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David Spooner
Assistant Secretary for Import Administration
Attention: Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Attention: Weighted Average Dumping Margin

Dear Assistant Secretary Spooner:

On behalf of United States Steel Corporation ("U.S. Steel") and pursuant to the Department's March 6, 2006 request for comments,[1] we hereby submit rebuttal comments regarding the Department's proposal to no longer calculate dumping margins in antidumping investigations using average-to-average comparisons without applying offsets for non-dumped comparisons.

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[1] See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (Dep't Commerce Mar. 6, 2006) (request for comments) ("Request for Comments"). In a subsequent notice, the Department extended the deadline for submitting rebuttal comments to May 4, 2006. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 23898 (Dep't Commerce Apr. 25, 2006) (extension of rebuttal comment period).

I. Introduction

In comments submitted on April 5, 2006, several parties have expressed their support for the Department's proposed change and, in fact, have argued that the Department should go even farther in applying offsets for non-dumped comparisons in all antidumping investigations, administrative reviews, sunset reviews, and changed circumstances reviews.[2] There is no basis for any of these arguments.

Indeed, as established in U.S. Steel's April 5, 2006 comments and as further demonstrated below, the U.S. statute requires the Department not to apply offsets for non-dumped sales when calculating a company's dumping margin. As a result, the Department may not change its margin calculation methodology so as to apply offsets for non-dumped sales in any

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[2] See Comments of the American Institute for International Steel (Apr. 3, 2006) ("AIIS Comments") at 1; Comments of Baker Hostetler on behalf of the Ontario Forest Industries Ass'n, et al. (Apr. 5, 2006) ("Canadian Lumber Comments") at 2-3, 7; Comments of the Consuming Industries Trade Action Coalition (Apr. 5, 2006) ("CITAC Comments") at 3, 7; Comments of the Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People's Republic of China (Apr. 5, 2006) ("BOFT Comments"); Comments of the Chinese National Federation of Industries at 2-3; Comments of the Gov't of Chile at 1; Comments of the Gov't of Japan (Apr. 4, 2006) ("Gov't of Japan Comments") at 1-3; Comments of Willkie Farr & Gallagher on behalf of Royal Thai Gov't (Apr. 5, 2006) ("RTG Comments") at 1-2; Comments of the Gov't of the Republic of Korea ("Gov't of Korea Comments") at 2; Comments of Sidley Austin LLP on behalf of the Japan Bearing Industrial Ass'n (Apr. 5, 2006) ("JBIA Comments") at 2; Comments of the Camara Nacional de Acuacultura (National Chamber of Aquaculture) of Ecuador (Apr. 5, 2006) ("Ecuador Chamber of Aquaculture Comments") at 1; Comments of Willkie Farr & Gallagher LLP on behalf of Yamaha Motor Co., Ltd. and Yamaha Motor Corp., USA (Apr. 5, 2006) ("Yamaha Comments") at 2, 8-9; Comments of Willkie Farr & Gallagher LLP on behalf of the Japan Iron & Steel Federation (Apr. 5, 2006) ("JISF Comments") at 2, 4 n.5, 11.

segment of an antidumping proceeding unless and until Congress amends the statute. Any comments to the contrary must be rejected.

II. The U.S. Statute and the Corresponding Provisions of the WTO Anti-Dumping Agreement Mandate the Denial of Offsets for Non-Dumped Sales

Several parties have submitted comments arguing that the Department's proposed change to apply offsets for non-dumped sales is warranted by either the U.S. statute or the WTO Anti-Dumping Agreement (the "AD Agreement"), or both. In fact, they contend that the Department should apply offsets for non-dumped sales not only in investigations involving average-to-average comparisons, but in all antidumping proceedings. Each of these contentions is flatly wrong and must be rejected. As established below, the U.S. statute and, for that matter, the corresponding provisions of the AD Agreement require the Department not to apply offsets for non-dumped sales in calculating a company's dumping margin in any antidumping proceeding.

Relying primarily on the decisions issued by the U.S. Court of Appeals for the Federal Circuit in Timken Co. v. United States ("Timken") and Corus Staal BV v. Dep't of Commerce ("Corus Staal"), certain commenters argue that the Department's current methodology of not applying offsets for non-dumped sales is not required by U.S. law and, therefore, that there is no legal impediment to the Department changing its methodology so as to apply such

offsets.[3] In addition, several of these commenters argue that the use of offsetting is not only permitted by the U.S. statute, but is the most appropriate and reasonable interpretation of the statute.[4] According to these commenters, the only lawful approach that can be adopted by the Department for antidumping investigations is the continuation of the average-to-average comparison methodology with the use of offsets.[5] However, not only is this not the only lawful approach, it is actually unlawful. This approach would violate the plain meaning of the statute as well as its structure and purpose, all of which demonstrate Congress' clear intent to require the Department not to apply offsets for non-dumped sales.

It is true, as the commenters in question contend, that the Federal Circuit did not find the denial of offsets for non-dumped sales to be required by the U.S. statute in either Timken or Corus Staal. However, this was based solely on the statutory definitions of "dumping margin" and "weighted average dumping margin" in 19 U.S.C. §§ 1677(35)(A) and (B). And even based solely on those statutory definitions, the Federal Circuit determined in Timken that it was a

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3 See Canadian Lumber Comments at 1-2; CITAC Comments at 8; BOFT Comments at 2, 5-6; Comments of Hunton & Williams on behalf of Dofasco Inc. (Apr. 5, 2006) at 6-7; Comments of the Gov't of Canada (Apr. 5, 2006) at 2-3; JBIA Comments at 2 n.2; Yamaha Comments at 4; JISF Comments at 1, 4.

4 See BOFT Comments at 5-6; Yamaha Comments at 4; JISF Comments at 1, 4.

5 Canadian Lumber Comments at 8.

"close question" as to whether or not the statute mandated the denial of offsets.[6] In fact, the Federal Circuit held that the statutory definitions of dumping margin and weighted average dumping margin "at a minimum" authorized the denial of offsets.[7] The Federal Circuit then followed this holding in reaching its decision in Corus Staal.[8]

Significantly, the Federal Circuit reached the above determinations without addressing certain critical provisions of the statute beyond the statutory definitions of dumping margin and weighted average dumping margin. Once these provisions are considered, it is clear beyond a shadow of a doubt that the statute requires the denial of offsets for non-dumped sales.

The statutory provisions in question set forth the comparison methods to be used by the Department in calculating dumping margins. Specifically, 19 U.S.C. § 1677f-1(d)(1)(A) provides that in antidumping investigations without targeting dumping, the Department is to compare weighted average normal values to weighted average U.S. prices.[9] In addition, 19 U.S.C. § 1677f-1(d)(1)(B) provides that in investigations where there is targeted dumping, the Department is to compare weighted average normal values to individual U.S. transaction prices.[10]

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6 354 F.3d 1334, 1341 (Fed. Cir. 2004), cert. denied, 543 U.S. 976 (2004).

7 Id. at 1342.

8 395 F.3d 1343 (Fed. Cir. 2005), cert. denied, ___ U.S. ___, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (2006).

9 19 U.S.C. § 1677f-1(d)(1)(A) (2000).

10 Id. § 1677f-1(d)(1)(B).

Furthermore, 19 U.S.C. § 1677f-1(d)(2) provides that in administrative reviews, the Department is to compare weighted average normal values to individual U.S. transaction prices. As these provisions clearly show, it was essential to Congress that a particular comparison method be used to calculate dumping margins (i.e., either comparing normal values to weighted average U.S. prices or to individual U.S. transaction prices) depending on the circumstances of the case. These different comparison methods must have been intended by Congress to have different results.

In turn, these statutory provisions demonstrate conclusively that the denial of offsets for non-dumped sales is mandated because if offsets are applied, it does not matter which comparison method is utilized – the end result will always be the same. For example, if offsetting is used in an investigation without targeted dumping, the Department will get the same weighted average dumping margin regardless of whether it compares normal value to weighted average U.S. prices or to individual U.S. transaction prices. The same holds true for investigations with targeted dumping and administrative reviews. If offsetting is used, it makes no difference which of the two comparison methods is used to calculate the weighted average dumping margin – the end result will always be the same.

As shown in U.S. Steel's April 5, 2006 comments, this principle can be established to an absolute mathematical certainty.[11] If offsets for non-dumped sales are applied, it

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[11] See Comments of Skadden, Arps, Slate, Meagher & Flom LLP on behalf of U.S. Steel (continued...)

makes no difference if the Department compares normal value to weighted average U.S. prices or to individual U.S. transaction prices. Under both comparison methods, all positive margins will be completely offset by all negative margins. Therefore, it does not matter which method is used – the end results will be identical. This principle has not been and cannot be disputed.

Clearly, it would have been pointless for Congress to provide for different comparison methods to be used in 19 U.S.C. § 1677f-1(d) depending on the circumstances of the case if the same result would be achieved no matter which comparison method is used. This undisputed and undeniable fact demonstrates once and for all that Congress intended for the Department not to offset dumping margins with non-dumped sales. It is the only way that the comparison methods that Congress provided for make sense. Because a statute may not be interpreted so as to render meaningless even a single word or phrase, the different comparison methods that Congress provided for in 19 U.S.C. § 1677f-1(d) must be given effect.[12] The only way to do this is to deny the use of offsetting. In other words, the statute does not merely authorize the denial of offsets for non-dumped sales; it requires it. Accordingly, the Department may not offset dumping margins with non-dumped sales in any antidumping proceeding without a change in the statute.

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11 (...continued)
(Apr. 5, 2006) at 6-9, Figures 1 and 2, Exhibit 1.

12 See TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001); Duncan v. Walker, 533 U.S. 167, 174 (2001); Ishida v. United States, 59 F.3d 1224, 1230 (Fed. Cir. 1995).

Although certain commenters argue that the provisions of the AD Agreement mandate that the Department apply offsets in calculating a company's dumping margin,[13] the same principle established above with respect to the U.S. statute applies with equal force to the Agreement. In fact, like 19 U.S.C. § 1677f-1(d), the only purpose of Article 2.4.2 of the AD Agreement is to specify when weighted-average and transaction-specific export prices are to be used in calculating a company's dumping margin under the circumstances in a particular case. Because the sole purpose of Article 2.4.2 is to specify when the different comparison methods are to be used, that provision would have absolutely no meaning if the result using either method is always the same. Plainly, the drafters of the AD Agreement intended the different comparison methods to have different results and requiring the use of offsetting would contravene and defeat that intent. An interpretation of the AD Agreement that would render Article 2.4.2 superfluous simply is not permissible and must be rejected.[14]

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13 See Canadian Lumber Comments at 3-7; RTG Comments at 2-3; Comments of Kaye Scholer LLP on behalf of the Korea Iron & Steel Ass'n (Apr. 5, 2006) at 5-8; Ecuador Chamber of Aquaculture Comments") at 9, 11-13; Yamaha Comments at 3-4, 9-10; JISF Comments at 3-4, 11-12.

14 See *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996, p. 23; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996, p. 12; *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted Feb. 25, 1997, p. 16; *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted Oct. 1, 2002, para. 7.277.

Indeed, the United States and two separate WTO Panels have now expressly recognized the truth of this principle in conjunction with their analyses of the applicable provisions of the AD Agreement.[15] The United States argued before both the WTO Panel and the Appellate Body in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*United States – Zeroing*") that if offsets were required, the margin results of the average-to-average methodology and the average-to-transaction methodology would, as a matter of mathematics, be identical.[16] In particular, the United States argued before the Appellate Body that

> regardless of the rationale, if offsets were required based on some generally applicable provision of the AD Agreement, the overall dumping margin calculated for an exporter under either the average-to-average method or the average-to-transaction method must, mathematically, be the same. The reason for this equivalence is that, if offsets are required, then all non-dumped sales (*i.e.*, negative values) will offset the dumping found on all of the dumped sales (*i.e.*, positive

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15 See Report of the Panel, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, circulated Oct. 31, 2005 ("Panel Report in *United States – Zeroing*"), para. 7.266; Report of the Panel, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW, circulated Apr. 3, 2006, at para. 5.33; Opening Statement of the United States at the First Substantive Meeting of the Panel in *United States – Zeroing* (Mar. 16, 2005) ("U.S. Opening Statement in *United States – Zeroing*") at 5, para. 13; Appellee Submission of the United States of America in *United States – Zeroing* (Feb. 13, 2006) ("U.S. Appellee Brief in *United States – Zeroing*") at 69-73, paras. 143-150.

16 U.S. Opening Statement in *United States – Zeroing* at 5, para. 13; U.S. Appellee Brief in *United States – Zeroing* at 70-71, para. 146.

> values). In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.[17]

Moreover, the WTO Panel in *United States – Zeroing* relied on this principle in declining to require the use of offsets in administrative reviews. The Panel found that if offsetting was to be required in all circumstances, "the alternative asymmetrical comparison {(i.e., the weighted average normal value to individual U.S. transaction price)} methodology would as a matter of mathematics produce a result that was *identical* to that of the first, average-to-average, methodology."[18] The Panel further found that it could not interpret the AD Agreement in a manner that would render the different comparison methodologies meaningless.[19]

The decision issued by the WTO Appellate Body on April 18, 2006 in *United States – Zeroing* is not to the contrary. Despite the United States' argument regarding this principle and the fact that this principle was a primary basis for the WTO Panel's decision upholding the denial of offsets in administrative reviews, the Appellate Body noted the United States' argument in one sentence in its 105-page report.[20] It then simply and inexplicably chose

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17 U.S. Appellee Brief in *United States – Zeroing* at 70-71, para. 146 (emphasis added).

18 See Panel Report in *United States – Zeroing* at para. 7.266 (underscoring added) (italics in original).

19 Id.

20 See Report of the Appellate Body, *United States – Zeroing*, WT/DS294/AB/R, circulated Apr. 18, 2006, at para. 145.

to ignore it.[21] Thus, nothing in the Appellate Body's decision undermines or even addresses this principle. The principle remains undisputed and should mandate the denial of offsets.

As a final matter, one commenter, the European Confederation of Iron and Steel Industries ("Eurofer"), recognizes an exception to the rule purportedly requiring the offsetting of dumping margins with non-dumped sales. According to Eurofer, the "sole and limited exception to this rule" is for investigations involving targeted dumping.[22] Eurofer contends that in such investigations, the U.S. statute and the AD Agreement permit the Department not to apply offsets.[23] In theory, if the Department did not apply offsets in investigations involving targeted dumping, as Eurofer suggests, this would achieve a different margin result than a normal investigation using average-to-average comparisons and applying offsets for non-dumped sales.

However, there simply is no basis for Eurofer's contentions in either the U.S. statute or the AD Agreement. Indeed, nothing in either the statute or the AD Agreement suggests, in any way, that offsetting is required generally in antidumping proceedings, but not in investigations involving targeted dumping. In other words, Eurofer is seeking to read into the statute and the AD Agreement a rule and an exception to that rule that do not exist anywhere in their provisions. If Congress or the drafters of the AD Agreement had intended to provide for

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21 See id.

22 Comments of the European Confederation of Iron and Steel Industries (Apr. 5, 2006) ("Eurofer Comments") at 2 and n.1.

23 See id.

this rule and an exception to the rule for investigations involving targeted dumping, it would have been necessary to do so somewhere in the statute or the Agreement. There is no such provision in either. Given this fact, the only logical and, in fact, possible interpretation of the applicable provisions of the U.S. statute and the AD Agreement that would give effect to those provisions is that offsetting may not be used for any of the margin calculation methodologies used in any segment of an antidumping proceeding.

In sum, if offsetting is not employed, the provisions of 19 U.S.C. § 1677f-1(d) and Article 2.4.2 of the AD Agreement have consequence and practical effect. If offsetting is employed, these provisions are devoid of meaning and superfluous. Therefore, the provisions of the statute and the AD Agreement themselves make clear that Congress and the drafters of the AD Agreement both intended to preclude the use of offsetting in all antidumping proceedings. No party has shown or can show to the contrary.

III. The Assertions Made Regarding the Inaccuracy and Unfairness of the Department's Current Margin Calculation Methodology Are Devoid of Merit

As established above, the commenters urging the use of offsetting in antidumping proceedings conducted by the Department ignore the basic requirements of the U.S. statute and the corresponding provisions of the AD Agreement. These commenters also make assertions regarding the effects of the Department's current margin calculation methodology that simply have no basis in fact. Accordingly, the comments in question should be rejected on this basis as well.

Several commenters argue that the Department's failure to offset dumping margins with non-dumped sales in its current margin calculation methodology introduces a distortion and inherent bias into the calculation of a company's dumping margin.[24] They contend that this methodology creates inflated dumping margins that are "inherently inaccurate"[25] and that "stack the deck" against imported products.[26] On this basis, the commenters in question argue that the Department's practice of not applying offsets for non-dumped sales violates "overarching principles of fairness" and should, therefore, be eliminated in all antidumping proceedings.[27] Each of these contentions is devoid of merit and should be rejected.

As an initial, overriding matter, the notion that the clear requirements of U.S. law and the AD Agreement should be blithely ignored on the basis of these commenters' assessment of what constitutes a fairer result is simply absurd. The commenters in question have not offered any basis or support for this result. The reason for this is simple – there is none.

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24 BOFT Comments at 11; Gov't of Japan Comments at 3; RTG Comments at 7; Yamaha Comments at 8; JISF Comments at 11; Comments of the Emergency Committee for American Trade (Apr. 5, 2006) ("ECAT Comments") at 1.

25 Gov't of Korea Comments at 3.

26 ECAT Comments at 1.

27 BOFT Comments at 11; RTG Comments at 7; Yamaha Comments at 8; JISF Comments at 11; see also CITAC Comments at 2 (same); Gov't of Korea Comments at 3 (same); Eurofer Comments at 1 (same).

In any event, contrary to the comments of these parties, the Federal Circuit and the U.S. Court of International Trade have both determined that the Department's current methodology of not offsetting dumping margins with non-dumped sales produces more accurate results.[28] Indeed, as the Federal Circuit determined in Timken, the methodology of not applying offsets for non-dumped sales "legitimately combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value."[29] Clearly, the U.S. courts have determined that the commenters' arguments regarding the Department's current methodology being biased and producing distorted and inaccurate results are without merit and should be rejected. The Department should do the same here.[30]

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28 See Timken, 354 F.3d at 1343; NSK Ltd. v. United States, 358 F. Supp. 2d 1276, 1282 (Ct. Int'l Trade 2005); PAM, S.p.A. v. United States Dep't of Commerce, 365 F. Supp. 2d 1362, 1371 (Ct. Int'l Trade 2003).

29 Timken, 354 F.3d at 1343.

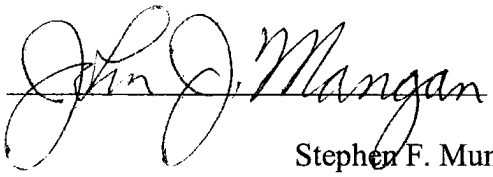
30 The Department should also reject the comments submitted by the American Institute for International Steel ("AIIS") regarding the purported effects of not applying offsets in antidumping proceedings involving steel products. AIIS claims that in antidumping proceedings involving steel products where offsetting is not used, dumping margins are calculated based entirely on sales of lower value commodity grade products because higher value products are sold at premium prices and are not dumped. See Comments of AIIS (Apr. 3, 2006) at 1-2. According to AIIS, the dumping margins calculated solely for the lower value commodity grade products are applied to the higher value products even though such higher value products purportedly were not dumped. Id. at 2. AIIS further asserts that U.S. consumers of steel products who need the higher value products then have to pay the antidumping duties because they cannot obtain those products domestically. Id. AIIS has not cited a single authority or shred of support for any one of its assertions. The fact is that there is no support for any of the assertions made by AIIS.

(continued...)

IV. Conclusion

For the foregoing reasons and the reasons stated in U.S. Steel's original comments of April 6, 2006, the U.S. statute and the corresponding provisions of the AD Agreement clearly require the Department not to apply offsets for non-dumped sales when calculating dumping margins in any segment of an antidumping proceeding, including investigations using average-to-average comparisons. Consequently, the Department may not make the change proposed in its March 6, 2006 request for comments without a change in the statute. Any comments arguing to the contrary should be rejected.

Respectfully submitted,



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On behalf of United States Steel Corporation

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30 (...continued)
They are baseless and should be summarily rejected.