FINAL RESULTS OF REDETERMINATION
PURSUANT TO REMAND

SKF USA Inc., SKF France S.A. and SKF Aerospace France S.A.S, SKF Industrie S.p.A. and Somecat S.p.A., SKF GmbH, and SKF (U.K.) Limited v. United States
Consol. Court No. 09-00392, Slip Op. 11-121 (CIT October 4, 2011)

I. SUMMARY

This remand redetermination, issued in accordance with the September 21, 2011, order of the U.S. Court of International Trade (Court) in *SKF USA Inc. v. United States*, Court No. 09-00392 (Ct. Int'l Trade Oct. 4, 2011) (Remand Order), concerns the determination of the Department of Commerce (the Department) for SKF USA Inc., SKF France S.A. and SKF Aerospace France S.A.S, SKF Industrie S.p.A. and Somecat S.p.A., SKF GmbH, and SKF (U.K.) Limited (collectively, SKF) in the administrative review of the antidumping duty order on ball bearings and parts thereof from France, Germany, Italy, Japan and the United Kingdom for the period May 1, 2007 through April 30, 2008. *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Revocation of an Order in Part*, 74 FR 44819 (Aug. 31, 2009) (*Final Results*).

Pursuant to the Court's Remand Order, the Department has rendered further consideration of the application of its zeroing methodology to SKF consistent with the recent decision of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) (*JTEKT*). For the reasons set forth below, the Department has not changed its calculation of SKF's weighted-average dumping margin on remand.

II. BACKGROUND

As it had done in prior administrative reviews of the antidumping duty order on ball bearings and parts thereof from France, Germany, Italy, Japan and the United Kingdom, the Department in the *Final Results* applied its zeroing methodology – in which the Department does not permit fair value sales to offset the amount of dumping found in other sales – in calculating the weighted-average dumping margin for SKF. *See Final Results* and accompanying Issues and Decision Memorandum at Comment 1. In response to an argument by SKF that the Department unreasonably maintained disparate interpretations of the statutory term "dumping margin," of section 771(35) of the Tariff Act of 1930, as amended (the Act), in antidumping duty investigations and administrative reviews, the Department stated, in relevant part, as follows:

> 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 price} or the {constructed export price}. As no dumping margins exist with respect to sales where normal value is equal to or less than the {export price} or the {constructed export price}, the Department will not offset the amount of dumping found with the "negative" margins calculated for the non-dumped sales. The {Federal Circuit} has held that this is a reasonable interpretation of the statute. See, *e.g.*, *Timken {Company v. United States}*, 354 F.3d at 1342, *Corus {Staal BV v. United States}*, 395 F.3d at 1347-49 (CAFC 2004), and *SKF v. United States*, 537 F.3d 1373, 1381 (CAFC 2008).
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> 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." We apply these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds {export price} or {constructed export price}, and dividing this amount by the value of all sales.
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> The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin"

> in section 771(35)(A) 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. *Id.*

The Federal Circuit recently upheld a similar explanation of the Department's zeroing practice in administrative reviews in *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (*SKF*) ("Even after Commerce changed its policy with respect to original investigations, we have held that Commerce's application of zeroing to administrative reviews is not inconsistent with the statute.") (citation omitted).

SKF challenged the Department's application of the zeroing methodology in the *Final Results* on grounds that zeroing is not in accordance with the statute. Upon examining the Department's decision to zero in the underlying administrative review, the Court held that "a remand is appropriate in this case to direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu Steel* and *JTEKT Corp.*, both of which decisions questioned the legality of the Department's construction of 19 U.S.C. § 1677(35) and declined to affirm the judgment of the Court of International Trade upholding that construction" and ordered the Department to "alter that decision or set forth an explanation of how the language of 19 U.S.C. § 1677(35) as applied to the zeroing issue permissibly may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews." Remand Order at 17, 18.

III. ANALYSIS

Upon multiple occasions, the Federal Circuit squarely addressed the reasonableness of the Department's zeroing methodology in administrative reviews and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing. *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 Co. v. United States*, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (*Timken*). Notwithstanding this precedential bulwark, the Department accords with the Court's Remand Order and provides further explanation concerning its interpretation of the statute to allow zeroing with respect to average-to-transaction comparisons in the underlying administrative review, while also allowing the Department not to apply zeroing with respect to average-to-average comparisons in antidumping duty investigations.

A. Background Behind The Perceived Inconsistency Identified In Dongbu and JTEKT

Section 771(35)(A) of the Act, which authorizes the Department to apply zeroing in antidumping duty proceedings, states that "{t}he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The Federal Circuit repeatedly found section 771(35)(A) of the Act ambiguous as to whether the statute *requires* zeroing, stating that "Congress's use of the word 'exceeds' {in section 771(35) of the Act} does not unambiguously require that dumping margins be positive numbers." *Timken*, 354 F.3d at 1342; *see also United States Steel Corp. v. United States*, 621 F.3d 1351, 1361 (Fed. Cir. 2010) (*U.S. Steel Corp.*) ("{T}he statute is silent as to what to do when the 'amount' calculated by Commerce pursuant to {section 771(35)(A) of the Act} is negative."). In so doing, the Department interpreted section 771(35) of the Act to permit zeroing in both administrative reviews and antidumping duty investigations. *See, e.g.*, *Timken*, 354 F.3d at 1340 (in a challenge to the Department's use of zeroing in administrative reviews, the United

States argued that "the plain meaning of the antidumping statute calls for Commerce to zero negative margin transactions, and that the legislative history confirms this reading."); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722, 77722 (December 27, 2006) (*Final Modification For Investigations*) (wherein the Department modified its prior practice of zeroing in investigations using average-to-average comparisons). The Federal Circuit upheld this interpretation separately in the context of both antidumping duty investigations and administrative reviews as a reasonable resolution of statutory ambiguity concerning the treatment of comparison results that show normal value does not exceed export price or constructed export price. *See, e.g.*, *SKF*, 630 F.3d at 1375 (upholding use of zeroing in an administrative review for which final results issued after *Final Modification For Investigations* took effect); *Corus I*, 395 F.3d at 1347-49 (upholding use of zeroing in an investigation); *Timken* (upholding use of zeroing in an administrative review).

In 2005, a panel of the World Trade Organization (WTO) Dispute Settlement Body (Panel) 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[1] 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*). In light of the adverse WTO Dispute Settlement Body decision and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department

[1] An average-to-average comparison involves a comparison of "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise." Section 777A(d)(1)(A)(i) of the Act.

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 in the limited context of average-to-average comparisons in antidumping duty investigations. *See generally Final Modification For Investigations*. The Department did not change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.[2] *See 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 whilst 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 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

[2] An average-to-transaction comparison requires the Department to compare "export price{} (or constructed export price{}) of individual transactions to the weighted average price of sales of the foreign like product." Section 777A(d)(2) of the Act.

antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist. *See id.* at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that 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 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).

Therefore, to the extent that the Department interprets section 771(35)(A) of the Act differently for antidumping duty investigations using average-to-average comparisons than for investigations using other comparison methodologies and administrative reviews using average-to-transaction comparisons, the Department did not create an inconsistency in this administrative review, but rather adhered to its position adopted in *Final Modification For Investigations*.

B. The Department Reasonably Interpreted Section 771(35) of the Act

The Department's interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, the Department has, with one

limited exception, maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if normal value does not exceed export price. Pursuant to this interpretation, the Department gives such sale a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, the limited exception to this interpretation does not amount to an arbitrary departure from established practice, as the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultation with the Legislative Branch, and explanation. Third, the Department's 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, on the one hand, and the result of an average-to-transaction comparison, on the other.

1. *The Department Used a Reasonable and Judicially-Affirmed Interpretation of Section 771(35) of the Act*

For decades, the Department and various federal courts considered the use of zeroing a reasonable tool in calculating dumping margins. *See, e.g.*, *Timken*, 354 F.3d at 1341-45; *PAM, S.p.A. v. U.S. Dept. of Commerce*, 265 F. Supp. 2d 1362, 1370 (CIT 2003) (*PAM*) ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1149-50 (CIT 1996) (*Bowe Passat*); *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360-61 (CIT 1987) (*Serampore*). During that time, the courts repeatedly held that the statute does not speak directly to the issue of zeroing. *See PAM*, 265 F.

Supp. 2d at 1371 ("{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*, 926 F. Supp. at 1150 ("The statute is silent on the question of zeroing negative margins."); *Serampore*, 675 F. Supp. at 1360 ("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."). In view of the statutory ambiguity, the courts consistently upheld as reasonable the Department's interpretation of the statute to permit the use of zeroing. *See, e.g.*, *Timken*, 354 F.3d at 1341-45; *PAM*, 265 F. Supp. 2d at 1370; *Bowe Passat*, 926 F. Supp. at 1149-50; *Serampore*, 675 F. Supp. at 1360-61. In so 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." *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 (Mar. 17, 1986)); *see also Timken*, 354 F.3d at 1343; *PAM*, 265 F. Supp. 2d at 1371.

2. The Executive Branch's Limited Implementation of an Adverse Finding of the WTO Dispute Settlement Body Results in a Reasonable Interpretation of Section 771(35) of the Act

The WTO Dispute Settlement Body limited its initial adverse report to the Department's

use of zeroing in average-to-average comparisons in antidumping duty investigations. *See generally EC-Zeroing Panel*, WT/DS294/R. The Executive Branch determined to implement this report pursuant to the authority provided in section 123 of the Uruguay Round Agreements Act (19 U.S.C. § 3533(f), (g)) (Section 123). *See generally 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 speak to 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, e.g.*, *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).

The WTO Dispute Settlement Body's finding on the use of zeroing in average-to-average comparisons in antidumping duty investigations, and the Department's *Final Modification For Investigations* to implement that limited finding, do 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. That the Department altered its interpretation of the statute in one limited context to implement a similarly limited finding supports the conclusion that the Court should affirm the Department's alternative interpretation of an ambiguous statutory provision in that limited context as consistent with the *Charming Betsy* doctrine.[3] Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the *Charming Betsy* doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the narrow context of average-to-average comparisons in antidumping duty investigations so that the United States may comply with its international obligations. Neither Section 123 nor the *Charming Betsy* doctrine requires the Department 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 is not subject to judicial review. *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 the Department reasonably interpreted section 771(35) of the Act differently in average-to-average comparisons in antidumping duty investigations relative to all other contexts.

[3] 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.

3. The Department's Interpretation Reasonably Accounts for Inherent Differences Between The Results of Distinct Comparison Methodologies

Additional justifications exist that demonstrate the reasonableness of the Department's distinct interpretations of section 771(35) of the Act. As a result of the Department's *Final Modification For Investigations*, the Department currently interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. The Department posits that, among other effects, its interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison, on the one hand, and the result of an average-to-transaction comparison, on the other.

The use of the verb "exceeds" in section 771(35)(A) of the Act allows the Department to reasonably interpret the term in the context of the average-to-average comparisons made in antidumping duty investigations 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.[4] When using an average-to-average comparison methodology, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average export price or constructed export price of transactions within one averaging group to an average normal value for the comparable model of the foreign like product at the same or most similar level of trade. In calculating the average export price or constructed export price, the Department averages together all prices, both high and low, for each averaging group. The Department then compares the average export price or constructed export price for the averaging group with the average normal value for the

[4] Section 771(35)(B) of the Act defines a 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."

comparable merchandise. This comparison yields an average amount of dumping for the particular averaging group because the high and low prices within the group have been averaged together prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not determine dumping on the basis of individual U.S. prices, but rather makes the determination "on average" for the averaging group within which lower prices are offset by higher prices. The Department then aggregates the results from each of the averaging groups to determine the aggregate dumping margins for a specific producer or exporter. At this aggregation stage, negative averaging group comparison results offset positive averaging group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits export prices above normal value to offset export prices below normal value within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the comparison results being aggregated were determined.

In contrast, when applying an average-to-transaction comparison methodology, as the Department did in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the export price or constructed export price for a particular U.S. transaction with the average normal value for the comparable model of 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 export price less than its normal value. The Department then aggregates 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 period of review. To the extent the average normal value does not exceed the individual export price or constructed export price of a particular U.S. sale, the Department does 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.[5] Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act as including only those comparisons that yield positive results. Consequently, in transaction-specific comparisons, the Department reasonably does 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, following the Department's *Final Modification For Investigations*, the Department has interpreted the application of average-to-average comparisons to contemplate a dumping analysis that examines the overall pricing behavior of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The

[5] The Department does 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, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin.

offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of overall pricing behavior. However, the need to account for overall pricing behavior does not arise when the Department examines an exporter's or producer's sales on an individual export transaction basis.

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, the Department 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. Accordingly, the Department's interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to not permit zeroing in average-to-average comparisons, as the Department does in antidumping duty investigations, reasonably accounts for the differences inherent in distinct comparison methodologies.

IV. COMMENTS FROM INTERESTED PARTIES

On November 21, 2011, the Department invited interested parties to comment on the Draft Results of Redetermination Pursuant to Remand (Draft Remand). SKF filed comments on November 25, 2011. In its submission, SKF summarizes what it perceives as the legal background behind the Department's alleged inconsistent interpretations of section 771(35) of the Act and offers several criticisms of the Draft Remand that question whether the Department complied with the Court's Remand Order. The petitioner, The Timken Company (Timken), which filed comments on the same date, endorses in all respects the Department's reasoning in the Draft Remand. The Department addresses interested parties' comments as follows:

Comment 1: Whether the Department Complied with the Court's Remand Order and Federal Circuit Precedent

SKF contends that the Draft Remand does not comply with the Court's Remand Order because the Department did not do what the Federal Circuit instructed in *JTEKT* and *Dongbu Steel v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) (*Dongbu*), the case that the Federal Circuit relied upon in addressing the zeroing issue in its *JTEKT* decision. SKF argues that the Draft Remand does not contain a reasonable justification for concluding that the Department may interpret the same statutory provision differently depending upon the type of antidumping proceeding. SKF urges the Department to reconsider its decision to apply its zeroing methodology in administrative reviews and to adopt a consistent methodology for investigations and administrative reviews when developing its final remand determination.

According to SKF, the Executive Branch's decision to comply with an adverse WTO report does not otherwise cure the Department's unreasonable interpretation of section 771(35) of the Act. SKF further contests the effect of the *Charming Betsy* doctrine on the current dispute, arguing that case does not license administrative agencies to adopt unreasonable constructions of statutory provisions, which the Department has done by adopting its inconsistent interpretations of section 771(35) of the Act. Instead, SKF asserts that, if the Department is going to rely on U.S. international obligations under *Charming Betsy* to justify its abandonment of zeroing in investigations, it must also acknowledge U.S. obligations under *Charming Betsy* to abandon zeroing in administrative reviews.

Finally, SKF contends that the Department's argument that using zeroing in administrative reviews but not investigations accounts for the inherent differences between the

results of an average-to-average comparison and the result of an average-to-transaction comparison inflates any differences between methodologies.

Timken contends that in the Draft Remand the Department appropriately addressed the concerns of the Federal Circuit in *JTEKT* by offering several persuasive arguments on the dual interpretation of section 771(35) of the Act. Timken endorses in all respects the rationale offered by the Department in the Draft Remand. Timken argues that nothing in either *Dongbu* or *JTEKT* precludes the Department from interpreting section 771(35) of the Act differently in different circumstances and that the different interpretations adopted by the Department in this instance are grounded in important considerations. Timken also observes that the Draft Remand complies with the requirements of *JTEKT* by explaining in detail the different statutory and regulatory schemes between investigations and administrative reviews.

Department's Position: After reviewing comments received from interested parties, the Department continues to find that it has provided sufficient explanation and justification to support its interpretation of section 771(35) of the Act as permitting the Department not to provide offsets when aggregating the results of the average-to-transaction comparisons at issue in this antidumping administrative review, while continuing to interpret the same provision as allowing it to grant offsets in the limited context of antidumping investigations when aggregating the results of average-to-average comparisons.

Contrary to SKF's arguments, the Department has not adopted an unreasonable interpretation of section 771(35) of the Act in the context of this review. Rather, the Department has applied its long-standing and judicially affirmed interpretation of that provision in this case. The central issue on remand concerns whether this interpretation remains reasonable in light of

the fact that, in one limited context involving antidumping investigations using average-to-average comparisons, the Department has interpreted the same provision differently. In this regard, the Department has maintained a well-established interpretation of section 771(35) of the Act, and the one expressly limited exception to that interpretation does not apply to the instant case.

The Department considers that the additional explanation and justification provided in this remand reasonably account for the difference between its long-standing interpretation and the new, limited exception to that interpretation. The Department also understands the Federal Circuit to have affirmed the exception, as an exception, in *U.S. Steel Corp.* and *SKF* while recognizing its limited application to investigations using average-to-average comparisons.[6] Further, as early as *Corus II*, the Federal Circuit expressly recognized that, when the Department abandoned the use of zeroing in investigations involving average-to-average comparisons, "it stated that the new policy did not apply to any other type of proceeding, including administrative reviews." *Corus II*, 502 F.3d at 1374 (citation omitted). On that basis, the Federal Circuit concluded that "{the Department's} new policy has no bearing on the present appeal . . . ." *Id.*

The exception, however, has not become the rule.[7] If a court found unlawful the limited application of the exception, then that does not mean *ipso facto* that the Department must allow

[6] The Department views the *U.S. Steel Corp.* decision to provide guidance to this case. In that decision, the Federal Circuit upheld the Department's reasoning for the adoption of the exception to the general interpretation of section 771(35)(A) of the Act, the meaning afforded to the term "exceeds" under such an exception, and the narrow application of the exception to investigations using average-to-average comparisons. *See generally U.S. Steel Corp.*, 621 F.3d 1351. In so doing, the Federal Circuit tacitly acknowledged that the exception would represent the lone departure from the Department's continuing practice of applying the general interpretation to all proceedings, except investigations involving average-to-average comparisons. *See id*. at 1361-63.

[7] On December 28, 2010, the Department published a "Proposed Modification" pursuant to Section 123 in which it proposed to implement certain additional WTO dispute settlement reports by adopting a methodology in administrative reviews similar to that used in investigations, namely, average-to-average comparisons with offsets. *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in*

that exception to swallow the rule. In other words, SKF errs if it assumes that the lone remaining legal option to the Department necessitates an expansion of the exception to apply in all contexts. Instead, among other alternatives, the Department could reconsider its decision to create the exception. Accordingly, the Department's explanation and justification for the different interpretations of section 771(35)(A) of the Act appropriately begins with an explanation that the interpretation at issue in this administrative review accords with the Department's well-established interpretation of that provision and not the newer, limited exception.

The Department recognized long ago that it generally interprets the word "exceeds" in section 771(35)(A) of the Act as not encompassing "greater than in a negative amount." In practice, this commonly accepted interpretation simply means that the Department views 3 as exceeding 2, and 2 as not exceeding 3. Acknowledging that the Federal Circuit has found ambiguous the meaning of the word "exceeds" in section 771(35)(A), the Department considers that, as a general matter, it reasonably interprets the word "exceeds" as not embracing "greater than in a negative amount." On numerous occasions, the Federal Circuit has accepted this permissible construction of section 771(35)(A) of the Act. *See Corus I*, 395 F.3d at 1347

Certain Antidumping Duty Proceedings, 75 FR 81533 (Dec. 28, 2010) ("*Proposed Modification for Antidumping Administrative Reviews*"). Within that *Proposed Modification for Antidumping Administrative Reviews*, the Department proposed a clear, specific effective date on a prospective basis. *See id.* 75 FR at 81535. The Courts have recognized the Department's ability to enforce a specific effective date for changing from one reasonable interpretation to another reasonable interpretation in investigations. *See, e.g., Advanced Tech. & Materials Co. v. United States*, No. 10-00012, 2011 WL 3624674 at *8 (Ct. Int'l Trade August 18, 2011) ("*Advanced Tech.*") ("{T}he Department's conclusion that the diamond sawblades investigation was not 'pending before the {D}epartment as of January 16, 2007' and therefore did not qualify for the policy change is not arbitrary, capricious, an abuse of discretion, and is in accordance with law."). Thus, even after the Courts have upheld the Department's change in interpretation of the statute, they have continued to uphold the Department's prior interpretation with respect to a proceeding that pre-dated the effective date of the change. *See, e.g., U.S. Steel Corp.* (a 2010 decision upholding the Department's application of its non-zeroing methodology in connection with average-to-average comparisons in investigations); *Advanced Tech.* (a 2011 decision upholding the Department's application of its zeroing methodology in connection with average-to-average comparisons in an investigation). The administrative context in which the Department applied the statutory interpretation, *i.e.*, the type of proceeding and/or type of comparison methodology the Department used, serves no less a compelling basis for upholding concurrent, different interpretations than does the date upon which the Department made the statutory interpretation.

(upholding the use of zeroing in an investigation); *Timken*, 354 F.3d at 1342 (upholding the use of zeroing in an administrative review).

The Department adopted a limited exception to its long-standing interpretation of section 771(35)(A) of the Act only for investigations using average-to-average comparisons, whereby the Department interprets the term "exceeds" in the manner found permissible by the Federal Circuit in *Timken, Corus I*, and subsequent cases. As described above, the Department adopted this exception pursuant to the statutory process set forth in Section 123 of the Uruguay Round Agreements Act. In the Section 123 determination, the Department explicitly limited the scope of applicability of this interpretation. *See Final Modification For Investigations*, 71 FR at 77724. In providing this background and explanation, the Department seeks to explain how its interpretation of section 771(35) of the Act as applied in the instant review fits into the larger picture of how the Department reasonably interprets this provision of the statute. Accordingly, as described above, the Department considers that its general interpretation of section 771(35) of the Act remains reasonable for all the same reasons that it has long held this same interpretation, and for the reasons that the Courts repeatedly have upheld the Department's interpretation as reasonable, both in the contexts of administrative reviews and original investigations. *See supra* at 8-11.

Furthermore, the Department previously has identified, and the Federal Circuit consequently has recognized, real differences between original investigations and administrative reviews. *See JTEKT*, 642 F.3d at 1384-1385 (where the Department pointed to differences between investigations and administrative reviews). In *JTEKT* and *Dongbu*, the Federal Circuit did not invalidate the Department's different interpretations of section 771(35), but rather has

sought a further explanation as to why the differences between investigations and administrative reviews meaningfully affect the Department's interpretation of its statute. *See id.* In this remand determination, the Department provides a further explanation to support its different interpretations of the statute based on the different comparison methodologies at issue, as sought by the Federal Circuit in *JTEKT* and by the Court in its Remand Order.

Contrary to SKF's assertions, the Department has demonstrated that in administrative reviews it reasonably may continue to aggregate average-to-transaction comparison results without offsets, while simultaneously, in the limited context of investigations using average-to-average comparisons, aggregate average-to-average comparison results with offsets. When the Department aggregates comparison results, it reasonably may account for differences in the underlying comparisons in the aggregating process.

With average-to-average comparisons in investigations, the Department implicitly grants offsets in the calculation of the average export price and explicitly grants offsets through implementation of the *Final Modification For Investigations*. An average-to-average comparison inherently permits transaction-specific export prices above the average normal value to offset transaction-specific export prices below the average normal value within the same averaging group because the Department averages all transaction-specific export prices prior to the comparison for each averaging group. Similarly, once the Department compares the average export price to the average normal value for each averaging group, the Department aggregates the results from all such comparisons, allowing offsets for comparisons where the average export price exceeds the average normal value between different averaging groups. Therefore, where the Department calculates the overall dumping margin based upon average export prices, the

"average" characteristic (1) implicitly includes offsets when calculating the average export prices and (2) explicitly includes offsets when aggregating averaging-group comparisons.

In contrast, an overall dumping margin based upon transaction-specific export prices (*i.e.*, average-to-transactions comparisons) includes no implicit offsets. With average-to-transaction comparisons, no inherent offsets occur within an averaging group because the Department compares transaction-specific export prices, not an average export price, with the average normal value. Consistent with the absence of implicit offsets, the Department's aggregation of the results of average-to-transaction comparisons excludes explicit offsets as well. When aggregating the results of the transaction-specific comparisons, the Department totals the amounts by which the average normal value exceeds (*i.e.*, is greater than) the transaction-specific export prices and divides that sum by the total value of all U.S. sales. Therefore, for an overall dumping margin based upon the transaction-specific export prices, the Department does not grant offsets for sales where the transaction-specific export price exceeds (*i.e.*, is greater than) the comparable average normal value.

This remand determination includes the additional explanation sought by the Federal Circuit in *Dongbu* and *JTEKT* that did not appear in the Department's prior proceedings. The Department's explanation connects the statutory provisions that discuss the use of an average-to-average and average-to-transaction comparison methodologies (section 777A(d) of the Act) with the statutory provision that defines dumping margin and weighted-average dumping margin (sections 771(35)(A) and (B) of the Act). The statute itself provides for these different comparison methodologies and the Department has demonstrated that it reasonably interprets section 771(35) of the Act differently as it applies to average-to-average comparisons in

investigations from average-to-transactions comparisons in administrative reviews. Therefore, SKF incorrectly claims that the Department has not provided sufficient additional explanation in support of its interpretation.

Because the Department provides further reasonable explanation for its interpretation of the statute to support the Department's use of its zeroing methodology when applying an average-to-transaction comparison methodology in administrative reviews, such as it did in the administrative review at issue in this case, while not using its zeroing methodology when applying an average-to-average comparison methodology in investigations, the Department has not changed its decision to use zeroing in this administrative review. Accordingly, the Department has not recalculated SKF's antidumping duty margins without the use of zeroing.

V. RESULTS OF REDETERMINATION

In accordance with the Court's Remand Order, and consistent with the Department's interpretation of the Act described above, the Department on remand continues to apply its zeroing methodology in calculating weighted-average dumping margins for SKF and has made no changes to the weighted-average dumping margins calculated for SKF in the *Final Results*.

The Department issues these results of redetermination pursuant to the Remand Order of the Court in *SKF v. United States*, Court No. 09-00392 (Ct. Int'l Trade Oct. 4, 2011).

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Kim Glas
Deputy Assistant Secretary
for Textiles and Apparel

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Date