Fischer S.A. Comercio, Industria and Agricultura v. United States
Court No. 10-00281 Slip Op. 12-59 (CIT April 30, 2012)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to the remand order from the U.S. Court of International Trade (the Court) in Fischer S.A. Comercio, Industria and Agricultura v. United States, Court No. 10-00281, Slip Op. 12-59 (CIT 2012) (Fischer), as clarified by, The Court's Clarification Order (CIT June 22, 2012) (Clarification Order). In its remand order, the Court directed the Department to: 1) recalculate Fischer S.A. Comercio, Industria, and Agricultura's (Fischer's) constructed value (CV) without including the "net exchange variation" account in Fischer's financial expense ratio; and 2) either reconsider its decision to apply its zeroing methodology or, alternatively, provide an explanation for the inconsistent construction of section 771(35) of the Tariff Act of 1930, as amended (the Act), in antidumping duty investigations and administrative reviews.

The Department issued draft remand results to all interested parties on July 12, 2012. See Draft Results of Redetermination Pursuant to Court Remand, July 12, 2012 (Draft Remand Redetermination). In these draft results, we recalculated Fischer's margin after revising its costs to remove the "net exchange variation" account from Fischer's financial expense ratio. We also provided an explanation regarding the Department's differing interpretations of section 771(35) of the Act in antidumping duty investigations and administrative reviews.

On July 17, 2012, we received comments on the draft results from Fischer, as well as from Florida Citrus Mutual and Citrus World, Inc. (collectively, "the petitioners"). In reviewing Fischer's comments, we discovered an error in the manner in which we implemented the order with respect to the calculation of constructed export price (CEP) profit. Therefore, on August 8, 2012, we corrected this error and provided parties an opportunity to comment on the specific changes to the CEP profit calculation. No party submitted comments on this issue.

The comments received from interested parties are addressed below. After analyzing these comments, we find that Fischer's recalculated dumping margin is 1.18 percent.

B. BACKGROUND

On April 30, 2012, the Court remanded to the Department its final results of the 2008-2009 antidumping duty administrative review of certain orange juice from Brazil. See Fischer, Slip Op. 12-59; and Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part, 75 FR 50999 (Aug. 18, 2010), and accompanying Issues and Decision Memorandum (Final Results). The period of review (POR) covers the period March 1, 2008, to February 28, 2009.

Fischer was a mandatory respondent in the 2008-2009 antidumping duty administrative review. During the review at issue, the Department: 1) continued to deny offsets to dumping based on CEPs that exceeded normal value (NV); and 2) included the amount of a net exchange variation shown on Fischer's financial statements in its financial expense ratio. Fischer argued in its administrative case brief that the Department should abandon its practice of "zeroing." In addition, Fischer argued that the exchange variation should be removed from its financial expenses because they were not actual expenses. In the final results, we disagreed with Fischer and continued to: 1) deny offsets to dumping based on CEP transactions that exceeded NV; and 2) include the exchange variation in Fischer's financial expenses. See Final Results at Comments 1 and 12.

In its decision, the Court remanded the Department's determination to use its "zeroing" methodology, directing the Department reconsider this issue in accordance with the decisions of the Court of Appeals for the Federal Circuit (CAFC) in Dongbu Steel Co. v. United States, 635 F.3d 1363, 1373 (Fed. Cir. 2011) (Dongbu); and JTEKT Corp. v. United States, 642 F.3d 1378, 1384 (Fed. Cir. 2011) (JTEKT). Furthermore, the Court held that Fischer was not exposed to currency fluctuations, and that the currency translation of its accounts to Brazilian reais for financial statement reporting purposes was not an actual expense incurred and realized by the company. As a result, the Court found that the Department's calculation of Fischer's CV violated section 773(e)(2)(A) of the Act. See Fischer, Slip Op. 12-59, at 7. Therefore, the Court stated:

> Because the inclusion of unrealized expenses is not in accordance with law, the Court remands this issue to Commerce to recalculate Fischer's constructed value in accordance with this Opinion and Order.

See Fischer, Slip Op. 12-59, at 7.

Because the Court did not appear to distinguish between the "net exchange variation" account and the "cumulative translation adjustments" account, and because the Department believed that it had not included any unrealized expenses or currency translation in CV, on June 8, 2012, we requested that the Court clarify its order to specify whether it covered all expenses recorded in Fischer's net exchange variation account. On June 22, 2012, the Court clarified that it was directing the Department to exclude the entire "net exchange variation" amount shown in Fischer's financial statements from the calculation of the financial expense ratio. See Clarification Order.

Pursuant to the Court's remand instructions, we have addressed the Court's concerns, recalculating Fischer's dumping margin after revising its costs[1] to remove the "net exchange variation" account from Fischer's financial expense ratio. Fischer's revised dumping margin is 1.18 percent. Further, we have explained the Department's differing interpretations of section 771(35) of the Act in antidumping duty investigations and administrative reviews.

C. ANALYSIS

1. Financing Expenses

Under respectful protest,[2] and pursuant to both the Court's order and its subsequent clarification, we have excluded the expenses recorded in Fischer's "net exchange variation" account from the calculation of the financial expense ratio. Further, we have recalculated Fischer's dumping margin after revising its NV; Fischer's revised dumping margin is 1.18 percent.

2. Offsetting of Negative Margins

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" (emphasis added). The definition of "dumping margin" calls for a comparison of NV and export price (EP) or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act and 19 C.F.R. 351.414 of the Department's regulations provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-

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[1] The exclusion of the net exchange variation expenses from Fischer's costs resulted in certain home market sales which "passed" the cost test. Therefore, we based NV on home market price where possible, as required by section 773(a)(1)(A) of the Act. We also used Fischer's actual home market and CEP profit data in our calculations, as required by sections 773(e)(2)(A) and 772(d)(3) of the Act.

[2] See Viraj Grp., Ltd. v. United States, 343 F.3d 1371 (Fed. Cir. 2003).

transaction, and average-to-transaction. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (averaging group).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The definition of "weighted average dumping margin" calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

The issue of "zeroing" versus "offsetting" involves how certain results of comparisons are treated in the aggregation of the numerator for the "weighted average dumping margin" and relates back to the ambiguity in the word "exceeds" as used in the definition of "dumping margin" in section 771(35)(A) of the Act. Application of "zeroing" treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the "weighted average dumping margin." Application of "offsetting" treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the "weighted average dumping margin" to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department's interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether "zeroing" or "offsetting" is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the POR; the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between "zeroing" and "offsetting" reflects the ambiguity the CAFC has found in the word "exceeds" as used in section 771(35)(A) of the Act. See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (Timken). The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.[3] For decades the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the CAFC and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.[4] In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, i.e., to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law."[5] The CAFC explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." See Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied

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[3] See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (PAM) ("{The} gap or ambiguity in the statute requires the application of the Chevron step-two analysis and compels this court to inquire whether Commerce's methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute."); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (Bowe Passat) ("The statute is silent on the question of zeroing negative margins."); and Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) (Serampore) ("A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter's home market as having a zero percent dumping margin.").

[4] See, e.g., Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (NSK); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I); Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); Bowe Passat, 926 F. Supp. at 1149-50; and Serampore, 675 F. Supp. at 1360-61.

by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II¸502 F.3d at 1370, 1375; and NSK, 510 F.3d at 1375.

In 2005, a panel of the World Trade Organization (WTO) Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations. See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (Oct. 31, 2005) (EC-Zeroing Panel). The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in antidumping duty investigations. See EC-Zeroing Panel, WT/DS294/R. The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123). See Final Modification for Investigations, 71 FR at 77722; and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (Jun. 26, 2007) (together, Final Modification for Investigations). Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities'

[5] See Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (Mar. 17, 1986)); see also Timken, 354 F.3d at 1343; and PAM, 265 F. Supp. 2d at 1371.

arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements. See EC-Zeroing Panel at 7.284, 7.291.

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the CAFC recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance. See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F. 3d 928, 934 (Fed. Cir. 2010). Moreover, in Corus I, the CAFC acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations. See Corus I, 395 F. 3d at 1347. In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the CAFC found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations. See Final Modification for Investigations, 71 FR at 77722. With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.[6] Id., 71 FR at 77724.

The CAFC subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews. See U.S. Steel Corp. v. United States, 621 F. 3d. at 1355 n.2, 1362-63 (Fed. Cir. 2010) (U.S. Steel Corp.). In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the CAFC accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations. Id., at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping). The CAFC's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type. Id., at 1361-63. The CAFC acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist. Id., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section

[6] On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (Feb. 14, 2012) (Final Modification for Reviews). The Final Modification for Reviews makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in the administrative review at issue here were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the Final Modification for Reviews does not apply here.

777A(d)(1)(B) of the Act. The CAFC also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing. See U.S. Steel Corp., 621 F. 3d at 1363. In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the CAFC acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist." Id. (emphasis added).

We disagree that the CAFC's decisions in Dongbu and JTEKT require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in Dongbu and JTEKT did not overturn prior CAFC decisions affirming zeroing in administrative reviews, including SKF, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. See SKF v. United States, 630 F.3d 1365 (Fed. Cir. 2011) (SKF). Unlike the determinations examined in Dongbu and JTEKT, the Department, in this remand redetermination, provides additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Investigations – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel, and SKF.

The Department's interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,[7] the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the URAA for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department's Final Modification for Investigations to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the CAFC in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act. See, e.g., SKF USA, Inc. v. United States, 537 F. 3d 1373, 1382 (Fed. Cir.

[7] The Final Modification for Reviews adopts this comparison method with offsetting as the default method for administrative reviews; however, as explained in note 6 this modification is not applicable to these final results.

2008); NSK, 510 F. 3d at 1379-1380; Corus II, 502 F. 3d at 1372-1375; and Timken, 354 F. 3d at 1343. In the Final Modification for Investigations, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine, to comply with certain adverse WTO dispute settlement findings.[8] Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of the Department's legitimate policy choices in this case – i.e., to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review. See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F. 2d 660, 665 (Fed. Cir. 1992). These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

Moreover, the Department's interpretation reasonably accounts for inherent differences between the results of distinct comparison methodologies. The Department interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular

[8] According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The principle emanating from the quoted passage, known as the Charming Betsy doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology (see, e.g., section 777A(d)(1)(A)(i) of the Act), the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product. In calculating the average EP or CEP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative averaging-group comparison results offset positive averaging-group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits EPs above normal value to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology (see, e.g., section 777A(d)(2) of the Act), as the Department did in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – i.e., the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.[9] Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act as

[9] As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the "aggregate dumping margin" within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are (1) implicitly granted when calculating average export prices and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We note that neither the CIT nor the CAFC has rejected the above reasons. In fact, the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations. See Union Steel v. United States, 823 F. Supp. 1346 (CIT Feb. 27, 2012) (Union Steel). Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons, reasonably accounts for the differences inherent in distinct comparison methodologies.

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

D. COMMENTS FROM INTERESTED PARTIES

On July 17, 2012, Fischer and the petitioners commented on our Draft Remand Redetermination. These comments are summarized below.

Issue 1: *Foreign Exchange Losses Recorded in the Net Exchange Variation Account*

On July 12, 2012, the Department released the revised margin calculation program for Fischer to all parties involved in this litigation. The Department also released a memorandum showing the calculation of Fischer's revised financing expense ratio to these parties on the same date. See the July 12, 2012, memorandum from Christopher J. Zimpo, Accountant, to Neal Halper, Director, Office of Accounting, entitled "Adjustments to the Cost of Production and Constructed Value Information Pursuant to Court Remand – Fischer S.A. Comercio, Industria and Agricultura" (Cost Calculation Memo).

Fischer asserts that it attempted to duplicate the Department's revised margin calculation by substituting the new financing expense ratio into the computer program used to determine Fischer's original dumping margin for this administrative review. However, according to Fischer, when it did this, it calculated a de minimis margin rather than the 1.13 percent computed in the draft redetermination by the Department. Fischer characterizes this result as "illogical," and it complains that the Department has not notified it of any changes made to the programming since the final results (other than the revision to the financing expense ratio). Fisher maintains that, because no additional programming changes should be required, the Department has not satisfactorily explained why the margin is not de minimis.

The petitioners maintain that there is no substantial evidence supporting the exclusion of the expenses recorded in Fischer's net exchange variation account from the calculation of the financial expense ratio. The petitioners contend that the Department's original calculation was proper because it: 1) excluded cumulative translation adjustments which were unrealized currency translations; and 2) included real currency exchange losses which were recorded as actual expenses on Fischer's income statement. The petitioners agree with the Department's finding in the underlying administrative proceeding that Fischer conducted extensive transactions in both reais and dollars, which exposed Fischer to real gains and losses. Finally, the petitioners point out that Fischer itself argued in prior reviews that foreign exchange gains recorded in the same account were properly considered part of the company's financing expenses. Thus, the petitioners maintain that the Department's original determination should have been affirmed.

Department's Position

We have complied with the Court's order. Because the Court has provided clear instructions with respect to Fischer's net exchange variation account, we have not engaged in further analysis of the information on the record or the appropriateness of the treatment of this information, as requested by the petitioners.

With respect to Fischer's comments, we disagree that we failed to notify Fischer of any changes to the margin program. We provided Fischer with the Cost Calculation Memo which detailed our recalculation of the financing expense ratio. We also indicated in our Draft Redetermination at footnote 1:

> The exclusion of the net exchange variation expenses from Fischer's costs resulted in certain home market sales which "passed" the cost test. Therefore, we based NV on home market price where possible, as required by section 773(a)(1)(A) of the Act.

Finally, we provided Fischer a copy of the margin calculation program in electronic form, which allowed Fischer to determine what changes had been made and duplicate the margin itself.

Because Fischer did not place its own calculations on the record, we do not know how these calculations differ from our own. However, we note for Fischer's reference that financing expenses are used in two places in the margin program: once in the cost test performed to determine whether home market sales are at below-cost prices and again in the buildup of CV used as NV when there are no home market sales made in the ordinary course of trade. It would be illogical to use the recalculated figure in only one of these places because the financing expenses do not vary by market (i.e., depending on whether they are part of the home market cost of production (COP) or U.S. CV). However, if Fischer did not use the revised figure in both places, its results would have differed.

Further, as noted above, once we excluded foreign exchange losses from Fischer's COP, we found that Fischer had home market sales which were in the ordinary course of trade. Sections 773(a)(1)(A) and (B) of the Act require the Department to base NV on home market price when there exist home market sales of foreign like product in the ordinary course of trade.[10] Again, if Fischer did not use the revised financing figure in COP, its results would also have differed for this reason.

Finally, because we originally found that Fischer made no home market sales in the ordinary course of trade, we based the profit and selling expense components of CV on Fischer's experience in a prior segment of this review. However, after performing the cost test anew, this fact pattern no longer held. Thus, we based these components of CV on Fischer's home market sales data in this review, as required by section 773(e)(2)(A) of the Act.[11] The Act does not permit the Department to use any of the alternatives contemplated in section 773(e)(B) (as was done for the original final results) unless "actual data are not available." See section 773(e)(2)(B) of the Act. Therefore, if Fischer failed to rely on its own home market selling and profit data in its recalculations, its results would have differed for this reason as well.

Issue 2: *Offsetting of Negative Margins*

As noted above, the Department did not offset Fischer's positive margins with its negative ones in the final results, in accordance with our longstanding practice; rather, where we found that certain transactions were not dumped, we set the difference between U.S. price and NV to zero (i.e., we "zeroed" the difference). Fischer argues that the Department should not apply zeroing when it recalculates the company's margins pursuant to this remand redetermination.

Fischer contends that the Department failed to provide a reasonable explanation for its difference in zeroing practice in less-than-fair-value investigations and reviews, as required both by the Court here and the CAFC in Dongbu and JTEKT, and instead in the Draft Remand

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[10] See section 773(a)(1)(A) of the Act, which states that the "normal value of the subject merchandise shall be the price described in subparagraph (B). . ." (emphasis added)

[11] See sections 773(e) and 773(e)(2)(A) of the Act, which state that the "constructed value of imported merchandise shall be an amount equal to. . ." (emphasis added) the actual amounts of selling, general, and administrative expenses and profits incurred and realized by the producer in question.

Redetermination it merely reiterated arguments already rejected by the CAFC. Finally, Fischer claims that it is unreasonable to continue its use of zeroing here, given that the Department has abandoned its zeroing practice in administrative reviews. See Final Modification for Reviews.

The petitioners disagree, contending that the Department did, in fact, provide a reasonable explanation of why it uses zeroing in administrative reviews but not in investigations. Moreover, the petitioners assert that the CIT has already affirmed this explanation in Union Steel. Thus, the petitioners support the Department's continued use of zeroing in this proceeding.

Department's Position

We disagree with Fischer. The CAFC did not consider the explanation provided in our Draft Remand Redetermination and in these final results of redetermination in either Dongbu or JTEKT. Unlike those cases, these final results of redetermination fully explain why the Department may interpret the statute differently for certain investigations and administrative reviews such as this one. As stated above, the CIT recently upheld this full rationale in Union Steel, and the Department's arguments will appear before the CAFC for the first time as part of that ongoing appeal.

Finally, regarding Fischer's argument that the Department has abandoned its zeroing practice and that it is unreasonable to continue it here, we disagree. As noted above, the Final Modification for Reviews makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. See Final Modification for Reviews, 77 FR at 8113. Because the preliminary results in the administrative review at issue here were completed on April 13, 2010, i.e., prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the

Final Modification for Reviews does not apply. The courts have recognized Commerce's ability to enforce a specific effective date for changing from one reasonable interpretation to another reasonable interpretation, and have affirmed Commerce's use of prior practices that pre-dated the effective date of a change.[12] Accordingly, the Department's application of its zeroing methodology in this review remains reasonable and otherwise in accordance with law.

E. FINAL RESULTS OF REDETERMINATION

As directed by the Court, we have explained why the Department's differing interpretation of section 771(35) of the Act in antidumping duty investigations and administrative reviews is reasonable. Further, under respectful protest, we have recalculated Fischer's margin after revising its NV to remove the "net exchange variation" account from Fischer's financial expense ratio. As a result of this recalculation, Fischer's final dumping margin is 1.18 percent.

Paul Piquado
Assistant Secretary
for Import Administration

14 August 2012
(Date)

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[12] See, e.g., Advanced Tech. & Materials Co. v. United States, Slip Op. 2011-105 (Ct. Int'l Trade August 18, 2011) at 8 ("{T}he Department's conclusion that the diamond sawblades investigation was not 'pending before the {D}epartment as of January 16, 2007, and therefore did not qualify for the policy change is not arbitrary, capricious, an abuse of discretion, and is in accordance with law"); United States Steel Corp. v. United States, 621 F.3d 1351, 1361 (Fed. Cir. 2010) (upholding Commerce's application of its non-zeroing methodology in connection with average-to-average comparisons in investigations); Grobest & I-Mei Industrial (Vietnam) Co., Ltd., 815 F. Supp. 2d 1359-60 (affirming Commerce's interim labor value methodology, despite Commerce having developed a new labor methodology after the date of the final results at issue).