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DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification

AGENCY: Import Administration, International Trade Administration, Department of Commerce

ACTION: Final Modification; Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation

SUMMARY: The Department of Commerce is modifying its methodology in antidumping investigations with respect to the calculation of the weighted-average dumping margin. This final modification is necessary to implement the recommendations of the World Trade Organization Dispute Settlement Body. Under this final modification, the Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The schedule for implementing this change is set forth in the "Timetable" section, below.

DATES: The effective date of this final modification is January 16, 2007.

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SUPPLEMENTARY INFORMATION:

Background

This change in methodology concerns the calculation of the weighted-average

dumping margin in investigations using the average-to-average comparison methodology.

Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis.

Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended (the Act), implements this provision of the Antidumping Agreement, providing that normally in an antidumping investigation, the Department may determine whether the subject merchandise is being sold at less than fair value through one of two options. The Department may compare a weighted-average of normal value to a weighted-average of the export or constructed export prices of comparable merchandise, known as the average-to-average comparison methodology. The Department also may compare normal values of individual transactions to the export prices or constructed export prices of individual transactions for comparable merchandise, known as the transaction-to-transaction comparison methodology.[1] The Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, Vol. 1 at 842-43 (1994),

[1]Section 777A(d)(1)(B) of the Act also provides for an exceptional methodology to be used in antidumping investigations. The Department may compare a weighted-average normal value to the export prices or constructed export prices of individual transactions if there is a pattern of export prices or constructed export prices that differs significantly among purchasers, regions or periods of time, and the Department explains why such differences cannot be taken into account using one of the methods described in section 777A(d)(1)(A). This is known as the targeted dumping or average-to-transaction methodology.

reprinted in U.S.C.C.A.N. 3773 (SAA), and the Department's regulations state that the Department normally will use the average-to-average comparison methodology in an investigation. 19 CFR 351.414(c)(1).

When the Department applies the average-to-average methodology during an investigation, the Department usually divides the export transactions into groups by model and level of trade ("averaging groups"). 19 CFR 351.414(d)(2). The Department then compares an average of the export prices or constructed export price of the transactions within one averaging group to the weighted-average of normal values of such sales. 19 CFR 351.414(d)(1).

Prior to this modification, when aggregating the results of the averaging groups in order to determine the weighted-average dumping margin, the Department did not permit the results of averaging groups for which the weighted-average export price or constructed export price exceeds the normal value to offset the results of averaging groups for which the weighted-average export price or constructed export price is less than the weighted-average normal value.

In October 2005, a World Trade Organization (WTO) dispute settlement panel issued a report in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (WT/DS294) ("*US – Zeroing (EC)*"). The panel found, among other things, that the Department's denial of offsets when using the average-to-average comparison methodology in certain antidumping investigations challenged by the European Communities ("EC") was inconsistent with Article 2.4.2 of the Antidumping

Agreement.[2] The United States did not appeal this aspect of the panel's report.

On March 6, 2006, the Department published a notice in the Federal Register (71 FR 11189) proposing that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. In that notice, the Department solicited comments and rebuttal comments on its proposal and appropriate methodologies to be applied in future antidumping investigations in light of the panel's report in *US – Zeroing (EC)*. On April 25, 2006, the Department extended the period of time for the submission of rebuttal comments (71 FR 23898). The Department received numerous comments and rebuttal comments submitted pursuant to these notices, as discussed below.

Final Modification Concerning the Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation

After considering all of the comments submitted, the Department is adopting this final modification concerning the calculation of the weighted-average dumping margin. The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.

Analysis of Public Comments

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[2]Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, para. 7.32, circulated October 31, 2005.

Numerous comments and rebuttal comments were submitted in response to the Proposed Modification. We have carefully considered each of the comments submitted. We have grouped and summarized the comments below according to common themes and responded accordingly.

Whether to Adopt the Department's Proposal

Some commentors welcomed the Department's proposal to permit offsets when making average-to-average comparisons, which would bring the Department's methodology into conformity with U.S. international obligations.

Other commentors argue that the denial of offsets creates more accurate results, because it combats the phenomenon of masked dumping. According to these commentors, masked dumping occurs when import transactions which are sold at less than normal value are masked by those sold at prices greater than normal value. The U.S. Court of Appeals for the Federal Circuit, these commentors note, has upheld the denial of offsets on these grounds. These commentors argue that if the Department is to grant offsets, it should do so on the narrowest grounds possible.

A few commentors argue that the Department cannot provide offsets without a statutory change. These commentors contend that the denial of offsets is required by the statute, because otherwise one of the permitted comparison methodologies would become redundant. According to these commentors, the statute permits the use of the average-to-average comparison methodology, the transaction-to-transaction comparison

methodology, and, in some circumstances, the average-to-transaction comparison methodology. If offsets were for non-dumped sales are provided, the results of the average-to-average and the average-to-transaction comparison methodologies would be mathematically equivalent. To avoid this outcome, the Department must interpret the statute to require the denial of offsets.

Other commentors rebut this argument, contending that the use of the average-to-transaction comparison methodology will not necessarily be mathematically equivalent to the use of the average-to-average comparison methodology.

Department's Position: The Department is adopting as its final modification its proposal that it will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department is doing so in response to the panel's report in *US – Zeroing (EC)*, following the procedures set forth in section 123 of the URAA.

While some commentors argue that this modification requires a change in statute, the Department disagrees. Specifically, the courts have consistently held that the denial of offsets is not required by statute, but rather is a result of an interpretation of the statute. See Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023 (2006); Timken Co. v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir.), cert. denied sub nom., Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). See also Paul Muller Industrie GmbH v. United States, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (stating new argument alone does not defeat binding precedent).

While we recognize that the Department may not interpret or apply the statute in a

way so as to nullify a statutory provision, the Department is not making such an interpretation. This final modification is addressing only the calculation of the weighted-average dumping margin in an investigation using the average-to-average comparison methodology and not the average-to-transaction comparison methodology. The argument that the targeted dumping methodology would be nullified presumes that offsets would be provided under that methodology and that certain other methodological choices would be made. To date, the Department has not used the targeted dumping comparison methodology, nor made any determination as to the issue of offsets pursuant to that methodology. Consequently, to the extent appropriate, the Department will consider the nullification argument when it applies the targeted dumping methodology.

Whether the Average-to-Average Comparison Methodology Should Continue to be the Department's Preferred Methodology in Investigations

Some commentors argue that the average-to-average comparison methodology should continue to be the preferred methodology for use in an antidumping investigation. This would be consistent with the SAA and the Department's own regulations. The use of the average-to-average comparison methodology simplifies the calculation of the weighted-average dumping margin, because it involves much simpler matching of export prices and normal values than would be involved if the transaction-to-transaction comparison methodology were used. According to these commentors, the average-to-average comparison methodology yields more predictable results because it is less

sensitive to aberrational sales and price fluctuations due to market forces. The average-to-average comparison methodology is appropriate to use when there are a large number of sales, whereas 19 CFR 351.414(c)(1) states that the transaction-to-transaction comparison methodology is more appropriate for investigations involving few sales and the merchandise sold in both markets is identical, very similar, or custom-made.

Some of these commentors argued that even if the Department were to use the transaction-to-transaction comparison methodology, the application of that methodology should include the provisions of offsets. According to these commentors, the denial of offsets when using transaction-to-transaction comparison methodology results in an even more unbalanced calculation than the denial of offsets when using the average-to-average comparison methodology because the transaction-to-transaction comparisons would eliminate any impact of non-dumped sales.

Other commentors argue that the transaction-to-transaction comparison methodology with the denial of offsets should become the Department's standard methodology in antidumping investigations. These commentors note that the use of the transaction-to-transaction comparison methodology is permitted by statute. The Department has used this methodology recently in the Section 129 determination in *Certain Softwood Lumber Products from Canada*, and a WTO panel upheld its application. Any concerns over the complexity of applying the transaction-to-transaction comparison methodology are alleviated by technological advances that ease the burden of matching a single normal value transaction to a single export transaction.

Some commentors argue that the Department itself has not proposed any change

in methodology other than providing for offsets when engaging in average-to-average comparisons. According to these commentors, the Department cannot adopt a new comparison methodology without fulfilling the applicable notice and comment requirements of both section 123(g) of the URAA and the Administrative Procedures Act.

Department's Position: While the statute itself does not provide for a preference between the use of the average-to-average and transaction-to-transaction comparison methodologies in an antidumping investigation, the Department is mindful of the preference expressed in the SAA and in the Department's regulations for the use of average-to-average comparisons in investigations. See SAA at 842-43; 19 CFR 351.414(c)(1). Thus, we agree with those commentors that indicated that altering this preference would, at a minimum, require a change in regulation. Although the Department is not proposing a change of regulation at this time, the transaction-to-transaction methodology remains available to be used in appropriate situations.

Providing Offsets in All Types of Proceedings

Several commentors argue that the Department should provide offsets, not only when using the average-to-average comparison methodology in an antidumping investigation, but in all types of antidumping proceedings. These commentors contend that the denial of offsets violates overarching principles of fairness embodied in the WTO agreements. The distortion and inherent bias stemming from the denial of offsets apply equally to administrative reviews as they do to investigations. Moreover, this change

would be simple to execute, as it would only require the deletion of a single line from the Department's standard computer programs.

Other commentors note that the finding of the WTO panel was narrow. The panel did not find that the denial of offsets in administrative reviews was inconsistent with the Antidumping Agreement, only that the Department's denial of offsets in certain investigations, when using the average-to-average comparison methodology, was inconsistent with the Antidumping Agreement. Moreover, if the Department were to provide offsets in other proceedings, it would need to provide a specific proposal and solicit further comments.

One commentor urges the Department to propose regulations to implement the targeted dumping provision of the Act. These regulations should specify that the Department will act whenever an interested party has demonstrated that targeted dumping is occurring, and should establish a threshold of when the price differences are significant enough to trigger the targeted dumping analysis.

Department's Position: In its March 6, 2006 Federal Register notice, the Department proposed only that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding.

Adopting a Change During the Negotiation of the Doha Round

Several commentors argue that the Department should not adopt a change with respect to offsets while the Doha Round of negotiations is still underway. According to these commentors, Congress gave explicit negotiation instructions to defend the denial of offsets. Thus, the Department should not adopt a change and provide for offsets while the issue is still being negotiated.

Department's Position: The Department is conducting this exercise pursuant to the procedures specifically established by section 123 of the URAA. This exercise is necessary to implement the panel report in *US – Zeroing (EC)* within the reasonable period of time negotiated by the United States. Notwithstanding this determination, the Department will continue to work closely with United States Trade Representative to pursue the negotiating objectives of the United States in the Doha Round.

Whether the Department Should Change Its Methodology as it Applies to Constructed Value and Non-Market Economies

One commentor argues that the WTO panel report did not address the denial of offsets when the Department compares constructed value to export price, or when the Department engages in a non-market economy analysis. Accordingly, the Department should continue to deny offsets in these two situations.

Department's Position: The Department has declined to adopt this suggestion. As stated above, when the Department engages in an average-to-average comparison, it divides the sales of the subject merchandise into "averaging groups." These averaging

groups usually consist of identical or virtually identical merchandise sold at the same level of trade. 19 CFR 351.414(d)(2). The Department then calculates a weighted-average of the export prices or constructed export prices of the sales included in the averaging group, and compares that to the weighted-average of the normal values of such sales. 19 CFR 351.414(d)(1).

The use of constructed value and the factors of production methodology concerns the manner by which the Department calculates the average normal value in the average-to-average comparisons.

For example, the Department bases its calculation of normal value on constructed value "where home market sales of the merchandise in question are either nonexistent, in inadequate numbers, or inappropriate to serve as a benchmark for a fair price, such as where sales are disregarded because they are sold at below-cost prices." SAA at 839. Constructed value is calculated on a control number-specific basis, and compared to the average export price of the corresponding averaging group.

Similarly, pursuant to section 773(c) of the Act, when an investigation involves a non-market economy country, the Department calculates normal value based on the factors of production methodology. Under this methodology, in an investigation the Department calculates a control number-specific normal value and compares it to the average export price for the corresponding averaging group.

Whether normal value is based on home market sales, third country sales, constructed value, or the factors of production methodology does not alter the manner in which the comparison is made between the weighted-average export price and the

weighted-average normal value or the manner in which those results are aggregated in an investigation. Thus, if the Department is to provide offsets for non-dumped sales when utilizing the average-to-average comparison methodology in an antidumping investigation, there is no basis for treating investigations involving constructed value or the factors of production methodology that also utilize the average-to-average comparison methodology in a different manner.

Whether Implementation Should Apply to On-Going Investigations

Some commentors argue that if the Department provides offsets when using the average-to-average comparison methodology during an antidumping investigation, this change should apply to all pending proceedings. These commentors argue that when a U.S. court announces a new interpretation of a statute it would apply to all pending cases. Failing to do so would create unequal justice, and, according to these commentors, would be a deliberate and purposeful violation of the WTO Antidumping Agreement.

Other commentors note that there is no precedent for a retroactive implementation of a WTO dispute settlement report. Rather, sections 123 and 129 of the URAA, which govern implementation, set forth a specific effective date.

Department's Position: In the March 6, 2006 Federal Register notice, the Department stated:

> Any changes in methodology will be applied in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the

new weighted average dumping margin calculation methodology.

71 FR at 11189.

Section 123(g)(2) of the URAA provides that a final modification may not go into effect before the end of the 60-day period after the consultations described in section 123(g)(1)(E) begin, unless the President determines that an earlier effective date is in the national interest. While the statute establishes the manner of determining the effective date of any final modification adopted pursuant to section 123, the statute does not specify whether the final modification must apply only to new segments of proceedings initiated after the effective date, or may apply to any segments pending as of the effective date.

The SAA does not provide any more specific guidance regarding the application of any final modification adopted pursuant to section 123. The SAA states that section 129 determinations will apply only with respect to entries occurring on or after the effective date. SAA at 1026. However, the SAA makes no such statement with respect to section 123 modifications. The SAA merely states, "A final rule may not go into effect before the end of the 60-day consultation period unless the President determines that an earlier date is in the national interest." SAA at 1021.

In the prior four section 123 proceedings, the Department has applied the final modification or final rule to segments initiated after the effective date. See, e.g., Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 FR 62061 (October 28, 2005) (applying amended regulations to sunset reviews initiated on or after the effective date); Notice of Final

Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125, 37138 (June 23, 2003) (applying new privatization methodology to investigations and reviews initiated on or after the effective date); Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 69186, 69197 (November 15, 2002) ("Arm's Length Test") (applying new methodology to investigations and reviews initiated on or after the effective date); Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 64 FR 51236 (September 22, 1999). However, on occasion the Department has adopted and applied a change in policy involving a statutory interpretation to all segments pending as of the date of the change. See, e.g., Basis for Normal Value When Foreign Market Sales Are Below Cost, Policy Bulletin 98.1 (February 23, 1998); Treatment of Inventory Carrying Cost in Constructed Value, Policy Bulletin 94.1 (March 25, 1994).

In the section 123 proceeding concerning the Arm's Length Test, the Department found it significant that section 123 uses the term "go into effect." 67 FR at 69196. Thus, the Department noted that section 123 does not preclude applying the change so as to affect entries made prior to the announcement of the change. Id.

After careful consideration of the arguments presented by the commentors and of the information needed to implement this change, and weighing the administrative burdens, the Department has determined to apply the final modification adopted through this proceeding to all investigations pending before the Department as of the effective date.

First, in this particular instance, applying this final modification to all

investigations pending before the Department will not create any undue administrative burden on the Department. The number of pending antidumping investigations is few (i.e. there are seven ongoing antidumping investigations).

Second, applying this change will not require the Department to gather any new information in those investigations.

Third, this announcement of the Department's intention to apply this modification to all pending investigations will not prejudice any of the parties to those proceedings. All of the currently pending investigations were initiated as a result of petitions filed after the date of publication of the Department's proposed modification. Thus, all of the interested parties in each of these investigations had notice of the Department's intention to modify the manner in which it calculates the weighted-average dumping margin when using the average-to-average comparison methodology in investigations. Moreover, even in the most advanced of the on-going investigations, there is sufficient time to permit the parties to comment on the application of this approach prior to the final determination in the investigation. In those investigations in which the Department will have reached a preliminary determination prior to the effective date of this notice, the Department will provide parties with notice and an opportunity to comment on the application of this methodology on the record of the investigation.

Timetable

The effective date of this notice is January 16, 2007, which is sixty days after the

date on which the United States Trade Representative and the Department began consultations with the appropriate congressional committees, consistent with section 123(g)(1)(E) of the URAA. This methodology will be used in implementing the findings of the WTO panel in *US – Zeroing (EC)* pursuant to section 129 of the URAA concerning the specific antidumping investigations challenged by the EC in that dispute. The Department will apply this final modification in all current and future antidumping investigations as of the effective date.

Dated: December 20, 2006

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David Spooner,
Assistant Secretary for Import Administration