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8th Administrative Review
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DATE: December 7, 2009

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

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

SUBJECT: Issues and Decision Memorandum for the 2007/08 Antidumping
Duty Administrative Review of Certain Polyester Staple Fiber
from the Republic of Korea

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the 2007/08 administrative review of certain polyester staple fiber from the Republic of Korea. As a result of our analysis, we have made no changes to the preliminary results. 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 and rebuttals from interested parties:

Comment 1: Valuation of Upstream Inputs Consumed in Qualified Terephthalic Acid
Comment 2: Offsetting Negative Margins

BACKGROUND

On June 9, 2009, the Department of Commerce (“Department”) published, in the Federal Register, the preliminary results of the eighth administrative review of the antidumping duty order on certain polyester staple fiber (“PSF”) from the Republic of Korea.¹ The period of review (“POR”) is May 1, 2007, through April 30, 2008. We invited interested parties to comment on the Preliminary Results.

¹ Certain Polyester Staple Fiber from the Republic of Korea: Preliminary Results of the 2007/2008 Antidumping Duty Administrative Review, 74 FR 27281 (June 9, 2009) (“Preliminary Results”).

On September 28, 2009, we received a case brief from Huvis Corporation (“Huvis”). On October 5, 2009, we received a rebuttal brief from Wellman, Inc., Invista, S.a.r.L., and DAK Americas, LLC (collectively, “Petitioners”). A public hearing was not requested.

DISCUSSION OF ISSUES

Comment 1: Valuation of Upstream Inputs Consumed in Qualified Terephthalic Acid

Huvis’s Argument: In order to produce PSF, Huvis purchases a major input, qualified terephthalic acid (“QTA”), from its affiliate Samnam Petrochemical Co., Ltd. (“Samnam”). Samnam produces QTA from paraxylene (“PX”) it purchases from Samnam’s affiliate GS Caltex Co., Ltd. (“GSCO”).

Huvis asserts that the Department adjusted Huvis’s cost of production (“COP”) based, in part, on an adjustment that Huvis alleges the Department made to Samnam’s cost of producing QTA under the major input rule. Huvis argues that the Department erred in applying the major input rule to Samnam’s purchases of PX from its affiliate GSCO. Huvis points out that GSCO is affiliated with Samnam but not with Huvis and, thus, contends that the major input rule does not apply to the transfer price of PX between affiliates GSCO and Samnam.

Petitioners’ Argument: Petitioners argue that the Department correctly applied the major input rule by increasing the COP of QTA to reflect the fact that PX was purchased by Samnam at below market prices. Petitioners counter Huvis’s argument by stating that the major input rule applies to the transfer price of PX between GSCO and Samnam because the major input rule authorizes the Department to review the values of transactions made between affiliated parties.

Department’s Position: The Department did not make the adjustment that Huvis opposes. In accordance with section 773(f)(3) of the Tariff Act of 1930 as amended (“the Act”), the Department compared the POR-average transfer price of QTA between Huvis and its affiliate Samnam with both a proxy of the POR-average market price and Samnam’s POR-average COP for QTA. Huvis did not provide a market price for QTA, so we used the market price for modified terephthalic acid (“MTA”) as a proxy for the market price of QTA because we determined that MTA and QTA are interchangeable. The comparison showed that the proxy market price was higher than both Samnam’s COP for QTA and the transfer price between Huvis and Samnam. See Memorandum to Neal Halper, “Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results - Huvis Corporation,” dated June 1, 2009 (“Cost Calculation Memo”) at Attachment 1. Accordingly, we adjusted the transfer price between Samnam and Huvis to equal QTA’s proxy market price.

Parties have made these comments because the Department incorrectly stated in the Preliminary Results² that we made an adjustment and because our Cost Calculation Memo includes a hypothetical adjustment to Samnam’s COP of QTA.³ However, close examination of the Cost

² See Preliminary Results, 74 FR at 27284.

³ See Cost Calculation Memo at Attachment 2.

Calculation Memo shows that no such adjustment was made.⁴ Instead, we used the COP of QTA Huvis reported in Huvis's September 25, 2009 Section D response at Exhibit 4 for our comparisons in the application of the major input rule. With regard to parties' arguments regarding the propriety of making such an adjustment, we have reviewed Samnam's purchases of PX from GSCO and unaffiliated suppliers and we find that the prices paid by Samnam for PX from affiliate GSCO reasonably reflect market prices. Therefore, we do not reach the issue of whether such an adjustment would be appropriate.

Comment 2: Offsetting Negative Margins

Huvis's Argument: The Department should eliminate the practice of "zeroing" out negative antidumping margins that occurred when Huvis's U.S. price exceeded the company's normal value. Huvis asserts that the Department should include negative antidumping margins in the total margin calculations. This would be consistent with the World Trade Organization ("WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement").

In response to United States-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (April 18, 2006) ("US-Zeroing (EC)"), the Department decided to eliminate zeroing in margin calculations for original investigations where average-to-average comparison methodology is employed. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) ("Zeroing Notice"). Huvis claims that elimination of zeroing in administrative reviews is also necessary to comply with the clear and consistent line of decisions of the WTO Appellate Body ("AB") that zeroing in virtually any context, including administrative reviews, contravenes the international obligations of the United States under the AD agreement.

These AB decisions encompass cases such as United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 23, 2007) ("US-Zeroing (Japan)"), where the ruling was that zeroing is not permitted when the average-to-transaction comparison methodology is employed. This ruling was re-affirmed by the AB in its decision in the context of Japan's recourse to Article 21.5. See Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan, WT/DS322/AB/RW (August 18, 2009).

Also, Huvis contends that the AB's decision in United States-Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (April 30, 2008) ("US-Zeroing (Mexico)"), could not have been more explicit regarding the AB's consistent determination that zeroing is impermissible in administrative reviews:

We fail to see a textual or contextual basis in the GATT 1994 or the Anti-Dumping Agreement for treating transactions that occur above normal value as "dumped" for purposes of determining the existence and magnitude of dumping

⁴ See Cost Calculation Memo at Attachment 1.

in the original investigation and as “non-dumped” for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review. {¶ 107}

Huvis contends that the AB’s decision in US-Zeroing (Mexico) made clear that the AB considered the previous analyses and determinations of the AB to be definitive and binding on WTO members. See US-Zeroing (Japan) and United States – Laws, Regulations And Methodology For Calculating Dumping Margins (Zeroing) – Recourse To Article 21.5 Of The DSU By The European Communities, WT/DS294/AB/R (May 9, 2006), which struck down the U.S. practice of zeroing in administrative reviews.

Huvis contends that the AB has also made clear in the course of hearing recent challenges to the implementation by the United States of these previous adverse rulings that it considers the previous rulings to be definitive and extend to all liquidations that occurred, or will occur, pursuant to importer-specific assessments that were calculated in administrative reviews using the zeroing methodology.⁵ For example, the AB found that the United States acted inconsistently with AD Agreement Article 9.3 and GATT Article VI:2 by using the “simple zeroing” methodology in the sixteen administrative reviews at issue.⁶

Huvis recognizes that the Department is not obligated to change its practice by implementing these WTO decisions described above in this administrative review. However, while the statute requires certain procedural steps in order for the Department to modify its practice “in the implementation of” a specific AB decision, Section 123(g)(1) of the Uruguay Round Agreements Act (“URAA”), 19 U.S.C. § 3533(g)(1), this does not prevent the Department from modifying a general practice on its own initiative. Huvis argues that it would be absurd to interpret Section 123(g)(1) as precluding the Department from voluntarily changing for good and compelling reasons a practice that is required by neither statute nor regulation simply because a WTO panel or the AB has ruled in another case that the same practice is inconsistent with the AD Agreement. Huvis argues that changing the Department’s margin calculation practice in administrative reviews to make it compatible with the AD Agreement would be the proper interpretation of existing U.S. laws, which have always allowed for the possibility that antidumping margins can and should be calculated using a method that incorporates in their entirety the export prices for non-dumped sales.

Petitioners’ Argument: Petitioners contend that the Department should continue to use zeroing for dumping margin calculations in this administrative review and note that the Department recently considered, and rejected, the same arguments and general authority presented by Huvis,⁷ and that the Court of Appeals for the Federal Circuit (“CAFC”) has held that this is a reasonable interpretation of the statute.⁸ Petitioners argue that no U.S. court has required the Department to

⁵ See Appellate Body Report, United States – Laws, Regulations And Methodology For Calculating Dumping Margins (“Zeroing”) – Recourse To Article 21.5 Of The DSU By The European Communities, WT/DS294/AB/RW ¶¶ 469(c)(i),(ii) (May 14, 2009), which rejected U.S. claims to the contrary.

⁶ *Id.* ¶135.

⁷ See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Recession of Antidumping Duty Administrative Review, 74 FR 47191 (September 15, 2009) (“Certain Frozen Warmwater Shrimp”) and accompanying Issues and Decision Memorandum for the Final Results of the Third Antidumping Administrative Review at Comment 3 (September 8, 2009).

⁸ See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (“Timken”); Corus Staal BV

demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.⁹ Petitioners note that 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 URAA.¹⁰ 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, Petitioners argue that Congress did not intend for WTO reports to automatically trump 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.¹¹ With regard to the denial of offsets in administrative reviews, Petitioners note that the United States has not employed this statutory procedure.

With respect to US-Zeroing (EC), Petitioners note that the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See 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. With respect to US-Zeroing (Japan), and United States-Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (February 9, 2009), Petitioners note that the steps taken in response to these reports do not require a change to the Department’s approach of calculating weighted-average dumping margins in the instant administrative review.

For all these reasons noted above, Petitioners contend that the various WTO AB 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, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions.¹²

Petitioners note that the Department rejected similar arguments on this issue in other reviews as well.¹³ In this proceeding, Huvis has presented no basis for altering the Department’s analysis and position articulated in Certain Frozen Warmwater Shrimp or in prior reviews and its request should be denied.

v. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006) (“Corus I”).

⁹ See, e.g., Timken, 354 F.3d at 1343; Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (“Corus II”); and NSK Ltd. v. United States, 510 F.3d 1375 (Fed. Cir. 2007) (“NSK”).

¹⁰ See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; NSK, 510 F.3d at 1379-80.

¹¹ See 19 USC 3533(g); see, e.g., Zeroing Notice.

¹² See Certain Frozen Warmwater Shrimp; see also SKF USA, Inc. v. United States, 537 F.3d 1373, 1381-82 (Fed. Cir. 2008); Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008); Zeroing Notice, 71 FR at 77724.

¹³ See, e.g., Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 74 FR 6365 (February 9, 2009) and accompanying Issues and Decision Memorandum at Comment 2.

Petitioners assert that the courts have long recognized that in light of the antidumping laws inherent complexity, the Department's attempts to interpret and apply the statute are entitled to special deference. See Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983) ("The Secretary has broad discretion in executing the {antidumping} law.") And, in interpreting the antidumping statute as a whole, the Department has long recognized that the statutory regime as a whole is best (and most fairly) effectuated when negative margins of dumping are treated as non-dumped sales, but not allowed to cancel out positive margins.

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 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, 354 F.3d at 1343; Corus I, 395 F.3d at 1347-49.

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 provision by aggregating all individual dumping margins, each of which is determined as the amount by which normal value exceeds export price or constructed export price, 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 export price or constructed export price exceeds the normal value permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise 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 merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise 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." 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 1347; Corus II, 502 F.3d at 1375; and NSK, 510 F.3d at 1379-80.

The respondent has cited WTO dispute-settlement reports finding the denial of offsets by the United States to be inconsistent with the AD 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 URAA. Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; NSK, 510 F.3d 1375. 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 respect to US-Zeroing (EC), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See 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. See id.

With respect to US-Zeroing (Japan) and US-Zeroing (Mexico), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

For all these reasons, the various WTO AB 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, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions.

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 and the final weighted-average dumping margins for all firms reviewed in the Federal Register.

AGREE _____

DISAGREE _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date