71 FR 54266, September 14, 2006

A-549-502
AR: 03/01/04-02/28/05
Public Document
O6: JA

DATE: September 7, 2006

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 the Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand

Summary

We have analyzed the case and rebuttal briefs from interested parties in response to the preliminary results of this review for Saha Thai Steel Pipe Company, Ltd. (Saha Thai), the sole respondent. As a result of our analysis, we recommend that you approve the positions we have developed in the "Discussions of Issues" section of this memorandum. A complete list of the issues on which interested parties commented is provided below.

Background

On April 7, 2006, the Department published in the Federal Register the preliminary results of the administrative review of the antidumping duty order on circular welded pipes and tubes from Thailand. See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review, 71 FR 17810 (April 7, 2006) (Preliminary Results).

In the Preliminary Results, we stated our intention to request further information from Saha Thai to allow Saha Thai the opportunity to demonstrate that there are two distinct levels of trade in the home market. On April 21, 2006, we issued a supplemental questionnaire for this purpose to Saha Thai and its affiliated resellers. Saha Thai submitted its response on May 8, 2006.

We invited parties to comment on the Preliminary Results; on May 18, 2006, we provided specific deadlines. On June 1, 2006, we received case briefs from Saha Thai, and from the petitioners, Allied Tube and Conduit Corporation and Wheatland Tube

Company (collectively, petitioners). Both petitioners and Saha Thai submitted rebuttal briefs on June 6, 2006. Neither party requested a hearing.

On August 3, 2006, the Department published in the Federal Register a notice extending the final results from August 5, 2006 to September 7, 2006. See Extension of Time Limit for Final Results of Antidumping Duty Administrative Review: Circular Welded Carbon Steel Pipes and Tubes from Thailand, 71 FR 44016 (August 3, 2006).

Issues

Comment 1: Saha Thai's Revocation Request
Comment 2: Antidumping Duty Exemptions
Comment 3: Duty Drawback
Comment 4: Product Matching for Fence Tube
Comment 5: Level of Trade in the Home Market
Comment 6: Zeroing of Saha Thai's Sales

Discussion of the Issues

Comment 1: Saha Thai's Revocation Request

Saha Thai argues that the Department unreasonably rejected its revocation request as untimely. Saha Thai argues that, while Department's regulations indicate that a request for revocation should be made at the time a request for an administrative review is filed, during the third and subsequent anniversary months of the publication of the order, the Department should acknowledge the enormous burden this places on a respondent company. According to Saha Thai, the Department's regulations impose an enormous burden on a respondent company, requiring it to gather all of the requisite sales and cost data and undertake a detailed analysis of that data before requesting a review and seeking revocation of the order. Because of this enormous burden of collecting and analyzing its sales and cost data, Saha Thai submitted its request not within the specified period, but with its questionnaire response. Saha Thai argues it was satisfied with the zero deposit rate that resulted from the last administrative review, and for this reason Saha Thai did not want to take on the time and commitment associated with participating in an administrative review.

In addition, Saha Thai further contends it was not until the questionnaire response was prepared that Saha Thai was able to certify that all of the conditions for the revocation request, discussed above, were met. In addition, Saha Thai notes that the WTO Appellate Body issued its decision in the EU Zeroing dispute on April 18, 2006 and, according to Saha Thai, the application of this decision to this period of review (POR) enabled Saha Thai to certify that it was not dumping. See United States-Laws, Regulations, and Methodologies for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (April 18, 2006) (EU Zeroing). Saha Thai requests that the Department reconsider the

September 13, 2005 decision denying Saha Thai's revocation request. Petitioners did not comment on Saha Thai's revocation request.

Department's Position: On September 13, 2005, we issued a memorandum determining that Saha Thai's revocation request was untimely. Saha Thai submitted its request with its questionnaire response, almost three months after the deadline. Furthermore, Saha Thai did not provide a compelling argument as to why the Department should find that there was good cause to extend the deadline for its request. Saha Thai did not request an administrative review or indicate it was considering requesting a revocation, which indicates that it was either not interested in an administrative review or was uncertain that it would meet the conditions. See "Memorandum from Jacqueline Arrowsmith, International Trade Compliance Analyst, Office 6, to Maria Mackay, Acting Director, AD/CVD Operations, Office 6: Certain Welded Carbon Steel Pipes and Tubes from Thailand: Untimely Request for Revocation." With respect to Saha Thai's argument regarding the WTO Appellate Body's decision in EU Zeroing, as discussed below (see Comment 6), that decision does not have any effect on this review, and for this reason, has no bearing on Saha Thai's revocation request. Since we issued the Preliminary Results, neither Saha Thai nor petitioners have presented any argument that would warrant re-examining this issue.

Comment 2: Antidumping Duty Exemptions

Saha Thai argues that the Department should increase export price (EP) by the amount of Thai antidumping duties that were uncollected by reason of exportation of subject merchandise to the United States. Saha Thai further contends that section 772(c)(1)(B) of the Tariff Act of 1930, as amended (the Act), provides for an adjustment to EP for duty drawback for "import duties" that are rebated or exempted and not imposed on goods which are exported. Saha Thai explains that because duty would be paid on imported coil to produce the foreign like product, Saha Thai mostly used domestically produced coil to manufacture pipe that was sold in the domestic market during the POR. Saha Thai explains that some of the coil that was consumed in 2004 production was imported in 2003 and came from the 2004 (beginning) inventory.

Saha Thai argues an adjustment to EP is appropriate to reflect the antidumping duties on hot-rolled coil imported from India, Russia, and South Africa. Saha Thai further contends that the language of the statute, the tax-neutral purpose of the antidumping law as interpreted by the Department and the courts, and the U.S.'s World Trade Organization (WTO) obligations dictate that EP should be increased for uncollected antidumping duties as it is increased for uncollected customs duties.

Saha Thai argues that the statute provides for an adjustment to EP for any import duties. According to Saha Thai, the fact that antidumping duties are assessed upon importation means these duties are included within the definition of any import duties. Saha Thai cites a finding on 201 duties (also known as "safeguard duties") to show that the Department has classified remedial duties as import duties. See Stainless Steel Wire Rod

from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and the accompanying Issues and Decision Memorandum.

Saha Thai then argues that, even assuming that some ambiguity remains over whether antidumping duties fall within the term "import duties," the statutory language requires that antidumping duties be considered import duties. Saha Thai cites a sentence from Notice of Final Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002), in which the Department stated that it "may not interpret the statute in a manner that would frustrate its very purpose," in order to demonstrate that the purpose of the statute is to ensure that the antidumping law is administered in a tax-neutral way. Saha Thai maintains that the antidumping duty law should not be used to create margins where none exist. According to Saha Thai, the policy of tax neutrality behind the adjustment to EP for uncollected import duties requires an adjustment for antidumping duties similar to any other type of duty upon importation in order to avoid the artificial creation of dumping margins. Saha Thai further argues that the antidumping law must be interpreted whenever possible in a manner consistent with international obligations.

Saha Thai states that the legislative history of the antidumping law confirms that Congress intended the antidumping calculation to be tax neutral. According to Saha Thai, Congress specifically endorsed adjusting U.S. price in an effort to create a neutral comparison between EP and normal value. Saha Thai recounts that in the 1990s, it was argued that the antidumping law was not completely tax neutral because of the "multiplier effect." Saha Thai states that Congress addressed this issue and changed the law to provide complete tax neutrality in section 773(a)(6)(B)(iii) of the Act. According to Saha Thai, this requires that Commerce reduce NV to account for the amount of any indirect taxes imposed on the foreign like product, or components thereof, that have been rebated or not collected to the extent that such prices are added or included in the price of the foreign like product. Saha Thai cites Federal Mogul Corporation v. United States, in which the Court of Appeals for the Federal Circuit (CAFC) stated that, absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations. Federal Mogul Corporation v. United States, 63 F.3d 1572 (Fed. Cir. 1995) (Federal Mogul).

Saha Thai further argues that the courts have upheld the Department's use of tax-neutral methodologies pursuant to the statute. Saha Thai cites the CAFC's decision in Federal Mogul, where the basic question was whether Congress, in the Tariff Act of 1930, precluded the Department from determining dumping margins in a tax-neutral fashion. In that determination, the CAFC held that the Department had recognized that determining dumping margins required careful treatment of taxes.

Saha Thai claims that the WTO Antidumping Agreement (Agreement)[1] stands squarely behind the proposition that tax differences should not affect antidumping duties.

[1] Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Art. 2.4

According to Saha Thai, the Agreement recognizes that taxes can affect the margin of dumping and provides that adjustments be made to eliminate that effect: "Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability." Saha Thai further claims that the Agreement describes the exact situation that Saha Thai is currently faced with, in that the duties were exempted by reason of exportation of the merchandise. Saha Thai claims that Article 2.4 of the Agreement also supports the principle of tax neutrality.

Finally, Saha Thai explains the production process to illustrate the importance of hot-rolled coil in the production of its subject merchandise. Saha Thai states that it used some imported hot-rolled coil to produce pipe that was sold for domestic consumption during the period of review. Saha Thai explains that pursuant to Thai Customs laws and regulations, Saha Thai received exemptions from import duties on all imports of hot-rolled coil, provided that the hot-rolled coil was used in the production of exports. Further, Saha Thai explains that these duty exemptions were obtained by meeting bonded warehouse importation requirements.

Saha Thai reiterates that because the product was exported, the Thai Government did not collect antidumping duties on imported Russian, South African, and Indian hot-rolled coil from Saha Thai for the same reason that it did not collect the customs duty. According to Saha Thai, a failure to increase EP for antidumping duties would result in the creation of a dumping margin due to tax policy. Petitioners did not comment on this particular argument.

Department's Position: In the previous administrative review of this order, the Department did not make an adjustment to U.S. price for exempted or rebated foreign antidumping duties by adding such duties to U.S. export price. As we noted in that administrative review, the Department has a long-standing policy and practice of not treating antidumping (or countervailing) duties as U.S. import duties, costs or expenses. See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 69 FR 61649 (October 20, 2004) (2002-2003 Review); see also Hoogovens Staal v. United States, 4 F. Supp. 2d 1213, 1220 (CIT 1998) (Commerce need not deduct antidumping duties from the initial price in the United States as either U.S. import duties or as costs); AK Steel Corp. V. United States, 988 F. Supp. 594 (CIT 1997) (actual antidumping and countervailing duties need not be deducted from the initial price in the United States).

With regard to Federal Mogul, the CAFC examined the Department's treatment of taxes, not special duties, and thus did not address the rationale for distinguishing "normal" or "standard" import duties from "special" import duties, like the Thai antidumping duties. See Federal Mogul, 63 F.3d at 1572.

(April 15, 1994), reprinted in H.R. Doc. No. 316, 103d Cong., 2d Sess. 1455(1994).

Moreover, we have previously stated that it was Congress' intent to include only normal import duties, but not other import duties, in construing section 772(c)(2)(A) of the Act. Specifically, in SWR from Korea, we noted:

> Congress has long recognized that at least some duties implementing trade remedies – including at least antidumping duties – are special duties that should be distinguished from ordinary customs duties. Accordingly, Commerce consistently has treated AD duties as special duties not subject to the requirement to deduct "United States import duties" (normal customs duties) from U.S. prices in calculating dumping margins.[2]

We interpret the phrase "import duties" in section 772(c)(1)(B) in a similar manner. Therefore, our conclusion that the antidumping duties at issue are not "import duties" within the meaning of section 772(c)(1)(B) is consistent with our longstanding interpretation of section 772(c)(2)(A). Accordingly, the Department is maintaining its current practice and will not adjust EP by the amount of uncollected Thai antidumping duties as claimed by the respondent.

Comment 3: Duty Drawback

Petitioners argue that in the Preliminary Results, EP was incorrectly increased by an amount for duty drawback under section 772(c)(1)(B) of the Act. Petitioners state that Saha Thai reported a duty drawback that was greater than the gross price of some U.S. sales. Petitioners then state that the duty drawback adjustment reported by Saha Thai was not based on the amount of import duties imposed on the hot-rolled steel input.

Petitioners state that import duties are "imposed by the country of exportation," but that the Department has not interpreted the word "imposed." Petitioners further note that the Department's two-prong test does not measure the amount of import duties imposed by the country of importation.

Petitioners then state that the word "imposed" has been interpreted under section 772(c)(1)(B) of the Act as establishing an unconditional and final obligation to pay duties. In Serampore Industries' et al. v. United States, the Court of International Trade (CIT) upheld the Department's interpretation of the word "imposed" to exclude cash deposits of countervailing duties, finding that, like AD duties, CVD duties are not imposed until they are actually assessed following an administrative review. See Serampore Industries' et al. v. United States, 675 F. Supp. 1354 (CIT 1987). Petitioners further state that any term used in multiple places in a single statute is presumed to carry the same meaning throughout the statute. See RHP Bearings Ltd. v. United States, 288 F.3d 1334, 1347 (Fed. Cir. 2002). Petitioners argue that, for the purposes of the drawback adjustment under section 772(c)(1)(B) of the Act, the word "imposed" should be interpreted to mean the finally assessed import duties defined in section 772(c)(1)(C) of the Act.

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[2] See 69 FR at 19159.

Petitioners argue that in the present case Saha Thai states that the amount of duty drawback adjustment which it reports consists of the amount of import duties that Saha Thai is exempt from paying by reason of exportation of the subject merchandise. According to petitioners, none of this exempted amount should be considered part of the amount of import duties that were imposed by the country of exportation because the full amount of provisional duties on imports of these inputs was extinguished by reason of exportation of qualifying subject merchandise.

Petitioners state that, when Saha Thai imported hot-rolled steel inputs under the Thai exemption program, it incurred a provisional obligation to pay import duties on these inputs. Petitioners further state that if Saha Thai did not comply with the conditions of the Thai exemption program by exporting merchandise capable of being produced from the inputs, Saha Thai incurred a final obligation to pay import duties on these inputs. Petitioners cite Thai government regulations, which base the imposed import duty on the date of importation, assuming that the goods are exported within a year of the date of importation. Petitioners note that the provisional obligation to pay import duties is incurred at importation. According to the petitioners, the final assessed drawback amount is the provisional duty obligation incurred at importation less the drawback at exportation. According to petitioners, this is analogous to the imposition of AD and CVD duties because the provisional obligation to pay import duties at the time of importation does not constitute the imposition of import duties.

Petitioners argue that when the amount of import duties imposed by the country of exportation is considered as the amount of provisional duty incurred at importation less the drawback received at exportation, the amount of import duties imposed on these inputs is the amount that is included in the cost of production (COP) and constructed value (CV). Petitioners explain that this is because the cost of raw material and inputs is determined by reducing the gross price for inputs by rebates or reductions to the raw material accounts payable. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from France, 67 FR 78773 (December 26, 2002). Petitioners submit that the amount of any import duties imposed is the amount finally assessed and not a provisional estimate incurred at importation or a drawback of a provisional estimate.

Petitioners note that the Department instructed Saha Thai to identify the amount of import duties that Saha Thai had included in the cost of manufacture (COM) component of its COP and CV. Petitioners cite Saha Thai's February 23, 2006 questionnaire response in which Saha Thai reported COM components of its COP and CV factors. Petitioners state that they do not object to the fact that Saha Thai excluded the provisional import duties from the calculation of COM. According to petitioners, this supports the fact that drawback does not identify the final cost to Saha Thai.

Petitioners state that the amount included in Saha Thai's cost of manufacture represented import duties on hot-rolled steel inputs for which Saha Thai paid import duties but did not request or receive drawback. Thus, according to petitioners, this is the only amount

that the Department should consider as "the amount of any import duties imposed by the country of exportation."

Petitioners state that the statute sets "the amount of import duties imposed" as the maximum amount for increase to EP under the duty drawback provision at section 772(c)(1)(B) of the Act. Petitioners cite the statute, which "identifies the increase in export price as the amount of any 'import duties imposed by the country of exportation' which have been rebated, or which have not been collected, by reason of exportation." According to petitioners, for purposes of deriving the amount of the increase to EP, the statute mandates that the amount of the increase to EP be reduced by any import duties that are drawn back. Petitioners claim that only the amount imposed and drawn back qualifies for an adjustment to EP. The statute specifies that the increase in EP is the amount of duties imposed, to the extent that this amount is not drawn back. Petitioners conclude that only the amount imposed, and not drawn back, qualifies for an adjustment to EP.

Petitioners state that, in the present case, the Department, citing its two-prong test, granted an upward adjustment to EP for the full amount of the drawback of provisional duties on inputs exempted from collection at export, even though none of these provisional duties were ultimately imposed because the full amount of the provisional duties on imports was extinguished by exportation of subject qualifying merchandise. Petitioners further argue that no aspect of the Department's determination considers the amount of import duty actually "imposed." According to petitioners, in order to calculate the amount of duty imposed it is necessary to subtract, from the provisional amount of import duties that arise at importation, the drawback amount that occurs at exportation, which is not part of the Department's two-prong test. Petitioners cite the Preliminary Results, where the Department delineates the two-prong test. Petitioners conclude that the linkage that the Department examines is that between the provisional duty and the drawback, not a linkage between the final duty imposed and the drawback. Petitioners summarize the Department's intent in its two-prong test but conclude that it does not satisfy the requirement of the statute to identify the amount of duties imposed by the country of exportation.

According to petitioners, the drawback may negate the provisional obligation incurred at importation, as was the case for which Saha Thai received exemptions from collection at export. Petitioners state that the market difference in cost equals the amount of import duties imposed by the country of exportation, which is drawn back. Petitioners cite Huffy Corp. v. United States, which addresses Congressional intent for the duty drawback adjustment by describing the market difference in cost and the need to increase the EP by the amount of this difference in order to accommodate the difference between two different purchasers. See Huffy Corp. v. United States, 632 F. Supp. 50 (CIT 1986). Petitioners explain that drawback is not granted on merchandise sold in the producer's home market, which is never exported. Petitioners continue that a market difference in cost only occurs when a cost of manufacture is imposed. According to petitioners, no cost was imposed as a result of the exemption of Saha Thai's provisional duties, and therefore, no increase to EP is warranted for exempted duties. Petitioners argue that the

drawback where there is no cost does not "accommodate the difference in cost" which the CIT addressed in Huffy Corp. v. United States.

Petitioners state that, in the instant case, Saha Thai did have a large amount of drawback, equal to the provisional duties on inputs, which were exempted from collection at exportation. According to petitioners, this drawback far exceeded the cost imposed on Saha Thai. Petitioners argue that the market difference in this cost makes export merchandise cheaper than the merchandise sold in the domestic market. Petitioners cite the Antidumping Act of 1921 to support their argument that the adjustment is limited to the amount of import duties imposed by the country of exportation, which are rebated or not collected by reason of exportation. Petitioners state that this is also the amount of the market difference in cost that would constitute dumping but for the drawback adjustment.

Saha Thai notes that petitioners argue that the only amount of duty drawback Saha Thai should be entitled to is the precise amount for which Saha Thai did not claim or receive drawback – import duties paid by Saha Thai for imported hot-rolled coil that was re-sold in the home market rather than used in the production of pipe for export. Saha Thai states that petitioners' argument rests on the supposed statutory requirement that in order to qualify for a duty drawback adjustment, the duties must be paid upon importation and later refunded. Saha Thai notes that this argument has been made in the past and has been rejected by the Department. Saha Thai cites 2002-2003 AR.

Saha Thai explains that, under the Government of Thailand's bonded warehouse regime, all imported goods enter the bonded warehouse duty free. Saha Thai states that if the goods are removed for export, they are exempt from the imposition of import duties. Saha Thai states that to receive the exemption from these duties, Saha Thai must submit quarterly reports to Thai Customs within a specified amount of time, which provide the link between the importation of hot-rolled coil, the exportation of pipe, and the exempted duty. Saha Thai explains that it has clearly satisfied both prongs of the Department's two-prong test for duty drawback. Saha Thai states that its quarterly reports, discussed in its February 23, 2006 supplemental questionnaire response (February 23 response) provide the link between the importation of hot-rolled coil, the exportation of pipe and the exempted duty, which satisfies the first prong of the Department's two-prong test. To satisfy the second prong, "by reason of the exportation of the subject merchandise," Saha Thai cites its February 23 response.

Department's Position: Section 772(c)(1)(B) of the Act states that the price used to establish EP and CEP shall be increased by "the amount of any import duties imposed by the country of exportation which have been rebated, or *which have not been collected*, by reason of the exportation of the subject merchandise to the United States..." (Emphasis added.)

In determining whether a duty drawback adjustment is appropriate, the Department applies a two-prong test establishing that (1) the import duty paid and rebate payment are directly linked to, and dependent upon, one another; and (2) the company claiming the adjustment can demonstrate that there were sufficient imports of the imported raw

material to account for duty drawback received on the exports of this manufactured product. The CIT has upheld this position. See, e.g., Wheatland Tube Company and Allied Tube & Conduit Corporation v. United States and Saha Thai Steel Pipe Company, Ltd., 414 F. Supp. 2d 1271 (CIT 2006).

Petitioners do not argue that Saha Thai failed to provide evidence demonstrating that Saha Thai had satisfied both prongs of our two-prong test. Instead, petitioners argue that because duties were not actually imposed -- except on a small amount used in the production of domestic merchandise, we should deny the duty drawback adjustment for exempted duty. This argument is identical to those arguments previously offered by petitioners in 2002-2003 AR and Light-Walled Rectangular Pipe and Tube From Turkey: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53675 (September 2, 2004) (Pipe from Turkey).

In Pipe from Turkey, the Department explained:

> Contrary to the petitioners' assertion, the Department does not require a respondent to demonstrate that it paid import duties on raw materials used in the production of merchandise sold in the home market as a prerequisite for being granted the duty drawback adjustment.
>
> The statute provides for the adjustment without reference to whether products sold in the home market are made with imported raw materials. The only limitation placed on the duty drawback adjustment is that the adjustment to the U.S. price may not exceed the amount of import duty actually paid. See Laclede Steel Co. v. United States, slip op. 94-160 (1994) (citing Far East Mach. II at 311-312). Therefore, we disagree with the petitioners that the Department should add a third prong to the test for drawback adjustments requiring that a respondent demonstrate that it paid import duties on raw materials used in the production of merchandise sold in the home market.

Petitioners' argument is not novel and does not warrant a departure from our decision in Pipe from Turkey. See also Chang Tieh Industry Co., Ltd. v. United States, 840 F. Supp. 141, 147 (CIT 1993); Avesta Sheffield, Inc. v. United States, 838 F.Supp. 608, 611 (CIT 1993); Stainless Steel Sheet Strip in Coils from Mexico; Final Results of Antidumping Administrative Review, 68 FR 6889 (February 11, 2003) at Comment 5. Therefore, we will continue to grant Saha Thai a duty drawback adjustment as it has satisfied the requirements under section 772(c)(1)(B) of the Act and our two-prong test.

Comment 4: Product Matching for Fence Tube

Saha Thai argues that the Department incorrectly calculated a dumping margin for Saha Thai's U.S. sales of fence tube by relying on CV instead of home market sales of similar merchandise. Saha Thai cites the Preliminary Results, which state that "there were no appropriate identical or similar matches" for a few U.S. sales which Saha Thai publicly identified as fence tube. See Saha Thai's June 1, 2006 case brief at 13. According to

Saha Thai, the Department violated the statute, judicial precedent and its own longstanding practice of matching U.S. sales to CV only when contemporaneous home market sales are not within the 20 percent difference-in-merchandise (difmer) test or within the ordinary course of trade. Saha Thai cites the SAA to underscore the statutory preference for using prices instead of CV. To underscore the judicial precedent, Saha Thai cites CEMEX, S.A. v. United States, 133 F. 3d 897 (Fed. Cir. 1998) (CEMEX). In that case, the CIT remanded the case to the Department to determine whether home market sales of Type I cement were suitable comparisons to U.S. sales of Type II and V cement. The court also remanded the case to the Department to collect from CEMEX the information necessary to make difmer adjustments. Saha Thai notes that this decision was sustained by the CAFC.

According to petitioners, Saha Thai's argument that the Department improperly used CV as the normal value for fence tube is based on a misunderstanding of the statute and the Department's practice. Petitioners state that the Department may use CV as NV whenever there are no home market sales of products identical or similar to products sold in the United States, not, as Saha Thai alleges, only when there are no contemporaneous home market sales that are in the ordinary course of trade. Petitioners cite sections 773(a)(1) and (4) of the Act. Petitioners agree with Saha Thai that the statute expresses a preference for the use of price over CV for NV. However, petitioners state that this preference only applies when there are home market sales that are sufficiently identical or similar to U.S. sales to enable meaningful price comparisons.

Petitioners state that, while Saha Thai correctly notes that prior to CEMEX it was the Department's practice to resort directly to CV if there were no identical product matches, CEMEX does not preclude the use of CV if there are home market sales of a product with a difmer within 20 percent of the U.S. sales. According to petitioners, CEMEX requires the Department to look for similar matches before resorting to CV if identical matches do not exist. Petitioners state that the Department has the obligation to determine whether particular home market sales are identical or similar to U.S. sales, but the Department also has considerable discretion in making this determination. Petitioners cite Timken Co. v. United States, 630 F. Supp. 1327 (CIT 1986). Given this fact, petitioners argue that the Department should continue to use CV as the NV for the Final Results of the instant review.

Department's Position: We have evaluated the information on the record of this review. In this case, we have matched U.S. sales of fence tube to home market sales of similar merchandise. This is consistent with our prior practice as it followed CEMEX, where we use any home market sale of similar merchandise as a potential match, provided that such match falls within the 20 percent difmer test.

Comment 5: Level of Trade in the Home Market

Saha Thai argues that the statute requires the Department to calculate normal value on the home market price at the same level of trade (LOT) as EP. Saha Thai states that the Department will determine whether sales are made at different levels of trade if they are

made at different marketing stages and whether there are differences in selling activities at each LOT. Saha Thai argues that the record of this proceeding shows that there are two levels of trade in the home market and one LOT in the U.S. market. According to Saha Thai, the first LOT in the home market (LOT 1) consists of Saha Thai's sales to its customers, while the second LOT in the home market (LOT 2) consists of sales made by its affiliated resellers. Saha Thai states that the U.S. LOT is comparable to LOT 1 and given this fact, the Department must compare U.S. sales prices to the normal value calculated using home market sales in LOT 1. According to Saha Thai, the Department may only use home market sales made at LOT 2 if there are no home market sales to match at LOT 1 and, when so doing, the Department must grant an LOT adjustment to account for differences in price due to the different levels of trade.

Petitioners state that after the Preliminary Results, the Department requested "further information" to allow Saha Thai to demonstrate that there are two distinct levels of trade in the home market. Petitioners state that both Saha Thai and the resellers have performed all of the functions related to sales activities. Petitioners counter Saha Thai's assertion in its responses that there is a difference in inventory management for Saha Thai. According to petitioners, the fact that Saha Thai characterizes its warehouse employees as "production workers" but its affiliated resellers' warehouse employees as "sales workers" does not establish a difference in function because both maintain inventory. Petitioners conclude that the unverified information submitted by Saha Thai after the Preliminary Results does not provide a basis for the Department to alter its finding that Saha Thai has not demonstrated that there are two distinct levels of trade and that the Department should not make an LOT adjustment.

Saha Thai states that the Department allowed the company to provide additional information to demonstrate that sales by affiliated resellers are at a different LOT than the company's sales to its own customers. Saha Thai restates that the information provided in its May 5, 2006 supplemental questionnaire response addressed these concerns.

Saha Thai argues that petitioners failed to acknowledge that the degree to which the various selling functions are performed is essential to the Department's LOT analysis. Saha Thai argues that the fact that many of the selling functions are performed by both Saha Thai and its affiliated resellers does not preclude a finding of two distinct levels of trade in the home market. Saha Thai states that the fact that the same selling functions are performed twice on sales by affiliated resellers indicates that the selling activity is greater on the sales made through affiliated resellers and that these sales are made at a more advanced stage of the marketing chain and at a different LOT than the sales made by Saha Thai to its customers. Saha Thai cites an earlier review of this order, in which the Department stated that the sales by Saha Thai's affiliated resellers were made at a different, more advanced, LOT. See Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand 63 FR 55798 (October 16, 1998) (1996-1997 Review); see also Certain Welded Carbon Steel Pipes and Tubes from Thailand: Amended Final Results of Antidumping Duty Administrative Review 63 FR 65172 (November 25, 1998). According to Saha Thai, the facts in that administrative review are the same as the facts in this administrative review. According

to Saha Thai, petitioners have not presented any evidence in this review that contradicts the LOT determination for the 1996-1997 Review. Further, Saha Thai claims that the information provided in its responses demonstrates that the sales by the affiliated resellers are made at a different, more advanced, LOT. Given this information, Saha Thai argues that the Department must determine that sales made by the affiliated resellers constitute sales at a different LOT. Saha Thai states that the LOT of Saha Thai's sales in the U.S. market is the same as the LOT of the direct sales made by Saha Thai in the home market. Saha Thai states that the Department is required by the statute to compare EP to home market sales at the same LOT wherever possible and that the Department is required to make an LOT adjustment to account for price differences resulting from the difference in LOT.

In their rebuttal brief, petitioners reiterate their direct argument that Saha Thai has not demonstrated that sales by Saha Thai's affiliated resellers are at a different LOT than Saha Thai's sales.

Department's Position: When a producer sells through an affiliated reseller, we consider the relevant functions to be the selling functions of both the producer and the reseller (i.e., the cumulative selling functions along the chain of distribution) for purposes of comparing the selling activities related to the affiliate's sale with those related to the producer's sale to its unaffiliated customers. If the reseller performs selling functions that add substantial selling activity in making the sale, we may find that sales by the reseller are made at a different LOT than the sales made by the producer.[2]

As we noted in the Preliminary Results, we gave Saha Thai the opportunity to provide more information about the claimed differences in the levels of trade at Saha Thai and its affiliated resellers. Saha Thai provided sufficient information for us to conduct a complete analysis of whether Saha Thai's sales in the home market are made at more than one LOT. We have analyzed the information that Saha Thai provided regarding selling functions and home market sales. We have made certain adjustments to Saha Thai's characterization of the selling activities in each of its two home market channels of trade. Even accounting for our adjustments, we have concluded that Saha Thai's sales were made at two distinct levels of trade in the home market: sales from Saha Thai to its unaffiliated customers and sales from Saha Thai through its affiliated resellers to unaffiliated customers. For our complete analysis, see Attachment 2 of the "Analysis Memorandum of Saha Thai Pipe Company, Ltd., for the Final Results of the Antidumping Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand for the period 03/01/2004 through 02/28/2005," (Analysis Memorandum) dated concurrently with this memorandum.

Further, we examined Saha Thai's selling functions for its sales in the U.S. market. Although we made some adjustments to the information Saha Thai reported, we find that

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[2] See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain, 67 FR 35482 (May 20, 2002) and the accompanying Issues and Decision Memorandum at pages 5-6.

all U.S. sales constitute one LOT and that this U.S. LOT matches one of the LOTs in the home market. See "Level of Trade" section in the Analysis Memorandum at page 2.

After finding that there are two distinct levels of trade in the home market and that the LOT in the U.S. market matches one of the two LOTs in the home market, we examined whether an LOT adjustment is warranted. In accordance with section 773(a)(7)(ii) of the Act, such an adjustment is warranted when the difference in the LOT "is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which the normal value is determined." Our comparison of the prices at the two levels of trade in the home market (the basis for NV) shows that there is a pattern of price differences and an LOT adjustment is warranted. See "Level of Trade" Section in the Analysis Memorandum at page 2. Therefore, we made an LOT adjustment in instances when U.S. sales are being matched with home market sales from LOT 2.

Comment 6: Zeroing of Saha Thai's Sales

Saha Thai states that the Department zeroed out more than half of its U.S. sales in this administrative review rather than including the negative margin transactions in the calculation of the weighted-average margin. According to Saha Thai, if the Department had not zeroed those observations, Saha Thai's preliminary margin for this review would be zero instead of 2.95 percent.

Saha Thai states that in determining whether an agency has properly followed a statute, U.S. courts consider whether an agency's actions violate U.S. international obligations and commitments. Saha Thai cites the "Charming Betsy Doctrine," whereby U.S. laws should be interpreted to avoid violating international obligations. See Alexander Murray, Esq. v. Schooner Charming Betsy, 6 U.S. 64 (1804). Saha Thai, citing Federal Mogul, states that U.S. obligations under GATT and the WTO Agreements have repeatedly been held to fall within the "Charming Betsy Doctrine." See Federal Mogul, at 1581.

According to Saha Thai, the Department's zeroing methodology is a violation of the requirements and provisions of the WTO Antidumping Agreement (Agreement), by which the United States has agreed to be bound and has amended its own regulations in order to establish conforming rules. Saha Thai states that the provision of the Agreement is paralleled by the language of the U.S. statute, which defines dumping as "the sale or likely sale of goods at less than fair value." Saha Thai further states that in disregarding sales made at non-dumped prices, the Department violates the definition of dumping.

Saha Thai further states that the WTO has held that zeroing is inconsistent with U.S. obligations under the Agreement. Saha Thai cites the WTO decision in E.C. Bed Linen in which the WTO panel found the E.C. practice of zeroing to be inconsistent with Article 2.4.2 of the Agreement. See European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India. WT/DS141/R (October 30, 2000) (E.C. Bed Linen). Further, Saha Thai notes that in a 2004 case, United States – Final Determination, Softwood Lumber from Canada, the WTO Appellate Body found the U.S.

practice of zeroing to be inconsistent with Article 2.4.2 of the Agreement. See United States – Final Determination, Softwood Lumber from Canada AB-2004-2 -(August 11, 2004) WT/DS264/AB/R (U.S. – Softwood Lumber). Saha Thai also refers to a more recent finding by the WTO Panel, relating to zeroing within the context of the E.U. zeroing dispute. See EU Zeroing.

Saha Thai cites Section 731 of the Act, which states that the Department may impose antidumping duties on a class or kind of merchandise that is being, or is likely to be, sold in the United States at less than fair value. Saha Thai states that the Department's practice of disregarding non-dumped sales violates this principle, because it eliminates the difference by which the U.S. sales above fair value exceed NV.

Saha Thai concludes by stating that the Department should give equal weight to both Saha Thai's U.S. sales transactions made at prices above NV and those U.S. sales transactions made at prices below NV to eliminate any skewing or inflation of Saha Thai's actual margin of dumping in this review.

Petitioners argue that Saha Thai is mistaken that the Department's practice has been found to violate the WTO obligations of the United States. Petitioners state that the WTO has found that zeroing, when part of a margin calculation that aggregates the EP or NV for margin calculations, is not consistent with the Agreement if the EP and NV are not aggregated at the level of the product. According to petitioners, the WTO has found that aggregation must be done at the level of the "product as a whole," which includes all subject merchandise. Petitioners cite the Softwood Lumber case at the WTO. See U.S. – Softwood Lumber. Petitioners also argue that Saha Thai conflates zeroing with WTO statements regarding the aggregation of the EP and NV in calculating dumping margins.

According to petitioners, zeroing, which involves the exclusion of non-dumped sales from the dumping margin, has never been found to violate WTO/GATT obligations. Petitioners state that the language of the Agreement clearly allows for zeroing. Specifically, petitioners cite Article 2.1 of the Agreement, which states that dumping occurs when EP is less than NV; this dictates that where EP exceeds the NV, the merchandise is not dumped, and may therefore be excluded from the dumping margin. Petitioners state that they have reservations about the WTO's finding that the Agreement requires that EP and NV be aggregated at the product level whenever the EP and NV are aggregated; petitioners conclude by stating that this issue is distinct from zeroing.

Department's Position: Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which NV *exceeds* the EP and constructed export price (CEP) of the subject merchandise" (emphasis added). We interpret this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, we do not permit these non-dumped sales to offset the amount of dumping with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir.), cert. denied sub nom., Koyo Seiko

Co. v. United States, 543 U.S. 976 (2004). 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).

Saha Thai has cited WTO dispute settlement reports finding the denial of offsets by the United States in specific administrative determinations to be inconsistent with the Agreement. With respect to U.S.- Softwood Lumber, consistent with Section 129 of the URAA, the United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute – the antidumping duty investigation of softwood lumber from Canada. See 19 U.S.C. § 3533 and § 3538. With respect to EU Zeroing, the United States has not yet completed the statutorily mandated process of determining how to implement this report. See 19 U.S.C. § 3533 and § 3538. As such, neither the implementation of U.S.-Softwood Lumber nor the Appellate Body's report in EU Zeroing has any bearing on whether the Department's denial of offsets in this administrative review is consistent with U.S. law. See Corus Staal BV v. Department of Commerce, 395 F.3d at 1347-49 and Timken Co. v. United States, 354 F. 3d at 1342. With respect to EC Bed Linen, the CAFC has refused to find the Department's interpretation of the Act unreasonable based on that WTO report. See id. at 1344. 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 we received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results and Saha Thai's final weighted-average dumping margin in the Federal Register.

Agree _____ Disagree _____

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David M. Spooner
Assistant Secretary
for Import Administration