

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of
Proceeding Under Section 129 of the Uruguay Round Agreements
Act: Antidumping Measures on Stainless Steel from Mexico

Summary

This memorandum addresses the sole issue raised by the parties participating in the above-referenced proceeding, whether to offset for U.S. sales that exceed normal value (NV) in administrative reviews.

Background

The Department of Commerce (the Department) issued its preliminary results in this proceeding on January 12, 2009. See Memorandum from Stephen J. Claeys to Ronald K. Lorentzen entitled “Preliminary Determination Under Section 129 of the Uruguay Round Agreements Act: Calculation of the Weighted-Average Dumping Margins for Stainless Steel Sheet and Strip in Coils from Mexico,” dated January 12, 2009 (Preliminary Results). On February 12, 2009, respondent ThyssenKrupp Mexinox S.A. de C.V. and Mexinox USA, Inc. (collectively, Mexinox) submitted a case brief to the Department. On February 23, 2009, Allegheny Ludlum Corporation, AK Steel Corporation and North American Stainless (collectively, petitioners) filed a rebuttal brief.

Discussion of the Issue

Comment 1: Whether the Department Should Recalculate Margins in Eight Administrative Reviews

Mexinox states the Department proclaimed in the Preliminary Results that it intended to implement the findings of the World Trade Organization (WTO) Dispute Settlement Body (DSB) in United States – Final Anti-Dumping Measures on Stainless Steel from Mexico

(WT/DS344) (May 20, 2008) (US-Zeroing (Mexico)). While the Department recalculated the weighted-average dumping margin for Mexinox and the all-others rate from the original investigation of stainless steel sheet and strip in coils (stainless steel) from Mexico in the Preliminary Results, Mexinox contends this recalculation does not render the Department's actions consistent with the findings in US-Zeroing (Mexico) in accordance with its statutory obligations under section 129 of the Uruguay Round Agreements Act (URAA).

Mexinox asserts that in United States - Final Anti-dumping Measures on Stainless Steel from Mexico (WT/DS344/AB/R) (Appellate Body Report), the Appellate Body found "zeroing" in administrative reviews to be "as such" inconsistent with Article VI:2 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 9.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement). See Letter from Hogan & Hartson to Secretary of Commerce, Mexinox Case Brief, at 4-5 (February 12, 2009) (Mexinox Case Brief), citing Appellate Body Report at para. 102, 133 and 134. Based on this "as such" determination, Mexinox states the Appellate Body also found the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement in the five administrative reviews at issue in US-Zeroing (Mexico) (i.e., the first through fifth administrative reviews) by employing "zeroing" in those reviews. See Mexinox Case Brief at 5, citing Appellate Body Report at para. 139.

Mexinox argues the term "particular proceeding" in section 129(b)(2) of the URAA must be interpreted to refer to the whole antidumping proceeding regarding stainless steel from Mexico, not just a single segment of the proceeding such as the original investigation or a particular administrative review. Mexinox contends the term "proceeding" is defined in section 129(b)(1) of the URAA as a "proceeding under title VII of the Tariff Act of 1930" and the Department's regulations at 19 CFR 351.102(40) clarify that such a proceeding is a single, continuous antidumping proceeding inclusive of an investigation and all ensuing administrative reviews. Referring to 19 CFR 351.102(47), Mexinox claims the definition of the term "segment of a proceeding" further supports the idea that a "proceeding" is a single, continuous antidumping proceeding, as this regulation states an antidumping or countervailing duty investigation would constitute a "segment of a proceeding." Based on these definitions, Mexinox maintains the Department clearly distinguishes between a "proceeding" and a "segment of a proceeding," and therefore the Department's recalculation of the margin from a single segment – the investigation – cannot render the Preliminary Results consistent with the findings in US-Zeroing (Mexico). Mexinox asserts that in order for the Department to render its actions consistent with the findings in US-Zeroing (Mexico) and to meet its statutory obligation under section 129(b)(2) of the URAA, the Department must recalculate the margins from the first through fifth administrative reviews without "zeroing" in addition to recalculating the margins from the investigation without "zeroing."¹

Moreover, Mexinox argues recent WTO decisions support the idea that a "proceeding" is a single, continuous antidumping proceeding consisting of multiple segments. Mexinox cites

¹ Mexinox adds the Department also has an obligation to terminate its "generally applicable policy of applying zeroing in administrative reviews" by the end of the Reasonable Period of Time stipulated by the WTO Article 21.3 arbitration award, but notes section 129 of the URAA does not govern that step. Mexinox Case Brief at 8, footnote 22.

United States – Continued Existence and Application of Zeroing Methodology

(WT/DS350/AB/R) (February 4, 2009) (US – Zeroing (EC II)), claiming the Appellate Body found the use of zeroing in administrative reviews subsequent to reviews specifically involved in the WTO dispute settlement process can be contested before the WTO. See Mexinox Case Brief at 10, citing US – Zeroing (EC II) at para. 181 and 185. In order to be consistent with the findings in US-Zeroing (Mexico) and to comply with section 129(b)(2) of the URAA, Mexinox avers the Department must recalculate the margins in all completed administrative reviews. Mexinox contends this includes the sixth, seventh, and eighth administrative reviews of stainless steel from Mexico, since these administrative reviews are related to the administrative reviews at issue in US-Zeroing (Mexico) and are part of the same continuous proceeding.

Where the WTO has found the United States’ use of zeroing in administrative reviews to be “as applied” inconsistent with terms of the WTO agreements, Mexinox asserts the United States has argued it is not obligated to recalculate the margins because those reviews and the resultant cash deposit rates were superseded by the results of later administrative reviews. See Mexinox Case Brief at 11, citing United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), (WT/DS294/RW) (December 17, 2008) at para. 5.105. Mexinox insists the United States’ stance is erroneous and should not be used to excuse the Department from recalculating the margins in all completed administrative reviews at issue in this proceeding. Mexinox contends the first through eighth administrative reviews have not been superseded by later administrative reviews and still have continuing legal effect. Although the related entries may be liquidated and the cash deposit rates may no longer be in effect, Mexinox maintains the margins computed in those eight reviews may be used to establish whether revocation of the antidumping duty order based on absence of dumping is appropriate under 19 CFR 351.222(b) or to determine the likelihood of continuation or recurrence of dumping in a sunset review under section 751(c) of the Tariff Act of 1930, as amended (the Act). Mexinox argues that in Hylsa S.A. de C.V. v. United States, 469 F.Supp.2d 1341, 1345 (CIT 2007), the U.S. Court of International Trade held the liquidation of entries did not invalidate a dispute over the dumping margin calculated in an administrative review where an amended margin could affect the outcome of a request for revocation or sunset review. Mexinox asserts it requested revocation of the antidumping duty order in the seventh administrative review based on dumping margins calculated without “zeroing” in the fifth, sixth and seventh administrative reviews, and that its request for revocation is now on appeal before a North American Free Trade Agreement panel in Stainless Steel Sheet and Strip in Coils from Mexico, Secretariat File No. USA-MEX-2008-1904-01.

Petitioners respond the Department has completed the only task at issue in this proceeding, that of recalculating the margins from the original investigation of stainless steel from Mexico. As a result, petitioners assert Mexinox’s entire argument is beyond the scope of this proceeding and should not be considered for the Department’s final determination.

If, however, the Department does not disregard Mexinox’s argument as being outside the scope of this proceeding, petitioners urge the Department to dispense with this argument from a legal standpoint. Citing Wooden Bedroom Furniture from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review, 73 FR 49162 (August 20, 2008) (Bedroom Furniture from the PRC) and accompanying Issues and Decision

Memorandum at Comment 4, petitioners contend the Department recently rejected the same fundamental arguments raised by Mexinox. See Letter from Kelley Drye & Warren to Secretary of Commerce, Petitioners' Rebuttal Brief, at 2-4 (February 23, 2009) (Petitioners' Rebuttal Brief). Petitioners also cite SKF USA, Inc. v. United States, Appeal No. 2007-1502 (Fed. Cir. Aug. 25, 2008), Koyo Seiko Co. v. United States, 543 U.S. 976 (2004), Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005) (Corus Staal), Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken) and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722, 77724 (December 27, 2006) (Final Modification). Petitioners argue the Department has rejected Mexinox's argument on this issue in the past, and since Mexinox has not provided any basis in this proceeding for changing the position expressed in Bedroom Furniture from the PRC or in prior reviews, Mexinox's request should be denied.

Petitioners contend the Department's duty is to interpret the U.S. antidumping statute, which is distinct from the WTO Antidumping Agreement, and that this often requires the Department to fill gaps Congress has either intentionally or inadvertently left in the statute. Petitioners maintain the courts have long recognized the Department's interpretation and application of the statute is given special deference, citing Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983). Petitioners assert the Department has acknowledged the statute is effectuated best when negative dumping margins are not permitted to offset positive dumping margins.

Petitioners argue it is not the Department's responsibility to interpret and apply WTO agreements or decisions, as section 123(g) of the URAA provides that WTO decisions can only be implemented after consultations between Congress, the affected agency and the United States Trade Representative (USTR) and an opportunity for public comment. In conclusion, petitioners contend the Department should interpret the antidumping law based on "its own assessment of the purposes and goals of the statute" as the courts have consistently held, rather than assenting to WTO panels' and the Appellate Body's interpretations of the WTO Antidumping Agreement. See Petitioners' Rebuttal Brief at 5.

Department's Position:

We agree with petitioners that Mexinox's request to recalculate margins in eight administrative reviews is beyond the scope of this section 129 proceeding. This section 129 proceeding addresses a specific determination in the original investigation of stainless steel from Mexico and is not intended to address any other determinations. The authority to decide whether, how, and in what manner to address a WTO dispute settlement report belongs to the political branches. In Corus Staal, the U.S. Court of Appeals for the Federal Circuit recognized that Congress has authorized the USTR, in consultation with various congressional and executive bodies and agencies, "to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation." See Corus Staal, 395 F.3d. at 1349 (citing sections 123(f) and (g) and section 129 of the URAA). Accordingly, the extent and scope of any section 129 proceeding is within the sole prerogative of the political branches. Here, the political branches initiated this section 129 proceeding to render one specific action, namely the determination in the original investigation of stainless steel from Mexico, not inconsistent with a WTO dispute settlement report. Any other determinations, including those in various

administrative reviews, are beyond the scope of this section 129 proceeding.

In arguing that section 129 requires the Department to modify every administrative review that occurred in the context of the antidumping duty order of stainless steel from Mexico, Mexinox misconstrues the relevant statutory language in section 129 of the URAA. Although we agree that as a general matter the term “proceeding” has a distinct meaning from the term “segment of proceeding,” section 129 does not use the term “proceeding” in the manner advocated by Mexinox.

Section 129 uses the term “proceeding” to provide a context in which a particular “action” or “determination” occurs. Specifically, section 129(b)(1) of the URAA provides that:

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(Emphasis added).

Section 129(b)(2) of the URAA further provides that the Department “shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the {Department’s} action ... not inconsistent with the findings of the panel or the Appellate Body.” *Id.* (emphasis added). A determination that renders a specific action not inconsistent with dispute settlement findings does not fail to be “in connection with the particular proceeding” simply because the determination does not address every segment of a proceeding or every finding of the dispute settlement report. Indeed, the instant determination renders the Department’s determination in the less-than-fair-value investigation of stainless steel from Mexico “not inconsistent with” the findings of the panel and Appellate Body. As such, it is indisputably “in connection with” the antidumping proceeding on stainless steel from Mexico.

The Statement of Administrative Action accompanying the URAA (SAA), H.R. Doc. No. 103-316, Vol. 1 (1994), at 1022, reprinted in 1994 U.S.C.C.A.N. 3773 explains that:

Section 129 ... establishes a procedure by which the Administration may obtain advice it requires to determine its response to an adverse WTO panel or Appellate Body report concerning U.S. obligations under the Agreement on Safeguards, Antidumping, or Subsidies and Countervailing Measures. Section 129 also establishes a mechanism that permits the {Department}... to issue a second determination, where such action is appropriate, to respond to the recommendations in a WTO panel or Appellate Body report.

As the SAA makes clear, the decision to implement an adverse finding by a WTO panel or

Appellate Body report is a political one. The USTR first consults with the Department before deciding on how to respond to such an adverse report. In addition, the USTR may hold consultations with the appropriate congressional committees. After contemplating the views of the Department and the congressional committees, the USTR may direct the Department to make a new determination that is not inconsistent with the recommendations in the WTO panel or Appellate Body report, and then may direct the Department to implement that determination.

In section 129(b)(1) of the URAA, the term “action” may denote a particular determination that occurs in the context of a particular segment of a proceeding. The language of the SAA clarifies that “action” to be rendered “not inconsistent” may be a particular determination made in a particular segment of a proceeding. The SAA states:

Implementation of an adverse WTO report under subsection 129(b) is a two-step process. First, the Trade Representative would direct Commerce to make a new determination. Second, the Trade Representative may direct Commerce to implement that determination. If the Trade Representative directs Commerce to implement the second determination, Commerce may do so even if litigation is pending with respect to the initial agency determination.

See SAA at 1025 (emphasis added). The SAA refers to a “second determination” that essentially replaces the “initial agency determination” even if litigation is pending with respect to the initial determination. Such an “initial agency determination” would take place in a particular segment of a proceeding, such as an investigation, a specific administrative review, or other type of review. Each such segment-specific determination is reviewable by courts under section 516A of the Act. Thus, the SAA makes it clear that section 129 allows the Department to address a segment-specific determination in a section 129 determination, which is exactly what the Department has done here.

After consulting with the Department on the findings in the Appellate Body Report, the USTR issued a written request to the Department on December 8, 2008. In its request, the USTR expressly directed the Department to issue a determination with respect to the antidumping duty investigation of stainless steel from Mexico so as to render that determination not inconsistent with the finding of the DSB in US-Zeroing (Mexico). See Letter from USTR to Secretary of Commerce, dated December 8, 2008. Thus, the written request makes it clear that under this section 129 determination, the Department is required to issue a determination with respect to a particular action, which in this case is the Department’s determination in the investigation of stainless steel from Mexico. The letter does not reference any other agency determinations. In accordance with the USTR’s request, and as noted in the Preliminary Results, we recalculated the weighted-average dumping margins at issue in the antidumping duty investigation of stainless steel from Mexico by applying the calculation methodology described in the Final Modification.

Because the eight administrative reviews referenced by Mexinox are outside the scope of this section 129 determination, we do not need to reach the merits of Mexinox’s remaining contentions. Nor do we need to reach the issue of whether section 129 provides the Department with authority to recalculate margins in the past administrative reviews where all entries have

been liquidated and in administrative reviews that were not identified among challenged measures in the relevant WTO proceeding and the Appellate Body Report.

In conclusion, we note that no party commented regarding the margins that we calculated in the Preliminary Results for the investigation of stainless steel from Mexico. Accordingly, we adopt these margins for these final results.

Final Antidumping Margins

The recalculated margins, unchanged from the Preliminary Results, are as follows:

<u>Manufacturer/Exporter</u>	<u>Weighted-Average Margin</u>
ThyssenKrupp Mexinox S.A. de C.V.	30.69 percent
All Others	30.69 percent

Recommendation

We recommend this determination, which will render our original determination in the investigation of stainless steel from Mexico not inconsistent with the findings of the WTO dispute settlement panel and Appellate Body by applying the methodology in the Final Modification. We further recommend adopting the above-referenced recalculated weighted-average dumping margins.

Agree_____ Disagree_____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

Date