

December 5, 2007

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 First  
Antidumping Duty Administrative Review of Purified  
Carboxymethylcellulose from the Netherlands

---

## **SUMMARY**

We have analyzed the comments and rebuttal comments from interested parties in the first antidumping duty administrative review of purified carboxymethylcellulose (CMC) from the Netherlands. As a result of our analysis of information and arguments on the record, we have made changes to the margin calculations from the preliminary results. See Purified Carboxymethylcellulose From the Netherlands: Preliminary Results of Antidumping Duty Administrative Review, 72 FR 44099 (August 7, 2007) (Preliminary Results). For these final results, we have determined that the companies in the above-captioned proceeding, Noviant B.V. (Noviant) and CP Kelco B.V. (CP Kelco) – the successor-in-interest to Noviant and collectively referred to as “CP Kelco” in this memorandum – made sales to the United States at less than normal value (NV) during the period of review (POR) (*i.e.*, December 27, 2004, through June 30, 2006). We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this review for which we received comments from interested parties, including the Department’s treatment of CP Kelco’s U.S. and home market factoring of invoices:

## **COMMENTS ON THE PRELIMINARY RESULTS**

- Comment 1: Alleged Errors Including Foreign Currency Conversions
- Comment 2: Excluded Constructed Export Price Sales
- Comment 3: Zeroing of Non-Dumping Margins

## **DISCUSSION OF THE ISSUES**

### Comment 1: Alleged Errors Including Foreign Currency Conversions

With regard to the comparison market program, CP Kelco argues that the Department should have created variables for indirect selling expenses that were incurred and reported in both Euros and U.S. dollars (e.g., INDIRS1T and INDIRS2T). CP Kelco contends further that the Department did not properly convert comparison market movement expenses (CMMOVE) or comparison market marine insurance expenses (MARNINT) into U.S. dollars.

With regard to the U.S. market program, CP Kelco argues that the Department should have converted the currency values in the fields for gross unit price denominated in U.S. dollars (CMGUPUSD), comparison market movement (CMMOVE) expenses, comparison market credit (CMCRED) expenses, and comparison market commission expenses denominated in U.S. dollars (CMCOMMT\_CURRUSD).

CP Kelco asserts that the Department inadvertently added to normal value third country commissions denominated in U.S. dollars (CMCOMMT\_CURRUSD) rather than subtracting these expenses from normal value.

CP Kelco maintains that the Department did not properly convert Euro values reported for gross unit price in the United States (GRSUPRU), U.S. credit (CREDITU), U.S. billing adjustments (BILLADJU), U.S. other discounts (OTHDISU), indirect selling expenses incurred in the United States (INDIRSU), and U.S. indirect selling expenses incurred in the country of manufacture (DINDIRSU).

The Aqualon Company, a division of Hercules Incorporated (petitioner) argues that the record indicates that DINDIRSU and inventory carrying costs incurred in the country of exportation (DINVCARU) are always denominated in Euros and require across-the-board conversion to U.S. dollars. Accordingly, petitioner suggests that the Department convert DINDIRSU and DINVCARU to U.S. dollars in the margin program.

Department's Position: We agree with both CP Kelco and petitioner and have amended both our comparison market and margin calculation programs to correct for all errors described above. Our amended language reflects the language proposed by CP Kelco in its case brief. See CP Kelco's September 6, 2007, case brief at pages 2-6.

With regard to petitioner's alleged clerical errors regarding currency conversions, it is clear from CP Kelco's November 20, 2006, Sections B and C questionnaire response (sections B&C response) that the currency in which DINDIRSU is reported varies depending on the currency of the transaction (ICURRT). Therefore, we will not make an across-the-board conversion to U.S. dollars for DINDIRSU as suggested by petitioner, but will instead only convert to U.S. dollars when the currency of the sale is reported in Euros. With regard to petitioner's other claimed currency conversion error, we will convert the variable DINVCARU to U.S. dollars, as it is clear from CP Kelco's questionnaire response that this variable is always reported in Euros. See CP Kelco's

sections B&C response at Exhibit C-1. For a detailed description of the changes made to both the comparison market and margin calculation programs, see the Department's Memorandum to the File, from Stephen Bailey, Case Analyst, entitled "First Antidumping Duty Administrative Review of Purified Carboxymethylcellulose from the Netherlands: Analysis Memorandum for the Final Results of Review for CP Kelco B.V.," dated December 3, 2007.

#### Comment 2: Excluded Constructed Export Price Sales

CP Kelco argues that the Department inadvertently eliminated 57 constructed export price (CEP) sales from the margin analysis when it merged constructed value selling expenses by level of trade for sales that did not have comparison sales in the third country. CP Kelco argues that to correct this problem, the Department should adjust the macro program to retain all constructed value (CV) models and merge these models with CV selling expenses, which are eventually used in the margin analysis.

Petitioner argues that CP Kelco's suggested correction for the 57 CEP sales that were dropped from the margin analysis program only replaces the missing 57 CEP sales from the analysis, rather than correcting the problem that led to the sales being dropped. Specifically, petitioner contends that in a situation where there is no level of trade (LOT) adjustment and/or the record lacks the information to run a pattern of price difference test necessary to calculate the LOT adjustment (as in the instant review), the Department typically "neutralizes" the LOT variable in its programs. However, in the instant case, petitioner claims that the Department did not do so, which caused the 57 CEP sales to be dropped from the calculations. To correct this error, petitioner suggests setting the LOT macro variable to "NO" in the comparison market program, and, in the same program, dropping the existing level of trade for the third country variable (LOTT) from the data and creating a new LOTT variable that is set to "0." In the margin program, petitioner suggests turning off all the LOT macros by setting them equal to "NO," and, in the same program, dropping the existing LOTU variable and creating a new LOTU variable set to "0."

Department's Position: We agree with both CP Kelco and petitioner and have determined it appropriate to include these 57 CEP sales in our analysis. Thus, we have revised the comparison market and margin analysis programs using language suggested by petitioner. The Department prefers to use petitioner's suggested language as it utilizes both the comparison market and margin analysis programs' inherent LOT macro variables to account for the fact that CP Kelco will receive no LOT adjustment. By setting the LOT macro variables in both programs to zero, and thus, disallowing the programs to perform an LOT adjustment, both programs will correctly retain all CEP sales in the overall margin analysis. Using both programs' LOT macro variables is preferable to adjusting the macro program, which does not contain language or a function to account for this particular situation.

#### Comment 3: Zeroing of Non-Dumping Margins

CP Kelco notes that section 751(a)(2) of the Tariff Act of 1930, as amended (the Act), instructs the Department to determine the normal value and export price of each entry of subject merchandise and the dumping margin for each entry. CP Kelco continues that 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.” See section 771(35)(A) of the Act. CP Kelco argues that the amount by which normal value exceeds the export price does not have to be positive. CP Kelco maintains that the U.S. Court of Appeals for the Federal Circuit (USCAFC) has determined that section 771(35)(A) of the Act, specifically the reference to “exceeds,” does not preclude the calculation of a negative margin and “does not unambiguously require that dumping margins be positive numbers.” See Timken Co. v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004) (Timken). CP Kelco argues further that the United States Court of International Trade (CIT) followed the Timken decision and determined that section 731 of the Act “neither unambiguously requires nor prohibits zeroing under the first step of Chevron.” See SNR Roulements et al. v. United States, 341 F.Supp.2d 1334, 1345 (Ct. Int’l Trade 2004); see also Corus Staal v. United States, 387 F.Supp. 2d 1291, 1297 (Ct. Int’l Trade 2005). CP Kelco contends that based on both decisions, the statute does not compel the Department to set negative margins to zero and permits the Department to comply with the letter and spirit of the recent World Trade Organization (WTO) dispute settlement rulings.

Specifically, CP Kelco asserts that the zeroing methodology used by the Department is inconsistent with WTO rules as interpreted by the WTO’s Appellate Body in the following decisions: Report of the Appellate Body on the Complaint of India Concerning European Communities – Antidumping Duties On Imports of Cotton-Type Bed Linens From India, WT/DS141/AB/R (March 1, 2001) (EC-Bed Linens); Report of the Appellate Body on the Complaint of Canada concerning United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, AB-2004-2 (Aug. 31, 2004) (U.S. - Softwood Lumber); Report of the Appellate Body on the Complaint of the European Communities concerning United States – Laws, Regulations and methodology for Calculating Dumping Margins, WT/DS294/AB/R (May 9, 2006) (U.S. - Zeroing (EC)); and Report of the Appellate Body on the Complaint of Japan concerning United States – Measures relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 9, 2007) (U.S. - Zeroing (Japan)). CP Kelco contends that in U.S. Zeroing (Japan), the WTO Appellate Body held that the Department’s zeroing methodology is inconsistent with Articles 2.4 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the General Agreement on Tariffs and Trade (1994) when applied in the context of administrative reviews.

CP Kelco maintains that the Department has recently adopted a new methodology that substantially limits the use of zeroing in investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 FR 77722, 77725 (December 27, 2006). Moreover, CP Kelco notes that the United States agreed to implement the decision in U.S. – Zeroing (Japan), which would eliminate zeroing in administrative reviews. CP Kelco argues that the Department should use this administrative review to revise its past practices with respect to zeroing in light of U.S. case law and the recent WTO decisions invalidating zeroing in administrative reviews.

Petitioner argues that the Department’s consistent position is that zeroing is legally supportable in reviews and that courts have upheld that position. Moreover, petitioner states that the Department must follow statutory procedures in order to change its zeroing methodology. Petitioner notes that the Department has reaffirmed its use of zeroing in the following cases: Certain Frozen Warmwater

Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52061 (September 12, 2007) (Warmwater Shrimp); Floor-Standing, Metal-Top Ironing Tables and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, 72 FR 13239 (March 21, 2007), and accompanying Issues and Decision Memorandum at Comment 4; and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 18204 (April 11, 2007), and accompanying Issues and Decision Memorandum at Comment 4.

Petitioner argues that the USCAFC has twice upheld the Department's reading of the statute, and the U.S. Supreme Court has refused to hear appeals from those who would challenge the Department. See Timken; see also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006) (Corus Staal). Petitioner notes that the USCAFC has held that WTO decisions are "not binding on the United States, much less this court." See Timken at 1344.

Petitioner argues that the statutory requirements for a change in methodology to zeroing have not been met. Petitioner maintains that despite the WTO's decision in U.S. – Zeroing (Japan) (i.e., zeroing is inconsistent with U.S. WTO obligations), the Department is not required or permitted to change its methodology in the instant review. Petitioner cites to Warmwater Shrimp, in which the Department determined:

Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 USC 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary); see also SAA at 354 (1994) ("{ a }fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is 'not inconsistent' with the panel or Appellate Body recommendations. . . )." Because no change has yet been made with respect to the issue of "zeroing" in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Administrative Review, 72 FR 28676 (May 22, 2007).

See Warmwater Shrimp at Comment 2 of the Issues and Decision Memorandum. Petitioner contends that the USCAFC concluded in Corus Staal that WTO decisions might be used as the basis for changing U.S. procedures only after the applicable statutory scheme has been utilized. Petitioner quotes Corus Staal to assert that the USCAFC determined that it gives "substantial" deference to Commerce's administration of the statute because of foreign policy implications. Because of this deference, the USCAFC is unwilling to attempt to perform duties that fall within the "exclusive" province of the political branches. Petitioner continues to quote that for these reasons, the USCAFC

refused to overturn the Department's zeroing practice based on any ruling of the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme. See Corus Staal at 1349.

**Department's Position:** We have not changed our calculation of the respondents' weighted-average dumping margins as suggested by the respondent for 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 and constructed export price of the subject merchandise" (emphasis added). 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 NV is greater than export or constructed export price. As no dumping margins exist with respect to sales where NV 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 USCAFC has held that this is a reasonable interpretation of the statute. See Timken; see also Corus Staal.

The Department notes it has taken action with respect to two WTO dispute settlement reports finding the denial of offsets to be inconsistent with the Antidumping Agreement. With respect to U.S. – Softwood Lumber, and Report of the Appellate Body on the Complaint of Ecuador concerning United States - Antidumping Measure on Shrimp from Ecuador, WT/DS335/R (January 30, 2007) (US – Shrimp (Ecuador)), consistent with section 129 of the Uruguay Round Agreements Act, the United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute; *i.e.*, the antidumping duty investigation of softwood lumber from Canada and the antidumping duty investigation of certain warm water shrimp from Ecuador. See 19 USC 3538.

With respect to US – Zeroing (EC), the Department recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See 71 FR at 77724. With respect to the specific administrative reviews at issue in that dispute, the United States did not apply any change in its calculation methodology in the those administrative reviews to render those determinations consistent with the findings contained in the WTO report.

As such, the Appellate Body's reports in U.S. – Softwood Lumber, US – Shrimp (Ecuador) and US – Zeroing (EC) have no bearing on whether the Department's denial of offsets in this administrative review is consistent with U.S. law. See Corus Staal, 395 F.3d at 1347-49; Timken, 354 F.3d at 1342. Accordingly, the Department has continued in this case to deny offsets to dumping based on export transactions that exceed NV.

According to CP Kelco, the Appellate Body recently determined in U.S. – Zeroing (Japan) that zeroing in administrative reviews was inconsistent with U.S. WTO obligations, and therefore, the

Department should eliminate its practice of “zeroing” in this administrative review. Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 USC 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department’s discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary); see also Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316 vol. 1, at 354 (1994) (“{a}fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is ‘not inconsistent’ with the panel or Appellate Body recommendations. . . .”) Because no change has been made with respect to the issue of “zeroing” in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Administrative Review, 72 FR 28676, 28678 (May 22, 2007).

For the foregoing reasons, we have not changed the methodology employed in calculating respondent’s weighted-average dumping margin for these final results.

**RECOMMENDATION:**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final antidumping margin and the final results of this review in the Federal Register.

\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

\_\_\_\_\_  
David M. Spooner  
Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date