

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 Final Results of the
Administrative Review of Stainless Steel Sheet and Strip in Coils
from Germany; July 1, 2004 through June 30, 2005.

SUMMARY:

We have analyzed the comments and rebuttal comments of interested parties in the 2004 to 2005 administrative review of the antidumping duty order covering stainless steel sheet and strip in coils from Germany. As a result of our analysis, we have made changes, including corrections of certain programming and clerical errors, in the margin calculations. We recommend that you approve the positions described in the "Discussion of Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review for which we received comments by parties:

1. Whether the Department of Commerce (the Department) properly deducted indirect selling expenses incurred in Mexico by an affiliate on behalf of respondent TKN from constructed export price (CEP).
2. Whether the Department miscalculated the CEP profit rate and CEP profit.
3. Whether the Department should grant a circumstance of sale adjustment to normal value for home market (HM) indirect selling expenses beyond the amount allowed under the CEP offset.

4. Whether the Department should allow non-dumped sales to offset dumped sales in its margin calculation (zeroing).

BACKGROUND:

On August 8, 2006, the Department published the preliminary results of administrative review of the antidumping duty order covering stainless steel sheet and strip in coils from Germany. See Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review, 71 FR 45024 (August 8, 2006) (Preliminary Results). The merchandise covered by this order is stainless steel sheet and strip in coils as described in the “Scope of the Review” section of the Federal Register notice. The period of review (POR) is July 1, 2004, through June 30, 2005. This review covers ThyssenKrupp Nirosta GmbH (ThyssenKrupp Nirosta), ThyssenKrupp VDM GmbH (TKVDM), ThyssenKrupp Nirosta Präszionzband GmbH (TKNP), and their various affiliates (collectively, TKN).

In the Preliminary Results we invited parties to provide comments. In response, the Department received a case brief from TKN on September 7, 2006. Allegheny Ludlum, North American Stainless, United Auto Workers Local 3303, United Steelworkers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization (collectively, Petitioners) submitted a rebuttal brief on September 14, 2006. No party requested a hearing; accordingly, none was held.

SUMMARY OF COMMENTS RECEIVED:

Comment 1: Whether the Department properly deducted indirect selling expenses incurred in Mexico by an affiliate on behalf of respondent TKN from CEP.

During the POR, Mexinox U.S.A., Inc. (Mexinox U.S.A.), a U.S. affiliate of TKN, made sales of TKN merchandise in the United States. This merchandise was produced in Germany by TKN, shipped through Mexinox S.A. de C.V. (Mexinox) in Mexico, and sold by Mexinox U.S.A. in the United States to an unaffiliated customer. In addition to those indirect selling expenses incurred in Germany, TKN reported indirect selling expenses incurred by Mexinox on this sale by Mexinox U.S.A. of this TKN merchandise. The Department treated these expenses as U.S. indirect selling expenses in the preliminary results, deducting them from CEP.

TKN argues the Department incorrectly treated its indirect selling expenses incurred in Mexico as U.S. indirect selling expenses. See TKN’s Case Brief, dated September 7, 2006, at 3. TKN contends the Department had not previously questioned, and seemed to accept, the foreign nature of these indirect selling expenses. Id. TKN argues that indirect selling expenses incurred outside the United States (i.e., in Mexico), should have been treated as foreign indirect selling expenses, rather than as U.S. indirect selling expenses, and should not have been deducted from CEP. Id.

Petitioners did not comment on this issue.

Department's Position:

We agree with TKN. Indirect selling expenses incurred in Mexico are properly classified as foreign indirect selling expenses and should not be deducted from CEP. In these final results we have properly classified indirect selling expenses as foreign indirect selling expenses and have not deducted them from CEP.

Comment 2: Whether the Department miscalculated the CEP profit rate and CEP profit.

TKN argues that, in calculating CEP profit, the Department miscalculated HM total revenue (TOTREVVH), HM total cost of goods sold (TOTCOGSH), HM total selling expenses (TOTSELLH), and HM total movement expenses (TOTMOVEH), understating these figures by a factor of 22.046 (the conversion rate used to convert quantities from a per-metric ton basis to a per-hundredweight basis), thus overstating TKN's CEP profit rate. See TKN's Case Brief at 3. TKN asserts that, rather than converting HM quantity from a per-metric ton basis to a per-hundred weight basis by adjusting the reported quantity variable, QTYH, directly, the Department introduced a new variable, "CMQTY," to make this conversion. Id. TKN asserts that because the HM CEP profit variables are calculated by the Department's program using the unadjusted "QTYH" variable, these variables were not converted to a per-hundredweight basis. Id. TKN argues that this had the effect of incorrectly increasing the CEP profit rate and the CEP profit deduction. Id. TKN contends that, instead of creating a new comparison market quantity variable, the Department should adjust the reported quantity variable, QTYH, directly. Id. at 4.

Petitioners did not submit rebuttal comments on this issue.

Department's Position:

We agree with TKN that the Department failed to convert quantity properly in calculating CEP profit. However, we disagree with TKN as to its suggested correction of this error. The Department miscalculated home market quantity by writing "CMQTY = QTYH*22.046." The appropriate code for this calculation is "&CMQTY = QTYH*22.046." The "&" designator allows the computer program to read in the "&CMQTY" variable as a macro variable. The effect of the Department's miscalculation was that the computer program ignored the instruction and did not make the appropriate conversion of home market quantity. Therefore, the Department miscalculated TOTREVVH, TOTCOGSH, TOTSELLH, and TOTMOVEH by not converting quantity from a per-metric ton basis to a per-hundredweight basis. We have corrected this error for these final results by converting quantity to a per-hundredweight basis as originally intended using the "&CMQTY" variable.

Comment 3: Whether the Department should grant a circumstance of sale adjustment to normal value for home market indirect selling expenses beyond the amount allowed under the CEP offset.

The CEP offset is used in certain circumstances to offset differences in the level of trade between CEP sales in the U.S. market and HM sales. However, the Department normally limits the amount of the CEP offset by the amount of indirect selling expenses deducted from CEP (the CEP offset cap).

TKN suggests the Department grant a circumstance of sale adjustment for HM indirect selling expenses in excess of the CEP offset cap. See TKN's Case Brief at 4. TKN argues that, while not prohibited by the Tariff Act of 1930, as amended (the Tariff Act), capping the CEP offset by the amount of indirect selling expenses deducted from CEP prevents the Department from making a "fair comparison" between U.S. and HM prices. Id. TKN argues that Article 2.4 of the WTO Antidumping Agreement requires that "{d}ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are demonstrated to affect price comparability." Id. at 5. TKN further asserts Article 2.4 of the WTO Antidumping Agreement provides that if "price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph." TKN argues the WTO Antidumping Agreement does not limit the amount of the adjustments that must be made to normal value. On the contrary, TKN argues, the language of the WTO agreement is broad and provides that allowance should be made for any differences which affect price comparability. Id.

TKN further argues that the Department should correct for the differences affecting price comparability by permitting a circumstance of sale adjustment for indirect selling expenses beyond the CEP offset amount. Id. at 4-6. TKN notes section 773b(a)(6)(C)(iii) of the Tariff Act provides that normal value "shall be...increased or decreased by the amount of any difference (or lack thereof) between export price or constructed export price and {normal value} (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to...differences in the circumstances of sale." Citing Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (Charming Betsy) and Federal Mogul Corp. v. United States, 63 F. 3d1572, 1581 (Fed. Cir. 1995) (Federal Mogul Corp.), TKN argues U.S. law must be applied to "give proper effect" to U.S. treaty obligations. Id. at 5 and note 14. TKN also cites Budd Co. Wheel and Brake v. United States, 746 F. Supp. 1093, 1100 (CIT 1990) (Budd Co.); and Viraj Group, Ltd. v. United States, 162 F. Supp. 2d 656, 663-664 (CIT 2001) (Viraj), as cases where the court upheld circumstance of sale adjustments for high inflation. TKN thus finds support for making circumstance of sale adjustments in the Department's practice and in court decisions to ensure appropriate price comparability. Id. at 6. For these reasons, TKN argues the Department should make a circumstance of sale adjustment to deduct HM indirect selling expenses beyond that allowed under the CEP offset.

Petitioners contend the Department should reject TKN's argument that the Department grant a circumstance of sale adjustment beyond the CEP offset cap. See Petitioner's Rebuttal

Brief, dated September 14, 2006 at 1. Petitioners note that TKN requests the Department reduce HM prices by all indirect selling expenses associated with HM sales, rather than limit the offset to the amount of indirect selling expenses associated with U.S. sales. Id. at 2. Petitioners maintain it is the Department's established practice not to reduce HM prices by HM indirect selling expenses in excess of the CEP offset cap. Petitioners contend TKN's arguments are identical to those presented by its Mexican affiliate Mexinox in past reviews of stainless steel sheet and strip in coils from Mexico. Petitioners maintain the Department has consistently rejected such arguments there. Id. Petitioners argue that in recent reviews of stainless steel sheet and strip in coils from Mexico, the Department has found that reducing HM prices in excess of the CEP offset cap is not permitted by the Tariff Act. Id. See Stainless Steel Sheet and Strip from Mexico; Final Results of Antidumping Duty Administrative Review, 68 FR 6889 (February 11, 2003) (S4 from Mexico (February 2003)) and the accompanying Issues and Decisions Memorandum at Comment 1, Stainless Steel Sheet and Strip from Mexico; Final Results of Antidumping Duty Administrative Review, 70 FR 3677 (January 26, 2005) (S4 from Mexico (January 2005)) and the accompanying Issues and Decisions memorandum at Comment 17, and Stainless Steel Sheet and Strip from Mexico; Final Results of Antidumping Duty Administrative Review, 71 FR 73444 (December 12, 2005) (S4 from Mexico (December 2005)) and the accompanying Issues and Decisions memorandum at Comment 9. Petitioners accuse TKN of mischaracterizing section 773(a)(7)(B) of the Tariff Act when it suggests that adjustments in excess of the offset are "not prohibited." Id. at 3-4.

Petitioners further argue that the CEP offset cap is a statutory requirement and that Congress has determined a fair comparison can only be made if the CEP offset deduction is limited. Petitioners argue TKN's proposal that a circumstance of sale adjustment be applied to cover differences in the level of trade in excess of the CEP offset cap is an incorrect interpretation of the statute. Petitioners contend the Tariff Act allows for an adjustment for "other differences in the circumstances of sale," in addition to adjustments for quality differences and physical differences covered under sections 773(a)(6)(C)(i) and 773(a)(6)(C)(ii) of the Tariff Act, but not CEP offsets and level of trade adjustments. Id. Petitioners argue section 773(a)(7) of the Tariff Act, which immediately follows section 773(a)(6), explicitly covers additional adjustments, including those for level of trade adjustments and CEP offsets. Petitioners argue the fact that adjustments are discussed explicitly in section 773(a)(7) of the Tariff Act belies TKN's suggestion that an additional adjustment for HM indirect selling expenses in excess of the CEP offset cap should also be granted under the circumstance of sale provision of the Tariff Act. Petitioners argue that "if the statutory intent were to adjust for indirect selling expenses 'no matter what,' the statute would not need to address 'additional adjustments' for level of trade and the CEP offset." Id. Citing section 351.410(b) of the Department's regulations, Petitioners argue that the Department's longstanding practice has been to limit circumstance of sale adjustments to direct selling expenses. Petitioners contend that TKN's argument is an attempt to reclassify indirect selling expenses as direct. Id. at 4. Petitioners further argue that the Department has consistently found that U.S. law is consistent with the United States' international obligations under the WTO. Id. at 2. Petitioners contend that for these reasons, TKN's arguments are without merit.

Department's Position:

We disagree with TKN. Section 773(a)(7)(B) of the Tariff Act provides that in making the CEP offset adjustment, the Department will reduce normal value by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 772(d)(1)(D) of the Tariff Act. See also section 351.412(f)(2) of the Department's regulations. This represents a specific statutory and regulatory limitation on the Department's authority to make adjustments for differences in level of trade, a limitation that is not overridden by the general authority in section 773(a)(6)(C)(iii) of the Tariff Act to make adjustments for differences in circumstances of sale, as TKN suggests.

Moreover, the Department's regulations at section 351.410(b) support our conclusion that section 773(a)(6)(C)(iii) of the Tariff Act cannot be used to circumvent the specific statutory and regulatory limitation with respect to adjustments for differences in level of trade. Section 351.410(b) of the Department's regulations indicates that adjustments for differences in circumstances of sale under section 773(a)(6)(C)(iii) of the Tariff Act will not be made for anything other than direct selling expenses, assumed expenses, and certain commissions. Specifically, section 351.410(b) of the Department's regulations states that, “with the exception of the allowance described in paragraph (e) of this section concerning commissions paid only in one market, the Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Tariff Act only for direct selling expenses and assumed expenses.” As defined in section 351.410(c) of the Department's regulations, direct selling expenses consist of expenses “such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question.” Section 351.410(d) of the Department's regulations, in turn, defines assumed expenses as “selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses.” The Department treats all other selling expenses as indirect expenses unless the respondent establishes that the expense in question is direct in nature. See, e.g., S4 from Mexico (February 2003); S4 from Mexico (January 2005); S4 from Mexico (December 2005). Indirect selling expenses and inventory carrying costs are, by their very nature, indirect expenses; they are incurred regardless of whether a sale is made.

With regard to the Department's granting a circumstance of sale adjustment in Budd Co. and Viraj, the Department finds the facts of these cases differ greatly from the instant case, since Germany did not experience hyperinflation over the POR. However, in conjunction with the decision reached in Budd Co., the Department maintains that the use of circumstance of sale adjustments should not be used to achieve unfair (or inaccurate) results. See Budd Co. at 1100. Based on information on the record and in accordance with 19 CFR 351.410, we find TKN has not reasonably demonstrated any significant differences between markets to warrant such an adjustment in this review. Therefore, we have not made an additional circumstance of sale adjustment to normal value with respect to indirect selling expenses beyond the amount of the CEP offset cap in these final results.

We further note that U.S. law, as implemented through the URAA, is fully consistent with the United States' WTO obligations. TKN's arguments notwithstanding, the Department's established practice with regard to the CEP offset cap is fully consistent with our obligation to interpret the Tariff Act to "give proper effect" to the treaty obligations of the United States under Federal Mogul Corp. Moreover, our practice in this proceeding is fully consistent with those of past segments of this proceeding, and with concurrent proceedings of stainless steel sheet and strip in coils. See, e.g., S4 from Mexico (December 2005) and the accompanying Issues and Decision Memorandum at Comment 9 and Stainless Steel Sheet and Strip in Coils From Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review, 70 FR 45682, 45687 (August 8, 2005) (unchanged in Final Results, 70 FR 73729 (December 13, 2005)).

Comment 4: Whether the Department should allow non-dumped sales to offset dumped sales in its margin calculation (zeroing)

In its calculation of antidumping duty margins and importer-specific assessment rates, the Department does not permit non-dumped sales (U.S. sales made at net prices greater than normal value) to offset the amount of dumping found with respect to dumped sales (U.S. sales made at net prices less than normal value). This practice is often referred to as "zeroing." TKN argues the Department's practice of zeroing transaction specific margins is no longer permitted under U.S. law and suggests the Department's zeroing methodology is not required by the Tariff Act, but rather, arose on the basis of administrative interpretation. TKN's Case Brief at 10 and note 29. Citing Timken v. United States, 354 F. 3d 1334, 1339-42 (Fed. Cir 2004), cert. Denied sub nom (Timken); Pam S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2002) (Pam); Corus Staal BV V. United States, 259 F. Supp. 2d 1253, 1261 (CIT 2003) (Corus Staal CIT 2003); and Bowe Passat Reinigungs-Und Waschereitechnik v. United States, 929 F. Supp. 1138, 1150 (CIT 1996); Corus Staal BV v. United States, Ct. No. 05-000354, Slip Op. 06-112 (CIT 2006) (Corus Staal CIT 2006); and Corus Staal BV v. Department of Commerce, 395 F. 3d 1343, 1347 (Fed Cir. 2005) (Corus Staal Fed. Cir. 2005), TKN asserts the federal courts have repeatedly ruled that the Tariff Act is "at best silent" with respect to zeroing. Id. at 9-10. TKN further argues that in Timken 354 F. 3d, the court found the statute does not require zeroing. Further, TKN argues, the court concluded in Timken 354 F. 3d, that the statute "does not unambiguously require that dumping margins be positive numbers" and "does not directly speak to the issue of negative-value {dumping margins}."¹ Id. at 10.

TKN further contends that the Department's zeroing methodology as applied in administrative reviews has been held to violate Article VI:2 of the 1994 General Agreements on Tariffs and Trade (GATT 1994) as well as Article 9.3 of the WTO Antidumping Agreement. TKN argues that the WTO body Appellate Body Decision in Unites States–Laws, Regulations, and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (April 18, 2006) (U.S.-Zeroing (EC)) makes it clear the Department's zeroing methodology is not a

¹See Timken v. United States at 1342

reasonable interpretation of the Tariff Act, in light of the United States' international obligations. Id. at 11. TKN maintains the United States was a party to the dispute in U.S.-Zeroing (EC), and is bound by the WTO's Appellate Body's finding there. Id. at 12. TKN recognizes that the finding in U.S.-Zeroing (EC) dealt with zeroing "as applied" in the specific cases brought to the WTO in U.S.-Zeroing (EC), but argues that the "as applied" rather than "as such" distinction has "no substantiative meaning." Id. Citing Charming Betsy and Federal Mogul Corp., TKN asserts the Department is under an affirmative obligation to interpret U.S. law in a manner consistent with the United States' international obligations. TKN recognizes that while, under ordinary circumstances, the Department's interpretation should be accorded deference under the principle advanced in Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), TKN argues that such deference is not appropriate when the Department's interpretation is inconsistent with the United States' international obligations. Id. at 10 to 11 (citing Hyundai Electronics Co., Ltd. V. United States, 53 F. Supp. 2d 1334 (CIT 1999)). TKN contends that because U.S. law does not require zeroing, and because the United States' international obligations under GATT 1994 and under the WTO Antidumping Agreement prohibit zeroing, the Department is under an affirmative obligation not to zero in the instant review. TKN notes that in Corus Staal Fed. Cir. 2005, and similar cases, the courts have deferred to interpretive discretion with respect to zeroing, leaving the issue of where and how to implement WTO decisions to Congress and to the U.S. Trade Representative. However, TKN insists the courts have not had the opportunity to rule on the zeroing issue in the context of the recent finding in U.S.-Zeroing (EC). Id. at 13 and footnote 36. TKN further argues that the traditional deference given to the Department by the courts does not permit the Department to ignore its international obligations under the WTO. Id. TKN cites Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 FR 11189 (March 6, 2006), arguing the United States indicated it will comply with WTO Appellate Body decisions with respect to the issue of zeroing. See Unites States—Laws, Regulations, and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (October 21, 2005). TKN notes that the CIT found in Pam and in Corus Staal CIT 2003 that the WTO Antidumping Agreement does not expressly prohibit zeroing. However, TKN argues the CIT is not empowered to issue legal interpretations of WTO obligations and lacks the necessary expertise to do so. Id. at 13 and footnote 39. In summary, TKN argues the Department should not apply the zeroing methodology in the final results. Id. at 14.

Petitioners contend the Department should reject TKN's arguments with regard to zeroing. See Petitioner's Rebuttal Brief at 4 and 9. Petitioners argue that the zeroing methodology is both well-established in the Department's practice and lawful. Petitioners point out that it is the Department's long standing practice to assign a zero margin value to U.S. sales made at or above normal value, rather than using these negative margins to offset positive margins found on other U.S. sales. Id. Petitioners note that U.S.-Zeroing (EC) made only "as applied" findings with respect to zeroing in 16 administrative reviews involving certain products from the European Union, and cites TKN's Case Brief at 12 to demonstrate that TKN concedes this. Id. at 5. While acknowledging that three of the cases associated with U.S.-Zeroing (EC) involved stainless steel sheet and strip, Petitioners argue, "as applied" decisions by the WTO apply only to the particular cases and proceedings at issue. Accordingly, Petitioners argue, U.S.-

Zeroing (EC) is not more relevant to this proceeding than any other antidumping case or proceeding, irrespective of what products are concerned. Id. Petitioners disagree with TKN's interpretation of the "as applied" nature of the decision as merely a "technical distinction {which} has no substantive meaning." Id. (quoting TKN's Case Brief at 12). Rather, Petitioners argue "the principle that 'as applied' WTO rulings are confined to their particular facts and the proceeding in which they arise is an important one that goes to the heart of the whole WTO scheme and the United States' willingness to be bound by WTO decisions." Id. Petitioners further contend that the decision in U.S.-Zeroing (EC) is not applicable to this proceeding and the Department is not compelled to apply it here. Id. Petitioners also note that the United States has agreed to implement the Appellate Body's recommendations and rulings within 11 months, or by April 9, 2007. Id. Petitioners further note the zeroing debate may be ultimately resolved through negotiations at the WTO. Id. Petitioners argue that the decision in U.S.-Zeroing (EC) involves serious implications with regard to the implementation of the WTO Antidumping Agreement, including the application of the "targeted dumping" provision (Article 2.4.2), and the transaction-specific assessment of antidumping duties. Id.

Petitioners also argue that the U.S. courts have consistently upheld the Department's zeroing methodology despite WTO rulings in several contexts which found that zeroing is contrary to the WTO Antidumping Agreement. Citing Timken at 1434, Petitioners argue that the U.S. Court of Appeals for the Federal Circuit has upheld several CIT decisions that had previously found the zeroing methodology to be reasonable and lawful. Petitioners contend that in Timken, the court found that Commerce had been reasonable in its interpretation of section 731(2)(B) of the Tariff Act, which defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" and, thus Petitioners insist the statute permits zeroing in administrative reviews. Id. at 7. Petitioners contend that in Corus Staal CIT 2006, Slip Op. 06-112 at 6. (CIT July 25, 2006) the CIT rejected the suggestion that recent WTO decisions required that the Department abandon the zeroing methodology. In Corus Staal CIT 2006, petitioners contend, the CIT found that "the Federal Circuit {in Timken} has '(1) expressly affirmed the reasonableness of Commerce's use of zeroing in an antidumping administrative review, and...(2) conclude {d} that WTO decisions are not binding on the U.S. and cannot trump legislation.'" Id., quoting Corus Staal CIT 2006 Ct. No. 05-000354, Slip Op. 06-112 (citing Corus Staal BV v. United States, 387 F. Supp 2d 1291, 1298 ((CIT 2005) (Corus Staal CIT 2005), aff'd, Slip Op. 05-1600, 2006 U.S. App. (Fed Cir. June 13, 2006)). Petitioners further argue the courts have found the Department's interpretations of the statute deserving special deference. Id. Citing S4 from Mexico (January 2005) and the accompanying Issues and Decision Memorandum at Comment 16, Petitioners argue "the Department has long recognized that the statutory regime 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." Id. Petitioners further suggest it is not the Department's responsibility to interpret and apply WTO decisions and that 19 U.S.C. 3533(g) expressly prohibits it. Id. Petitioners note that 19 U.S.C. 3533(1)(A) provides: "In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the

implementation of such report unless and until” the appropriate congressional committees have been consulted, comments and advice have been solicited by the U.S. Trade Representative and by the Department, and the final rule or modification has been published. Id. at 9. Petitioners argue that 19 U.S.C. 3533(1)(A) demonstrates that WTO rulings will be adopted only after being evaluated by Congress and the administering agency. For these reasons, Petitioners argue that the Department should not abandon its practice of zeroing negative transaction-specific antidumping margins.

Department’s Position:

Section 771(35)(A) of the Tariff Act defines “dumping margin” as the “amount by which the normal value exceeds the export price and constructed export price of the subject merchandise.” 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 U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. See Timken, 354 F. 3d at 1342; Koyo Seiko Co. v. United States, 543 U.S. 976 (2004); Corus Staal Fed. Cir. 2005, 395 F. 3d 1343, 1347, cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

With respect to TKN’s arguments regarding the WTO dispute settlement report in US – Zeroing (EC), the United States has not yet gone through the statutorily mandated process of determining whether or how to implement the report. See 19 U.S.C. 3533 and no bearing on whether the Department’s denial of offsets in this administrative determination is consistent with U.S. law. See Corus Staal Fed. Cir. 2005, 395 F. 3d at 1347-49; Timken 354 F. 3d at 1342. Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed normal value.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the positions set forth above and adjusting the related margin calculation accordingly. If these recommendations are accepted, we will publish the final determination and the final weighted-average dumping margin for TKN in the Federal Register.

Agree _____

Disagree _____

David M. Spooner
Assistant Secretary
for Import Administration

Date