transaction).

Nucor contends that the third point in the Department's explanation above addresses the particular concerns that the Federal Circuit raised in *JTEKT* because the third point explained why the differences between the two types of comparisons make it reasonable to continue zeroing in administrative reviews even after the publication of the *Final Modification for Investigations*.

Nucor explains that, in accordance with the different statutory and regulatory schemes for investigations and administrative reviews, the Department uses different calculation methodologies depending on the segment of the proceeding. In an investigation, according to Nucor, the Department does either an average-to-average comparison or an average-to-transaction comparison depending on whether targeted dumping exists. Citing *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1362-63 (Fed. Cir. 2010) (*U.S. Steel Corp.*), Nucor claims that zeroing is permitted when targeted dumping exists in an investigation. Nucor states that, in an administrative review, the Department always must do an average-to-transaction comparison.

According to Nucor, when the Department does an average-to-transaction comparison in an administrative review, the Department compares the export price (EP) or constructed export price (CEP) for an individual U.S. transaction with the weighted average NV. Nucor explains that the Department then aggregates the results of its comparisons that are specific to individual U.S. sales transactions in order to calculate a weighted-average antidumping duty margin. Nucor argues that granting offsets is not logical when the Department examines the pricing behavior for

individual U.S. sales transactions and calculates antidumping duty margins in relation to individual U.S. prices, not in relation to an average price or overall pricing behavior.

Nucor explains that not using zeroing in administrative reviews would result in a calculation of the exact same margin for the same universe of sales regardless of the comparison methodology the Department uses. Accordingly, Nucor argues, even assuming that *Dongbu* and *JTEKT* are consistent with Federal Circuit and U.S. Supreme Court precedents, these cases do not require that the Department end the use of zeroing in this review. Finally, Nucor agrees with DSM that the *Final Modification for Reviews* is effective for reviews for which the date of publication of the preliminary results is on or after April 16, 2012, the *Final Modification for Reviews* is not applicable to this administrative review.

Department's Position: We have not changed our calculation of the weighted-average dumping margin, as suggested by DSM, 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). The definition of "dumping margin" calls for a comparison of NV and EP or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (averaging group).

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 definition of "weighted average dumping margin" calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

The issue of "zeroing" versus "offsetting" involves how certain results of comparisons are treated in the aggregation of the numerator for the "weighted average dumping margin" and relates back to the ambiguity in the word "exceeds" as used in the definition of "dumping margin" in section 771(35)(A) of the Act. Application of "zeroing" treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the "weighted average dumping margin." Application of "offsetting" treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may

be included in the aggregation of the numerator of the "weighted average dumping margin" to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, we find that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons as we did in this administrative review. We interpret the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology we undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. Our interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether "zeroing" or "offsetting" is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the POR; the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between "zeroing" and "offsetting" reflects the ambiguity the Federal Circuit has found in the word "exceeds" as used in section 771(35)(A) of the Act. *See Timken Co. v. United States*, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (*Timken*). The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.[2] For decades, the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the Federal Circuit and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.[3] In so

[2] *See PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (*PAM*) ("{The} gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce's methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute."); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996) (*Bowe Passat*) ("The statute is silent on the question of zeroing negative margins."); *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360 (CIT 1987) (*Serampore*) ("A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter's home market as having a zero percent dumping margin.").

[3] *See, e.g., Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (*NSK*); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (*Corus II*); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (*Corus I*); *Timken*, 354 F.3d at 1341-45; *PAM*, 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); *Bowe Passat*, 926 F. Supp. at 1149-50; *Serampore*,

doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law."[4] 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 applied 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; *Corus II*, 502 F.3d at 1370, 1375; and *NSK*, 510 F.3d at 1375.

In 2005, a panel of the World Trade Organization (WTO) Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations. *See* Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R (Oct. 31, 2005) (*EC-Zeroing Panel*). The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in antidumping duty investigations. *See EC-Zeroing Panel*. The Executive Branch determined to implement this report pursuant to the authority provided in section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123). *See Final Modification for Investigations*, 71 FR at 77722; and *Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification*, 72 FR 3783 (June 26, 2007) (collectively *Final Modification for Investigations*). Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities' arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements. *See EC-Zeroing Panel* at 7.284, 7.291.

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance. *See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States*, 603 F.3d 928, 934 (Fed. Cir. 2010). Moreover, in *Corus I*, the Federal Circuit acknowledged the difference between antidumping duty investigations and

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675 F. Supp. at 1360-61.

[4] *Serampore*, 675 F. Supp. at 1361 (citing *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value*, 51 FR 9089, 9092 (March 17, 1986)); *see also Timken*, 354 F.3d at 1343; *PAM*, 265 F. Supp. 2d at 1371.

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. In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations. *See Final Modification for Investigations*, 71 FR at 77722. 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 URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.[5] *Id.*, 71 FR at 77724.

The Federal Circuit subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews. *See U.S. Steel Corp.*, 621 F.3d. at 1355 n.2, 1362-63. In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations. *Id.*, at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping). The Federal Circuit's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type. *Id.*, at 1361-63. The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist. *Id.*, at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); *see also* section 777A(d)(1)(B) of the Act. The Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing. *See U.S. Steel Corp.*, 621 F.3d at 1363. In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department

[5] On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. *See Final Modification for Reviews*. The *Final Modification for Reviews* makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the *Final Modification for Reviews* does not apply here.

may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist." *Id.* (emphasis added).

We disagree with DSM that the Federal Circuit's decisions in *Dongbu* and *JTEKT* require us to change its methodology in this administrative review. These holdings 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 Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in *Dongbu* and *JTEKT* did not overturn prior Federal Circuit decisions affirming zeroing in administrative reviews, including *SKF*, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. *See SKF*, 630 F.3d at 1375. Unlike the determinations examined in *Dongbu* and *JTEKT*, we provide in these final results additional explanation for its changed interpretation of the statute subsequent to the *Final Modification for Investigations* – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in *Dongbu, JTEKT, U.S. Steel,* and *SKF*.

Our interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,[6] we have maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which we do not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, we treat such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the URAA for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, our interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The *Final Modification for Investigations*, which implements the WTO Panel's limited finding, does not disturb the reasoning offered by the Department and affirmed by the Federal Circuit in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act. *See, e.g., SKF USA, Inc. v. United States*, 537 F.3d 1373, 1382 (Fed. Cir. 2008); *NSK*, 510 F.3d at 1379-1380; *Corus II*, 502 F.3d at 1372-1375; *Timken*, 354 F.3d at 1343. In the *Final*

[6] The *Final Modification for Reviews* adopts this comparison method with offsetting as the default method for administrative reviews, however, as explained in note 4 this modification is not applicable to these final results.

*Modification for Investigations*, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the *Charming Betsy* doctrine, to comply with certain adverse WTO dispute settlement findings.[7] Even where we maintain a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the *Charming Betsy* doctrine bolsters our ability to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither Section 123 of the URAA nor the *Charming Betsy* doctrine requires us to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of the Department's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review. *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992). These reasons alone sufficiently justify and explain why we reasonably interpret section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

Moreover, our interpretation reasonably accounts for inherent differences between the results of distinct comparison methodologies. We interpret section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

We may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, *see, e.g.*, section 777A(d)(1)(A)(i) of the Act, we usually divide the export transactions into groups, by model and level of trade (averaging groups), and compare an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product. In calculating the average EP or CEP, we average all prices, both high and low, for each averaging group. We then compare the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, we do not calculate the extent to which an exporter or producer dumped a particular sale into the United States because we do not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. We then aggregate the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset

[7] According to *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The principle emanating from the quoted passage, known as the *Charming Betsy* doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

positive, averaging-group comparison results. This approach maintains consistency with our average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, we determine an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which we determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, *see*, *e.g.*, section 777A(d)(2) of the Act, as we do in this administrative review, we determine dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, we compare the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. We then aggregate the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the POR. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, we do not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.[8] Thus, when we focus on transaction-specific comparisons, as we did in this administrative review, we reasonably interpret the word "exceeds" in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, we reasonably do not permit negative comparison results to offset or reduce other positive comparison results when determining the "aggregate dumping margin" within the meaning of section 771(35)(B) of the Act.

Put simply, we interpret the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology we continue to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are (1) implicitly granted when calculating average EPs and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where we are using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

[8] As discussed previously, we do account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, we reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. Neither the CIT nor the Federal Circuit has rejected the above reasons. In fact, the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations. *See Union Steel v. United States*, Consol. Court No. 11-00083, slip op. 12-24 (CIT Feb. 27, 2012). Accordingly, our interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably account for the differences inherent in distinct comparison methodologies.

Accordingly, and consistent with our interpretation of the Act described above, in the event that any of the U.S. sales 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 of other transactions.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above position. If this recommendation is accepted, we will publish the final results of the review and the final dumping margin for DSM in the *Federal Register*.

Agree ✓ Disagree _____

Paul Piquado
Assistant Secretary
for Import Administration

4 April 2012
(Date)