

January 4, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Antidumping Duty Administrative Review of Light-Walled
Rectangular Pipe and Tube from Mexico

SUMMARY:

We have analyzed the case briefs of respondents in the administrative review of the antidumping duty order on light-walled rectangular pipe and tube (LWRPT) from Mexico. As a result of our analysis, we have made changes to the dumping margin calculation of one respondent company, as discussed below. We recommend that you approve the Department of Commerce's (the Department's) positions, described in the "Discussion of Interested Party Comments" section of this issues and decision memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

1. Offsetting of Negative Margins
2. U.S. Packing Expense Clerical Error

BACKGROUND:

On September 7, 2011, the Department published the preliminary results of the second administrative review of the antidumping duty order on LWRPT from Mexico. *See Light-Walled Rectangular Pipe and Tube from Mexico: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 55352 (September 7, 2011) (*Preliminary Results*). The merchandise covered by the order is LWRPT from Mexico, as described in the "Scope of the Order" section in the *Federal Register* notice of the final results. The period of review (POR) is August 1, 2009, through July 31, 2010. This review covers two manufacturers/exporters, Regiomontana de Perfiles y Tubos S.A. de C.V. (Regiopytsa) and Maquilacero S.A. de C.V. (Maquilacero).

In the *Preliminary Results*, we invited parties to comment. *See Preliminary Results*, 76 FR at 55356. In response, both Regiopytsa and Maquilacero timely submitted case briefs on October 7, 2011. *See* letter from Regiopytsa titled, “Light-Walled Rectangular Pipe and Tube from Mexico: Case Brief (Regiopytsa’s Case Brief) and letter from Maquilacero titled, “Light-Walled Rectangular Pipe and Tube from Mexico; Case Brief of Maquilacero S.A. de C.V.” (Maquilacero’s Case Brief). No hearing was requested by any interested party and no rebuttal briefs were filed.

DISCUSSION OF INTERESTED PARTY COMMENTS:

1. Offsetting of Negative Margins

Comment 1: Maquilacero argues that the *Preliminary Results* disclosed several instances where the comparison of its net U.S. prices to the most contemporaneous, monthly-average normal value resulted in negative dumping margins, which the margin-calculation program set to zero before calculating the overall weighted-average dumping margin for the company. Maquilacero adds that employing the “zeroing” practice in administrative reviews is not required by statute and has been found to be inconsistent with the World Trade Organization (WTO) Anti-Dumping Agreement. It notes that both the U.S. Court of Appeals of the Federal Circuit (Federal Circuit) and the U.S. Court of International Trade (CIT) have found that the relevant provisions of the Tariff Act of 1930, as amended (the Act), do not compel the practice, citing *Dongbu Steel Co. v. United States*, 635 F.3d 1,363, 1,371-73 (Fed. Cir. 2011) (*Dongbu*); *JTEKT Corp. v. United States*, 642 F.3d 1,378, 1,384 (Fed. Cir. 2011); *JTEKT Corp. v. United States*, 780 F. Supp. 2d 1357, 1359 (CIT 2011) (*JTEKT*); *SKF USA Inc. v. U.S.*, Slip Op. 11-121, 2011 WL 4565757, *9, (CIT Oct. 4, 2011).

Specifically, citing *Dongbu* and *JTEKT*, Maquilacero argues that the Department’s interpretation of 19 USC § 1677(35)(A) has been unreasonable because the Department has continued to apply zeroing in reviews but abandoned the use of zeroing in investigations. According to Maquilacero, the Department interpreted the statutory provision in 19 USC § 1677(35)(A) to allow zeroing in this review, but based on the same provision, calculated Maquilacero’s dumping margin in the investigation without zeroing. Maquilacero argues that in the final results, the Department should find that there are no differences between investigations and reviews, and recalculate Maquilacero’s dumping margin in this proceeding without zeroing.

Moreover, Maquilacero claims that zeroing has been found to be inconsistent with WTO rules as interpreted in several decisions issued by the WTO Appellate Body. *See, e.g., United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (May 20, 2008) (*U.S. – Zeroing (Mexico)*); and *United States – Measures relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (January 9, 2007) (*U.S. – Zeroing (Japan)*). Maquilacero asserts that in *U.S. – Zeroing (Mexico)*, the WTO Appellate Body found that zeroing is inconsistent with WTO international obligations of the United States. According to Maquilacero, the WTO Appellate Body specifically found that zeroing “disregards the amounts by which the export prices exceed the monthly, weighted-average normal values,” and “results in the levy of an amount of anti-dumping duty that exceeds an exporter’s margin of dumping. *See U.S. – Zeroing (Mexico)* at paragraph 133. Maquilacero argues that because the methodology described in *U.S.*

Zeroing (Japan) and *U.S. – Zeroing (Mexico)* is identical to the methodology used by the Department in the preliminary results of the current review, the Department acted in a manner that was inconsistent with the United States’ obligations under the doctrine established in *Alexander Murray v. Schooner Charming Betsy*, 6. U.S. 64, 118 (1804).

Maquilacero claims that the Department has begun to change its practice, citing a NAFTA Panel decision. *See Stainless Steel Sheet and Strip in Coils from Mexico*, Secretariat File No USA-MEX-2007-1904-01 (Apr. 14, 2010) at 9. Additionally, Maquilacero claims that, on remand, the NAFTA Panel instructed the Department to recalculate the dumping margin for another Mexican respondent, Mexinox, without zeroing. *See NAFTA Stainless Steel Sheet and Strip in Coils from Mexico*, Secretariat File No USA-MEX-2007-1904-01 (Aug. 17, 2011) at 33. Therefore, according to Maquilacero, the Department is under legal obligation to recalculate Maquilacero’s dumping margin without zeroing.

Maquilacero states that the Department published a notice announcing its intention to abandon zeroing in administrative reviews because it violates U.S. international obligation, and is not required by a statute or regulation. *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 FR 81533 (December 28, 2010) (*Proposed Modification for Reviews*). However, it adds, the Department seems to be stalling the process of implementing this change described in the *Proposed Modification for Reviews*. According to Maquilacero, no change to any regulation is necessary for the Department to immediately act consistently with respect to its international legal obligation and not use zeroing in reviews. Therefore, Maquilacero claims that the Department’s use of zeroing in this review, almost nine months after it has formally announced its intention to abandon zeroing, is contrary to law.

Department’s Position: We have not changed our calculation of the weighted-average dumping margin, as suggested by Maquilacero, in these final results. Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” 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 (NV) is greater than export price (EP) or constructed export price (CEP). Because no dumping margin exists with respect to sales where normal value is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The Court of Appeals of the Federal Circuit (CAFC) has held that this is a reasonable interpretation of section 771(35) of the Act.¹

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 section by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this

¹ *See Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004) (*Timken*); *see also Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (*Corus I*) and *SKF USA Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011). (*SKF III*).

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 EP or CEP exceeds the NV permitted to offset or cancel the dumping margins found on other sales.

This does not mean that non-dumped transactions are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average dumping margin will reflect any non-dumped transactions 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 transactions is included in the numerator. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping 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.”² 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 chosen 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.³

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations.⁴ With this modification, the Department’s interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department’s interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word “exceeds” in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales, but rather at an “on average” level for the comparison. 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

² See *Timken*, 354 F.3d at 1342.

³ See, e.g., *Timken*, 354 F.3d at 1343; see also *NSK*, 510 F.3d at 1379-80 (*NSK*).

⁴ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 FR 77722 (December 27, 2006) (*Final Modification for Antidumping Investigations*).

averaging group comparison results. This approach maintains consistency with the Department’s average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, 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 Department determined the comparison results being aggregated. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable manner of aggregating the comparison results produced by this comparison method. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, and treated in the calculation of the weighted-average dumping margin under section 771(35)(B) of the Act, it is reasonable for the Department to consider whether the comparison result in question is a product of an average-to-average comparison or an average-to-transaction comparison.

In *U.S. Steel*, the CAFC considered the reasonableness of the Department’s interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-average transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act.⁵ Specifically, in *U.S. Steel*, the CAFC was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The CAFC acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring.⁶ The CAFC then affirmed as reasonable the Department’s application of its modified average-to-average comparison methodology in investigations in light of our stated intent to continue zeroing in other contexts.⁷

In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department’s continued application of “zeroing” in the context of an administrative review completed after the implementation of the *Final Modification for Antidumping Investigations*.⁸ In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is consistent with the CAFC’s recent decision in *SKF III*.

Furthermore, in *Corus I*, the CAFC acknowledged the difference between antidumping investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping investigations.⁹ That is, the CAFC explained that the holding in *Timken*—that zeroing is neither required nor precluded in administrative reviews—

⁵ See *U.S. Steel Corp. v. United States*, 621 F.3d 1351 (Fed. Cir. 2010) (*U.S. Steel*).

⁶ See *U.S. Steel*, 621 F.3d at 1363.

⁷ *Id.*

⁸ See *SKF III*, 630 F.3d at 1375.

⁹ See *Corus I*, 395 F.3d at 1347.

applies to antidumping investigations as well. Thus, *Corus I* does not preclude the use of zeroing in one context and not the other.

We disagree with Maquilacero's argument that the CAFC's recent decision in *Dongbu* requires the Department to change its methodology in this administrative review.¹⁰ The holdings of *Dongbu* and the recent decision in *JTEKT* were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law.¹¹

Importantly, the panels in neither *Dongbu* nor *JTEKT* overturned prior CAFC decisions affirming zeroing in administrative reviews, including *SKF III*, which we discuss above, in which the CAFC affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in *Dongbu* and *JTEKT*, the Department here is providing additional explanation for its changed interpretation of the statute subsequent to the *Final Modification for Antidumping Investigations* - whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in *Dongbu*, *JTEKT*, *U.S. Steel*, and *SKF III*.

Maquilacero has also cited WTO reports finding the denial of offsets by the United States to be inconsistent with the WTO Antidumping Agreement. As an initial matter, the Federal Circuit 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. *See Corus I*, 395 F.3d at 1347-49; *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Federal Circuit 2007) (*Corus Staal II*); and *NSK*, 510 F.3d at 1375. Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. *See, e.g.*, 19 U.S.C. 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 U.S.C. 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 U.S.C. 3533(g); *see, e.g., Final Modification for Antidumping Investigations*. For all these reasons, the various WTO Appellate Body reports regarding zeroing do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. With regard to the denial of offsets in administrative reviews, the United States has not adopted a change in its well-established practice in response to the WTO findings upon which Maquilacero relies. Accordingly, there currently has been no change to the Department's standard dumping margin calculation methodology in administrative reviews.

Furthermore, the Department has not proposed to apply any modification of its current practice, if and when it is adopted, in the context of administrative review results issued pursuant to section

¹⁰ *See Dongbu*.

¹¹ *See JTEKT*.

751(a) of the Act, prior to the determined effective date of any such modification.¹² We note that the Department's zeroing practice remains unchanged as of the date of the issuance of these final results and that any future change in the Department's zeroing methodology would have no retroactive effect on the instant administrative review.

Maquilacero's reliance upon the NAFTA panel in *Stainless Steel Sheet and Strip in Coils from Mexico* is also misplaced. With regard to the *Stainless Steel Sheet and Strip in Coils from Mexico* panel, this decision is not final and NAFTA decisions are not precedential. Additionally, this panel fundamentally misinterpreted U.S. law and failed to follow binding Federal Circuit precedent on the issue of zeroing. Moreover, the NAFTA panel decision was brought to the Federal Circuit's attention in *SKF III*, where the Federal Circuit was not persuaded by the panel's rationale and again upheld zeroing as being in accordance with U.S. law.¹³ Furthermore, the CIT, in *NSK LTD v. United States*, Slip Op. 10-117 *7 (October 15, 2010) addressed this panel's decision (where the CIT did not find that there is a "split" within Federal Circuit jurisprudence that would have enabled it to depart from the well-established precedent that is the binding law of the United States on the question of whether zeroing is permitted in administrative reviews) and declined to follow the panel's decision in light of a clear binding Federal Circuit precedent to the contrary.

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 NV, the amount by which the price exceeds NV will not offset the amount of dumping found in respect to other transactions.

2. U.S. Packing Expense Clerical Error

Comment 2: Regiopytsa states that the Department erred in its currency conversion of the company's U.S. packing expense, which resulted in the overstatement of Regiopytsa's weighted-average dumping margin. Specifically, Regiopytsa argues that the Margin Program used by the Department for calculating the preliminary weighted-average dumping margin, assumes that the U.S. packing expenses, stored in the field "USPACK," are reported in U.S. dollar-denominated amounts. However, Regiopytsa states that it reported its U.S. packing expenses in Mexican pesos. Regiopytsa states that the Department should revise certain language in its Margin Program to correct for this error.

No other party commented on this issue.

Department's Position: We have reviewed the programming language for Regiopytsa's U.S. packing expense in the Margin Program, and agree with Regiopytsa that its U.S. packing expenses were not properly converted to U.S. dollars in that program. At the beginning of the Margin Program, we inadvertently failed to identify the packing expense variable, PACKU, as one of the variables to be converted from Mexican pesos into U.S. dollars. Additionally, for the field USPACK, we did not assign PACKU_USD, which would have represented the original variable reported by Regiopytsa, PACKU, in a U.S. dollar amount. As a result, the Mexican

¹² See *Proposed Modification for Reviews*, 75 FR at 81535.

¹³ See *SKF III*, 630 F.3d at 1375.

peso-denominated packing expense, rather than the U.S. dollar-denominated expense, was used in the foreign-unit-price-in-U.S.-dollars (FUPDOL) calculation.

It was our intent to convert PACKU from Mexican pesos to U.S. dollars and also to set USPACK equal to PACKU_USD in the Margin Program. Thus, for these final results, we have modified the programming language in two sections of the Margin Program to convert the U.S. packing expenses from Mexican pesos to U.S. dollars. Accordingly, U.S. packing expenses have been properly converted for all subsequent calculations in Regiopytsa's Margin Program.

For the relevant programming language changes, please *see* Memorandum to the File, from Brian Davis, International Trade Analyst, through Angelica Mendoza, Program Manager, titled "Analysis of Data Submitted by Regiomontana de Perfiles y Tubos S.A. de C.V. for the Final Results of the Antidumping Duty Administrative Review of Light-Walled Rectangular Pipe and Tube from Mexico (A-201-836)," dated concurrently with this *Federal Register* notice.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting the positions set forth above. If these recommendations are accepted, we will publish the final results, including the final dumping margins, for all companies subject to the review in the *Federal Register*.

Agree_____

Disagree_____

Paul Piquado
Assistant Secretary
for Import Administration

Date