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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

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, 2006, through January 31, 2007

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 products (steel plate) from the Republic of Korea (Korea) for the period of review (POR) February 1, 2006, through January 31, 2007. We recommend that you approve the positions described in this memorandum with respect to 1) product matching and 2) offsetting positive margins with negative margins. We also corrected a ministerial error which we have explained in the “Changes Since the Preliminary Results” section of the accompanying notice of final results of administrative review.

Background

On November 23, 2007, the Department of Commerce (the Department) published Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind Administrative Review in Part, 72 FR 65701 (November 23, 2007) (Preliminary Results), in the Federal Register.

We invited parties to comment on the Preliminary Results. On December 26, 2007, we received a case brief from Dongkuk Steel Mill Co., Ltd. (DSM), a producer and importer of the

subject merchandise. On January 3, 2008, we received a rebuttal brief from Nucor Corporation (Nucor), a domestic producer and interested party.

Abbreviations

CAFC – Court of Appeals for the Federal Circuit

CIT – Court of International Trade

SAA - Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, at 870 (SAA), reprinted in 1994 U.S.C.C.A.N. 4040

The Act - The Tariff Act of 1930, as amended

Discussion of the Issues

Product Matching

Comment 1: DSM claims that the Department made incorrect product comparisons for determining U.S. price and normal value due to an error in the computer program the Department used in its margin calculation. Specifically, DSM asserts that, due to an error involving the model-specification field, there are instances where 1) sales of U.S. models are not matched to sales of identical or similar home-market models and 2) sales of U.S. models are matched to sales of identical or similar home-market models but the sales of the home-market models are not contemporaneous with the sales of the U.S. models. DSM provides a list which identifies the alleged incorrect product comparisons made by the Department and which identifies the product comparisons which DSM believes to be correct. DSM urges the Department to revise its calculations to reflect the correct comparisons.

Nucor argues that the Department should disregard DSM's allegation on the grounds that DSM has not provided adequate information for the Department to understand the allegation. Specifically, Nucor asserts, DSM has not identified any error in the computer program nor has it cited any statutory, regulatory, or policy provision that the Department has violated in calculating a dumping margin. Nucor asserts further that, in the list of comparisons DSM provided, a portion of the comparisons are not model-match differences but are instead merely comparisons which reflect sales of models in different months from the months the Department selected. Nucor contends that it does not see any link between the specification field and the contemporaneity of the comparisons. Nucor contends further that the Department should reject DSM's proposed product comparisons because implementing it would have an insignificant effect on the weighted-average margin.

Department's Position: After analyzing the computer program we used for our calculations in the Preliminary Results, we found incorrect product comparisons in several instances due to programming errors. Specifically, in some instances, we matched U.S. sales to home-market sales of merchandise which were less similar and/or less contemporaneous than other available home-market sales. In analyzing the reason for these incorrect matches, we found that there was an error in the programming language concerning the product-specification field.

The product-specification field affects directly the hierarchy of the specifications for matching sales of products in the two markets. Contrary to Nucor's argument, the use of the product-specification field may have an effect on the contemporaneity of the products we match in light of how we use this field at various steps and processes of the computer program. We have corrected the erroneous programming language for calculating the final results of review. See the Final Analysis Memorandum for DSM dated March 14, 2008, for a more detailed discussion.

Offsetting Positive Margins with Negative Margins

Comment 2: DSM argues that the Department should give full consideration to U.S. sales with negative margins in calculating the weighted-average dumping margin. DSM cites to United States - Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294 (App. Body Rep't Apr. 18, 2006) (US - Zeroing (EC)), and United States - Final Determination on Softwood Lumber from Canada, WT/DS264/AB/R (App. Body Rep't Aug. 11, 2004) (US-Softwood Lumber), as well as earlier WTO disputes (*i.e.*, US-Corrosion Resistant Steel (DS244) and EC-Bed Linens (DS141)) and asserts that the practice of the United States of setting negative margins to zero (zeroing) has been found to be inconsistent with the "fair comparison" requirement of the WTO Antidumping Agreement in several decisions by the WTO Appellate Body. DSM asserts further that in US - Zeroing (EC) the WTO Appellate Body has held that the practice of zeroing in administrative reviews is not consistent with the Antidumping Agreement's provisions concerning duty assessment. Citing United States - Measures Relating to Zeroing And Sunset Reviews, WT/DS322/20 (May 8, 2007) (US - Zeroing (Japan)), DSM states that the United States informed the Dispute Settlement Body (DSB) of the WTO that it intends to implement the Appellate Body's recommendations and rulings regarding zeroing by December 24, 2007. If the Department continues its practice of zeroing, DSM argues, the DSB will eventually conclude that the Department's actions are inconsistent with the Antidumping Agreement; thus, the Department should not burden interested parties and the U.S. and Korean governments with unnecessary legal proceedings. DSM concludes that, in implementing the Appellate Body's ruling, the Department should revise its margin calculations to give full weight to negative margins.

Nucor points out that the Department explained the bases for its practice of zeroing in Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 70 FR 18366 (April 11, 2005), and accompanying Issues and Decision Memorandum at Comment 1 (HR Steel - Netherlands). Nucor cites to Corus Staal BV v. United States, Court No. 05-00354, Slip Op. 06-112 at 6 (CIT July 25, 2006) (quoting Corus Staal BV v. United States, 387 F. Supp. 2d 1291, 1298 (CIT 2005)), and asserts that, in numerous instances, the courts have affirmed that the Department's methodology of zeroing is reasonable. Nucor asserts further that the Department's practice of zeroing is arguably mandated under the Act. Although the CAFC found in Timken that the Act "does not directly speak to the issue of negative-value dumping margins," Nucor claims that a close review of the CAFC's interpretation of the statutory text does not give effect to the plain language of the Act. That is, according to Nucor, the CAFC's holding does not recognize the plain meaning of the

word “exceeds” as used in section 771(35)(A) of the Act as it is confirmed by other portions of the statute, citing Timken Co. v. United States, 354 F. 3d 1334, 1340-1342 (CAFC 2004).

Referring to section 777(A) of the Act, Nucor asserts that the U.S. Congress was careful to outline very specific requirements for the comparison methods to be used in calculating weighted-average dumping margins. That is, Nucor continues, Congress carefully differentiated between comparison methods for investigations and reviews. Where Congress outlines two different standards within a statute, Nucor claims, it is traditional rules of statutory construction that Congress did not mean the two standards to be the same, citing INS v. Cardozo-Fonseca, 480 U.S. 421, 448 (1987). Nucor maintains further that eliminating zeroing is illogical given the statutory distinctions between how antidumping duty margins are calculated in investigations and in administrative reviews. In fact, Nucor asserts, the WTO has recognized the mathematical certainty of identical results under U.S. law in the absence of zeroing, citing Panel Report, United States - Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), WT/DS294/R (Oct. 31, 2005) at 142 (para. 7.26).

Nucor states further that the Department and the courts acknowledge that there is a specific statutory process that must be effected before any federal agency can modify its regulations or practices to adopt an adverse WTO ruling, citing Corus Staal BV, 387 F. Supp. 2d at 1298, 19 USC 3533(f)-(g) and 3538 (2000), and HR Steel- Netherlands. Nucor asserts that the Department has not initiated the process for changing its zeroing methodology in administrative reviews. Although the United States has stated that it intends to implement the WTO’s ruling by December 24, 2007, as DSM points out, Nucor asserts that neither this statement of intent nor the agreement the United States entered into pursuant to Article 21.3(b) of the DSU can supercede the statutory framework mandated for altering U.S. regulations or procedures to conform to adverse WTO rulings, citing 19 USC 3538. Accordingly, Nucor asserts, the Department has no legal authority to change its zeroing practice in this administrative review.

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

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.” 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 is greater than the export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, 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 the statute. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (CAFC 2004), Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (CAFC 2005), cert. denied, and 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) (Corus I).

The respondent has cited WTO dispute-settlement reports (WTO reports) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. As an initial matter, the CAFC has held that WTO reports are without effect under U.S. law “unless and until such a [report] has been adopted pursuant to the specified statutory scheme” established in the Uruguay Round Agreements Act (URAA). Corus I, 395 F.3d at 1347-49; accord Corus Staal BV v. United States, 502 F.3d 1370, 1375 (CAFC 2007) (Corus II); NSK, Ltd. V. United States, 510 F.3d 1375, ***, 2007 U.S. App. LEXIS 28917, at *8 (CAFC Dec. 14, 2007).

With respect to United States-Final Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004) (US-Softwood Lumber), the Appellate Body’s finding only related to the denial of offsets in the Softwood Lumber from Canada antidumping investigation. That report, and the Department’s implementation of that report, did not address the Department’s denial of offsets in other antidumping investigations or in any administrative review. Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 FR 22636 (May 2, 2005). Moreover, ultimate resolution of that WTO dispute was achieved through a mutually agreed solution and not through an elimination of the denial of offsets. Notification of Mutually Agreed Solution, United States-Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/29/Add.1 (March 9, 2007).

With respect to United States-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (Apr. 18, 2006) (US-Zeroing (EC)), the Department has modified 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 (Dec. 27, 2006) (Zeroing Notice). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. Id., 71 FR at 77724.

With respect to United States-Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (Dec. 15, 2003) (US-Corrosion-Resistant Steel), and EC-Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (Mar. 1, 2001) (EC-Bed Linens), the CAFC refused to find the Department’s interpretation of the Act unreasonable on the basis of these reports. See, e.g., Corus I, 395 F.3d at 1348-49. As discussed above, the CAFC found that WTO reports are without effect under U.S. law until they are implemented pursuant to the statutory scheme provided in the URAA. Id. Additionally, the CAFC noted that, in US-Corrosion Resistant Steel, the Appellate Body never made a finding regarding the Department’s denial of offsets. Id. Further, the CAFC noted that, in EC-Bed Linens, the United States was not a party to the dispute. Id.

With respect to United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007) (US-Zeroing (Japan)), and as discussed above, Congress has

adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g); see, e.g., Zeroing Notice. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to US-Zeroing (Japan), it is the position of the United States that appropriate steps have been taken in response to that report and those steps do not involve a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to US-Zeroing (Japan), the CAFC has repeatedly affirmed the permissibility of denying offsets in administrative reviews. Corus II, 502 F.3d at 1374-75; NSK, 510 F.3d at ***, 2007 U.S. App. LEXIS 28917, at *7-10.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on export transactions that exceed normal value in this review.

Recommendation

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

Agree _____

Disagree _____

David M. Spooner
Assistant Secretary
for Import Administration

Date