

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 Sweden

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## **SUMMARY**

We have analyzed the comments and rebuttal comments from interested parties in the first antidumping duty administrative review of purified carboxymethylcellulose (CMC) from Sweden. 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 Sweden: Preliminary Results of Antidumping Duty Administrative Review, 72 FR 44089 (August 7, 2007) (Preliminary Results). These changes, including the consideration of factual information obtained since the Preliminary Results, effected a change in the margin that was calculated at the Preliminary Results. Therefore, we have determined that the respondent in the above-captioned proceeding, Noviant AB (Noviant) and CP Kelco AB (collectively, CP Kelco) – the successor-in-interest to Noviant – made sales to the United States at less than normal value (NV) during the period of review (*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:

## **COMMENTS ON THE PRELIMINARY RESULTS**

Comment 1: Programming Errors regarding Foreign Currency Conversions  
Comment 2: Zeroing of Non-Dumping Margins

## **DISCUSSION OF THE ISSUES**

### **Comment 1: Errors with Regard to Foreign Currency Conversion**

On September 6, 2007, the Aqualon Company, a division of Hercules Incorporated (petitioner) filed comments on the Preliminary Results with the Department. See Letter from Petitioner to the Department, titled “Purified Carboxymethylcellulose from Sweden; Demonstration of Programming Errors in Lieu of Case Brief,” dated September 6, 2007 (Petitioner Brief). With respect to the comparison market program, petitioner argues that the Department made a number of errors in its programming which resulted in the improper conversion of several variables that were reported in multiple currencies (i.e., U.S. dollars, Swedish kroners (SEK), and Euros). Petitioner argues that the Department should revise its program to account for the accurate conversion of all mixed currency variables. With regard to the U.S. margin program, petitioner notes that the proposed corrections to the comparison market program, if made, will necessitate changes to the comparison market net price (CMNETPRI) calculation in order to bring all comparison market variables to a U.S. dollar basis.

Also on September 6, 2007, CP Kelco filed comments on the Preliminary Results with the Department. See Letter from CP Kelco to the Department, titled “Purified Carboxymethylcellulose from Sweden; Comments Regarding August 7, 2007 Preliminary Results of Review,” dated September 6, 2007 (CP Kelco Brief). In its brief, CP Kelco raised one comment concerning programming errors. Specifically, and with regard to the U.S. margin program, CP Kelco argues that the Department did not properly convert inventory carrying costs incurred in Euros in the U.S. market (INVCARU) and inventory carrying costs incurred in Euros in the comparison market (DINVCARU) into U.S. dollars. We have not received rebuttal comments from either of the parties regarding these alleged programming errors.

#### Department’s Position:

Upon reviewing the comments submitted by petitioner and CP Kelco, as well as the proposed programming changes, the Department has determined these proposed changes to be correct. Consequently, we have amended our margin calculation programs to correct for the errors described by both CP Kelco and petitioner as outlined above. For a complete discussion of these changes and identification of the Department’s programming revisions to the home market and U.S. margin programs, see Memorandum to the File through Angelica L. Mendoza, Program Manager, from Patrick S. Edwards, Case Analyst, entitled “Analysis Memorandum for the Final Results of Review: CP Kelco AB, First Antidumping Duty Administrative Review of Purified Carboxymethylcellulose from Sweden,” dated December 5, 2007 (Final Analysis Memorandum).

### **Comment 2: Zeroing of Non-Dumping Margins**

CP Kelco notes that in calculating the normal value and export price of each entry of subject merchandise, section 771(35)(A) of the Tariff Act of 1930, as amended (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 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 claims that the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has determined that section 771(35)(A) of the Act, specifically the reference to “exceeds,” does not preclude the calculation of negative margins 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 findings.

Specifically, CP Kelco asserts that the zeroing methodology used by the Department is inconsistent with WTO obligations as interpreted by the WTO’s Appellate Body in the following reports: European Communities – Antidumping Duties On Imports of Cotton-Type Bed Linens From India, WT/DS141/AB/R (March 1, 2001) (EC-Bed Linens); United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, AB-2004-2 (Aug. 31, 2004) (US - Softwood Lumber); European Communities concerning United States – Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R (May 9, 2006) (US - Zeroing (EC)); and United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 9, 2007) (US - Zeroing (Japan)). CP Kelco contends that in US - Zeroing (Japan), the WTO Appellate Body found that the Department’s zeroing methodology is inconsistent with Articles 2.4 and 9.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping 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) (Final Modification). Moreover, CP Kelco believes that the United States agreed to eliminate zeroing in the context of administrative reviews with regard to US – Zeroing (Japan). Accordingly, CP Kelco claims 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 argues 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 Federal Circuit 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 Federal Circuit 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 Appellate Body's findings in US – Zeroing (Japan) (i.e., finding zeroing in administrative reviews inconsistent with the United States' 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 U.S.C. 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 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also SAA [Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, (1994)] at 354 ("{ 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 Federal Circuit 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 asserts that in Corus Staal, the Federal Circuit determined that it gives "substantial" deference to Commerce's administration of the statute because of foreign policy implications. Petitioner argues that because of this deference, the Federal Circuit is unwilling to attempt to perform duties that fall within the "exclusive" province of the political branches. For these reasons, petitioner notes that the Federal Circuit 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 respondent's weighted-average dumping margin 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 Federal Circuit has held that this is a reasonable interpretation of the statute. See Timken; Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). See also Corus Staal.

The Department notes it has taken action with respect to three WTO dispute settlement reports finding the denial of offsets to be inconsistent with the Antidumping Agreement. With respect to US – 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 those WTO reports affected only the specific administrative determinations that were the subject of those WTO disputes; *i.e.*, the antidumping duty investigation of softwood lumber from Canada and the antidumping duty investigation of certain warmwater shrimp from Ecuador. See 19 U.S.C. 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 Final Modification. 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 US – 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.

CP Kelco relies on the Appellate Body's recent determination in US – Zeroing (Japan), which found zeroing in administrative reviews to be inconsistent with the United States' WTO obligations, to argue that the Department should eliminate "zeroing" in this administrative review. However, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO

dispute settlement reports. See 19 U.S.C. 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 U.S.C. 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 been made with respect to the issue of “zeroing” in administrative reviews, the Department has continued with its current approach in 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 and record evidence, 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.

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Agree

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Disagree

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David M. Spooner  
Assistant Secretary  
for Import Administration

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Date