

August 20, 2007

MEMORANDUM

TO: David Spooner
Assistant Secretary
for Import Administration

FROM: Gary Taverman
Acting Deputy Assistant Secretary
for Import Administration

RE: Final Results for the Section 129 Determination: Certain Stainless Steel Sheet and Strip in Coils from Italy (Italy SSSS)

SUBJECT: Issues and Decision Memorandum for the Final Results of the Section 129 Determination

Summary

This memorandum addresses issues briefed in the above-referenced section 129 proceeding. Below is a complete list of the issues in this proceeding for which we have received comments from the parties:

- Comment 1: Clerical Error Allegations
- Comment 2: Whether the Department Has the Authority to Implement the WTO Appellate Body Decision
- Comment 3: The Court of International Trade Remand

Background

On February 16, 2004, the European Communities (EC) requested the establishment of a World Trade Organization (WTO) dispute settlement panel (the Panel) challenging, among other things, the final determinations of 15 antidumping duty investigations concluded by the Department of Commerce (the Department). The Panel circulated its report on October 31, 2005, finding that the Department's calculation of the margins of dumping when using the average-to-average comparison methodology in the 15 investigations was inconsistent with U.S. obligations under the WTO agreements. United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), WT/DS294/R (October 31, 2005) (US – Zeroing (EC)). The United States did not appeal this aspect of the Panel's report. On March 6, 2006, the Department

published a notice in the Federal Register proposing that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 FR 11189 (March 6, 2006).

The EC and the United States appealed other aspects of the Panel's report not relevant to these proceedings. The WTO Appellate Body issued its report on April 18, 2006, addressing those aspects of the Panel's report appealed by the EC and the United States. United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), WT/DS294/AB/R (April 18, 2006). The Panel's finding concerning the 15 investigations involving EC member countries, however, remained unchanged.

On May 9, 2006, the WTO Dispute Settlement Body (DSB) adopted the Panel's report as modified by the Appellate Body report. On May 30, 2006, the United States indicated to the DSB that the United States intends to implement the DSB's recommendations and rulings. Pursuant to the Panel's findings in US – Zeroing (EC), the Department published its final modification, adopting its March 6, 2006, proposal. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Final Modification).

On February 26, 2007, the Department issued the Preliminary Results for this Section 129 Determination. See Memorandum from Stephen J. Claeys, Deputy Assistant Secretary, to David M. Spooner, Assistant Secretary, Regarding Section 129 Determinations: Calculation of the Weighted-Average Margins, dated February 26, 2007 (Preliminary Results). In the Preliminary Results, the Department determined to implement the recommendations and rulings of the DSB by offsetting dumped sales with non-dumped sales in the challenged investigations as explained in the Final Modification. We invited parties to comment on the Preliminary Results.

ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA (TKAST); Allegheny Ludlum Corporation, Armco Inc., J&L Specialty Steel, Inc., Washington Steel Division of Bethlehem Steel Corporation, the United Steelworkers of America, AFL-CIO/CLC, the Butler Armco Independent Union, and the Zanesville Armco Independent Organization, Inc., (collectively, “petitioners”); and the European Union submitted case briefs on March 15, 2007.¹ TKAST and petitioners submitted rebuttal briefs on March 22, 2007.

With respect to Italy SSSS, in its comments to the Department, TKAST alleged certain clerical errors in the Department's margin calculation in the less-than-fair-value (LTFV) investigation and in the Preliminary Results. Because of these allegations, and for the Department to ensure that its recalculation in the section 129 proceeding accurately reflects its methodological choices, we placed the original investigation record onto the record of this 129 proceeding on April 19,

¹ See Issues and Decision Memorandum for the Final Results of the Section 129 Determinations, from Stephen J. Claeys to David M. Spooner, dated April 9, 2007.

2007, and invited interested parties to provide comments on computational errors in the weighted-average dumping margin with respect to TKAST that may have been present in the Department's Preliminary Results. See the Department's Memo to the File from Angelica Mendoza, Program Manager, and Stephen Bailey, Case Analyst, through Richard Weible, Office Director, AD/CVD Operations/OFC 7, to the File, titled "Placement of Record from the Less-Than-Fair-Value Investigation onto the Record of the Section 129 Determination," dated April 19, 2007 (Record Transfer Memorandum).

TKAST requested two hearings for this proceeding, with one held in this section 129 proceeding on April 6, 2007, and another on June 22, 2007.

Discussion of the Issues

Comment 1: Clerical Error Allegation

In its March 16, 2007, case brief, TKAST alleges that the Department incorrectly calculated the U.S. price for 84 unreported U.S. sales for which the Department applied an adverse facts available (AFA) rate. TKAST contends that the Department verified the quantity and value of these 84 unreported sales in the original investigation. TKAST asserts that as part of the AFA calculation, the Department applied the highest non-aberrational rate (29.83 percent) calculated for TKAST's properly reported U.S. sales to the average unit value (AUV) of TKAST's 84 unreported U.S. sales to generate the potential uncollected dumping duties (PUDD) for these sales. TKAST argues that the Department miscalculated the AUV of these sales by inadvertently dividing quantity by value, instead of correctly dividing the value by the quantity. This miscalculation, TKAST alleges, resulted in an overstatement of the total PUDD and ultimately an overstatement of the final margin.

TKAST further alleges that the Department incorrectly applied the AFA rate to a gross price rather than net price, for sales made through TKAST's affiliate Ken-Mac Metals (Ken-Mac). TKAST's downstream sales through Ken-Mac were determined to be unreliable at verification and the Department applied an AFA rate to these sales in the original investigation. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy, 64 FR 30750 (June 8, 1999) (LTFV Final Determination), and accompanying Issues and Decision Memorandum at Comment 2. TKAST contends that the Department should apply the findings of the Court of International Trade (CIT), which ordered the Department to calculate a net price for these sales as part of the application of an AFA price. See TKAST's March 16, 2007, case brief at page 6, citing to Acciai Speciali Terni S.p.A. and Acciai Speciali Terni (USA) v. United States, Consol. Court No. 99-08-00551 (Ct. Int'l Trade, March 30, 2001) (CIT Remand Determination). TKAST also asserts that the Department should calculate a net price for the AFA calculation of the 84 unreported sales.

Additionally, TKAST argues that the calculation of the highest non-aberrational rate (which is applied to the AUV of the unreported 84 sales and also to the AUV of a group of affiliated

downstream sales which could not be verified), should be modified to take into account the Department's new methodology of offsetting dumped sales with sales that are not dumped. TKAST argues that the original AFA rate was calculated using only positive margins and was based on too narrow a group of sales. TKAST argues that the Department must now calculate an AFA rate that is consistent with the DSB findings. Because the Department's methodology has changed (i.e., zeroing has been eliminated), TKAST contends that the Department should consider negative margins in determining the frequency distribution used to determine the AFA rate. Accordingly, taking into account transactions with both positive and negative margins, TKAST maintains that the Department should use the rate of 14.08 percent. TKAST asserts that an AFA rate of 14.08 percent is in the 89th percentile of all available comparison results, similar to the original investigation AFA rate of 29.83 percent, which was in the 89th percentile of all positive comparison results.

In their March 22, 2007, rebuttal comments, petitioners maintain that the Department's new zeroing methodology is not related to TKAST's claim of a clerical error that may or may not have existed at the time of the original investigation. Petitioners argue that TKAST does not argue that it was somehow precluded from raising this alleged clerical error during the original investigation, and that the time has passed for the introduction of clerical errors. Petitioners contend that TKAST could have requested judicial review of this issue at the time of the original investigation and thus should be barred from raising it at this time. If the Department, however, decides to consider this issue, petitioners assert that the entire record should be opened to allow a comprehensive analysis of TKAST's data, including specifically whether TKAST engaged in targeted dumping.

On May 25, 2007, TKAST submitted its comments in response to the Department's Record Transfer Memorandum. TKAST again argues that the Department should correct the U.S. price calculation for TKAST's unreported 84 sales as it contends that quantity was incorrectly divided by the value, when it should have been vice versa. TKAST also argues that the Department should calculate a net price in its AFA rate for Ken-Mac's downstream sales database, as ordered by the CIT in its remand. Finally, TKAST contends that the Department should include negative margins in its calculation of the highest non-aberrational margin for use as the AFA rate applied to both the 84 unreported sales and Ken-Mac's downstream sales database.

On June 1, 2007, petitioners submitted their case brief in response to the Department's Record Transfer Memorandum. Petitioners argue that pursuant to the Department's decision in Korea Stainless Steel, the Department should not make any changes to the margin calculation based on alleged clerical errors. See Amendment of Final Determinations of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From the Republic of Korea; and Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 66 FR 45279 (August 28, 2001) (Korea Stainless Steel). In Korea Stainless Steel, petitioners assert that the Department determined that the Korean Government did not allege certain "clerical" errors as part of its WTO panel request, and clerical errors were not alleged by any party in the implementation of the panel's findings. Accordingly, petitioners contend that the Department decided in Korea Stainless Steel, as it

should in this case, to restrict its implementation of the WTO panel's 129 findings to those areas of the Department's practice that the WTO panel found to be inconsistent with the Antidumping Agreement. Petitioners assert that the United States did not agree to discuss clerical errors before the WTO panel, the errors are not within the scope and are not properly the subject of this section 129 implementation, and are outside the terms of reference of the WTO panel. As such, petitioners maintain the ministerial errors alleged by TKAST should not be addressed in the context of this 129 proceeding.

Petitioners assert that because there is no statutory or regulatory basis to revisit TKAST's alleged ministerial errors at this stage, and because petitioners have made numerous decisions based on its reliance of the Department's original LTFV determination, it would be unfair and an abuse of discretion for the Department to modify its AFA methodology in this case.

Petitioners argue that if the Department revises its AFA calculation from the original LTFV determination to correct alleged ministerial errors, it should select a more appropriate AFA rate to apply to the two AFA pools of sales (*i.e.*, 84 unreported sales and Ken-Mac downstream sales). Petitioners maintain that the AFA rate applied should be based on the highest, non-aberrational control number (CONNUM)-specific margin, which is representative of an average of several commercial quantity sales, is well below other CONNUM-specific margins. Petitioners also contend that applying the highest, non-aberrational CONNUM-specific margin is consistent with prior Department and CIT decisions.

Petitioners also argue that TKAST received an inappropriate offset for transaction-specific insurance revenue during the original LTFV determination for goods damaged during transit. Petitioners maintain that this transaction-specific insurance revenue should be treated as either an adjustment to cost of production, a loss in inventory value, or as a general selling expense, but not as a direct selling expense. Petitioners also argue that the insurance revenue for these sales was received nine months after the end of the period of investigation (POI) and as such is not associated with sales during the POI. Petitioners argue further that TKAST failed to account for the expense to repair the damaged merchandise, and also for the costs incurred to transport the merchandise to processors who repaired the damage. As such, petitioners claim that the insurance revenue is not associated with sales during the POI and the adjustment should be disallowed.

Petitioners continue that the Department acknowledged in the context of the CIT remand re-determination that it could not tie non-transaction specific insurance revenue to sales of subject merchandise, and that the revenue related to sales that occurred outside the POI. As such, petitioners contend that the adjustment for this insurance revenue is a clerical error and should not be used to adjust U.S. price.

In addition, petitioners claim that the Department incorrectly calculated constructed export price (CEP) profit by converting certain values into metric tons; petitioners note that unit values are reported on a per pound basis. Petitioners also contend that the Department incorrectly

calculated foreign unit price in Dollars (FUPDOL) because the difference in merchandise (DIFMER), calculated on a kilogram basis, was not converted into pounds in the Department's margin program. Further, petitioners assert that the values reported in the fields "indirect selling expenses" (INDIRSU) and "domestic indirect selling expenses" (DINDIRSU) are identical, which is an unlikely occurrence given the nature of the calculation. Petitioners claim that the calculations for these fields should be revisited.

TKAST argues in its June 12, 2007, rebuttal comments that the Department is bound by section 129 and 19 USC 1673(e) to correct computational errors in a final determination, and that the Department is bound by court decisions to ensure the accuracy of margin calculations. TKAST contends that it is irrelevant whether these alleged clerical errors were addressed by the WTO dispute settlement panel and Appellate Body. TKAST argues that section 129 does not confine the Department's 129 determination to issues addressed in a WTO dispute settlement decision; it simply states that the recalculation may not be inconsistent with the WTO decision.

TKAST maintains that Korea Stainless Steel involved a party arguing the Department's date-of-sale methodology in the context of the 129 determination, which petitioners assert is a methodological issue and inapposite to these 129 proceedings. Additionally, TKAST contends that a recalculation in Korea Stainless Steel did not result in a de minimis result, as it does in this case. Furthermore, TKAST argues that the respondent in Korea Stainless Steel failed to make the allegation in a timely manner, and cites to Alloy Piping Products, Inc. v. United States, 334 F.3d 1284 (Fed. Cir. 2003), in which the CIT ruled that the Department could be absolved of its requirement to make certain corrections if the request for such changes comes too long after a final determination.

TKAST argues that it made its clerical error allegation in the original final determination. TKAST argues that the Department should not revise its AFA rate methodology as proposed by petitioners (i.e., using the highest transaction-specific margin as the AFA rate). TKAST contends that this is not a clerical error and as such should not be addressed.

TKAST contends that the Department should not alter its calculation of transaction-specific insurance revenue as this issue involves methodology and is not clerical in nature. Regardless, TKAST argues that an accounting write-down of inventory to offset the value of lost goods would be inaccurate because possession of the goods in question already passed from TKAST to its U.S. affiliate and would therefore not affect TKAST's books. TKAST contends that the loss in value of the damaged goods could not be an adjustment to its cost of production because only raw materials and work-in-process, not finished goods, are included in the cost of production.

TKAST argues that insurance proceeds were properly received by TKAST and accepted by the Department in the final determination as they relate to transactions within the POI, regardless of whether or not the payment was received after the POI. TKAST argues that the Department properly included an amount in ThyssenKrupp AST USA's (AST-USA's) (TKAST's U.S. affiliate) indirect selling expenses to account for the loss incurred on the damaged goods.

TKAST argues that the Department considered the treatment of non-transaction specific insurance revenue in the original investigation and concluded that revenue proceeds related to sales within the POI. Furthermore, TKAST asserts that petitioners are relying on the remand determination, which is not part of the record of the current determination and any decisions therein are not relevant for these proceedings. TKAST argues that the Department verified the amounts reported in the INDIRSU and DINDIRSU fields and noted no discrepancies. Accordingly, TKAST argues that the Department should continue to accept the amounts reported in these fields.

Petitioners argue in their June 12, 2007, rebuttal comments that the Department should not address clerical errors raised by TKAST in the context of this 129 proceeding. Reiterating their March 22, 2007, comments, petitioners contend that clerical error allegations should have been argued either in the context of the final determination, before the CIT, on appeal to the U.S. Court of Appeals for the Federal Circuit, or before the WTO, which TKAST failed to do. Petitioners note that TKAST argued this clerical error in the original final determination and the Department disagreed with TKAST that a clerical error existed. Petitioners assert that TKAST failed to exhaust its remaining remedies, and therefore lost its opportunity to challenge the alleged ministerial errors.

Additionally, petitioners cite to Korea Stainless Steel in which the Department declined to address clerical errors. In Korea Stainless Steel petitioners contend that the Department determined that, because clerical errors were not alleged as part of the WTO panel request, nor as part of the Department's implementation of the 129 proceedings, the 129 determination is unrelated to allegations of clerical errors and should be restricted to those areas of U.S. dumping law found by the WTO panel to be inconsistent with the Antidumping Agreement. Additionally, petitioners maintain that the Department determined that it should not conduct a "wholesale review of all issues in the underlying case." See Korea Stainless Steel, 66 FR 45279, 45282.

Petitioners contend that the EC did not include ministerial errors within the scope of the 129 proceedings when it made the request to the WTO. As such, petitioners argue that the U.S. did not agree to discuss clerical errors before the WTO panel and consequently the alleged errors are not within the scope of this proceeding.

However, petitioners argue that, should the Department consider TKAST's claimed clerical errors, it should consider in its 129 determination all errors, including TKAST's insurance revenue claim. Additionally, in order to comply with the Congressional directive to "ensure that a party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully," petitioners assert that the Department should apply the highest, CONNUM-specific transactional margin calculated from the margin dataset as the AFA rate applied to TKAST's unreported sales. See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (I) at 870 (1994) (SAA).

Department Position: The Department determines that considering any alleged clerical or computational errors that are unrelated to the implementation of the U.S. Trade Representative's instructions is outside the scope of this 129 proceeding. To this end, all other changes to the Preliminary Results requested by interested parties are also outside the scope of this proceeding. Accordingly, we are confirming and finalizing the calculation of the weighted average dumping margin made in the Preliminary Results and only adjusting the margin calculation program from the original investigation to implement the U.S. Trade Representative's instructions pursuant to section 129 of the Uruguay Round Agreements Act (URAA) to offset dumped sales with non-dumped sales for average-to-average comparisons. This is consistent with our Implementation Notice and Korea Stainless Steel, 66 FR 45279. See Implementation of the Findings of the WTO Panel in US--Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 FR 25261 (May 4, 2007) (Implementation Notice).

Section 129 of the URAA is the applicable provision governing the nature and effect of determinations issued by the Department to implement findings by WTO panels and the Appellate Body. Specifically, section 129(b)(2) provides, "the administering authority 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 administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body." 19 USC 3538(b)(2).

On March 26, 2007, the Department received this written request when it was instructed by the U.S. Trade Representative to render the challenged determinations not inconsistent with the findings of the Panel in the EC zeroing reports. The Department issued its Preliminary Results in conformity with the findings of the panel, thus eliminating zeroing and calculating the weighted average dumping margins using both negative and positive comparisons. All other aspects of the Department's final determination in the original investigation became final and conclusive and have not been revised or reopened pursuant to domestic litigation or WTO dispute settlement proceedings. Thus, the limited purpose of a section 129 proceeding is to reopen for revision those aspects of the Department's original determination found to be inconsistent with the WTO Agreements. Accordingly, we will not adjust our final determination for alleged errors, clerical or otherwise that were not raised in the WTO dispute settlement proceeding and found to be inconsistent with U.S.-WTO obligations.

The Department reached a similar conclusion in Korea Stainless Steel. In Korea Stainless Steel, the Department determined that alleged clerical errors from the original investigation would not be addressed in the context of a section 129 proceeding. In its decision, the Department explained that the Government of Korea did not allege the errors in question as part of its panel request, and the panel therefore had no basis to make a ruling with respect to the alleged errors. Additionally, the Department determined that the errors were not alleged as part of the implementation of the panel's findings. Accordingly, the Department determined to restrict the

129 proceeding to those areas of the final determination which were found by the panel to be inconsistent with the Antidumping Agreement.

The Department reaches the same conclusion in this current section 129 proceeding, where the European Communities did not raise the alleged errors as part of its panel request. Accordingly, the WTO panel did not make a finding with respect to alleged errors. Therefore, the WTO panel recommendation does not recommend that the Department fix any of the errors alleged by the interested parties.

Additionally, the Department in Korea Stainless Steel decided that correcting an alleged error two years after the final determination “would effectively be allowing time for such allegations far exceeding the time granted to other parties in these and other proceedings.” See Korea Stainless Steel, 66 FR 45279, 45282. The Department reiterated that section 129 determinations have a limited purpose, and the existence of the section 129 proceeding “does not provide an excuse for a wholesale review of all issues in the underlying case.” *Id.* at 45282. Moreover, the Department considered it mere happenstance that a section 129 proceeding occurred, arguing that parties would not normally have an opportunity to argue a ministerial error years after the fact. See Korea Stainless Steel, 66 FR 45279, 45281-82.

The errors alleged by TKAST and petitioners did not relate to the revision of the margin calculation program to implement the panel’s findings (*i.e.*, to eliminate zeroing). To correct alleged errors that were not raised as part of the WTO dispute and otherwise became final and conclusive years ago exceeds the scope of this section 129 proceeding. Thus, the Department has determined that this proceeding is restricted to those areas of the final determination which were found by the panel to be inconsistent with the URAA. See Korea Stainless Steel, 66 FR 45279, 45281-82.

TKAST maintains that unlike the current proceeding, the respondent in Korea Stainless Steel raised a methodological issue in the context of the 129 determination. The Department disagrees with TKAST’s interpretation of Korea Stainless Steel. The Department’s decision in Korea Stainless Steel did not take into consideration whether or not the alleged error was clerical or methodological in nature, only that we would not entertain the substance of the claim as we deemed it to be beyond the scope of the section 129 proceeding. Korea Stainless Steel, 66 FR 45279, 45281-82.

TKAST contends that the recalculation in Korea Stainless Steel would not have resulted in a de minimis margin. Contrary to TKAST’s argument, the effect of the alleged error on the dumping margin is irrelevant. Department decisions are based on principles of law and are not results oriented.

TKAST asserts that the respondent in Korea Stainless Steel failed to make the allegation in a timely manner, claiming that in the current proceeding it made its clerical error allegation in the original LTFV determination. The Department disagrees with TKAST’s assertion that the fact

that it raised a clerical error allegation in the original investigation somehow entitles it to have the issue revisited in this 129 proceeding. There is nothing in section 129 (codified at 19 USC 3538) or Korea Stainless Steel that requires the Department to examine an alleged error not raised in the WTO dispute simply because a party allegedly raised it during the Department's administrative proceeding.

With regard to TKAST's argument that the calculation of the highest non-aberrational rate should be modified to take into account the Department's new methodology of offsetting for non-dumped sales, the Department disagrees. The Department calculated an AFA rate for both the Ken-Mac downstream sales database which proved to be unreliable and for the 84 unreported sales, which represented a significant amount of data and was submitted late in the process. See LTFV Final Determination and accompanying Issues and Decision Memorandum at Comment 1. The AFA rate was calculated using the positive margins of verified sales, while taking the number of sales into consideration to ensure the rate was non-aberrational. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy, 64 FR 30750, 30760 (June 8, 1999). This methodology is reasonable and consistent with 776(b) of the Act. Accordingly, we are not adjusting our AFA rate calculation methodology.

For a discussion of the application of the CIT Remand Determination to the current proceeding, see Comment 3 below.

Comment 2: Whether the Department Has the Authority to Implement the WTO Appellate Body Decision

In their March 15, 2007, case brief, petitioners argue that the Department should continue its long-standing practice of not offsetting dumped sales with negative comparisons. Petitioners contend that a plain reading of section 771(35)(A) of the Tariff Act of 1930, as amended (the Act), indicates that an item is considered to have been dumped only if the normal value exceeds the export price or CEP. Petitioners assert that if the export price is below normal value, no dumping has occurred and the transaction should not be used to offset the dumping that is occurring. Petitioners claim that the negative margins are properly neutralized in the calculation to ensure that the dumping that does occur is not eliminated. Petitioners note that all sales, whether dumped or not, are included in the denominator of the margin calculation to calculate a weighted-average dumping margin.

Petitioners argue that the Department should not implement the new zeroing policy as it violates current U.S. law and is the result of overreaching by the Appellate Body. Petitioners contend that in 19 USC 3801(b)(3)(A), Congress expressed its displeasure with legislation by dispute settlement, which petitioners argue the Appellate Body has done by legislating new rights and obligations with regard to zeroing, violating Articles 3.2 and 19.2 of the Dispute Settlement Understanding. Petitioners maintain that the Appellate Body has been relying on its own phrase "the product as a whole" in analyzing the Department's practice of zeroing and, in so doing, has skewed the customary rules of interpretation of public international law. Petitioners assert that

the Appellate Body's findings contradict the language and history of the WTO's relevant provisions on zeroing, as evidenced by the U.S. Trade Representative's belief that the WTO Agreements do not reference zeroing and the Appellate Body's reports are not based on sound legal grounds. See U.S. Statements at the WTO Dispute Settlement Body Meeting, February 20, 2007.

Petitioners argue that the Department has failed to explain whether eliminating zeroing from the current proceeding is consistent with U.S. law. Petitioners contend that a U.S. government agency must provide a rational basis for its decisions so that interested parties can either accept the new decision or challenge it. Petitioners maintain that failure to explain its decision results in a decision that is not in accordance with law or supported by substantial evidence.

Petitioners argue that in the recent final determination in the investigation of activated carbon from the People's Republic of China, the Department failed to justify why zeroing is consistent with U.S. law, explaining that the Courts have not found that zeroing was mandated by the statute. Accordingly, petitioners contend that the Department determined it could change its practice. See Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 FR 9508 (March 2, 2007), and accompanying Issues and Decision Memorandum at Comment 4. Petitioners argue that even though the CIT upheld the Department's zeroing practice, it would require an explanation from the Department if it were to change its practice and would not automatically accept a change in calculation methodology. Petitioners assert that in Ta Chen Stainless Steel Pipe v. United States, 25 CIT 1349, 1351 (2001) (Ta Chen), the CIT determined that an "agency may change its policy, practice or legal interpretation, subject only to the constraint that it explain the reason for its change and that the new policy remains consistent with the governing statute." See Ta Chen, 25 CIT at 1351. Petitioners argue that in the current proceeding, the Department has failed to comply with the CIT's decision in Ta Chen by failing to explain why the elimination of zeroing is appropriate or whether it is consistent with U.S. law.

Petitioners argue that the Courts have approved the Department's practice of zeroing negative comparisons. Petitioners assert that the Department in Timken Co. v. United States, 354 F.3d 1334, 1343 (Fed. Cir. 2004) (Timken), determined that zeroing "legitimately combats the problem of masked dumping." See Timken, 354 F.3d 1343. Petitioners contend that U.S. courts have found that zeroing is permitted under U.S. law. Petitioners note, though, that the Department has disregarded the U.S. judicial branch and decided to eliminate zeroing in favor of the Appellate Body's reports. Petitioners maintain that this change in practice requires the Department to explain whether it now agrees that the WTO Appellate Body's interpretation of the Antidumping Agreement is correct and consistent with U.S. law. Further, petitioners argue that the Department has not explained whether it believes that the WTO Appellate Body exceeded its authority to rule on an issue that was never negotiated by the Member States, and why it would implement a decision that it was not required to implement. Finally, petitioners contend that the Department should explain whether it believes it is required to implement an Appellate Body report even if it believes that the decision violates U.S. law.

Petitioners argue that the Department is usurping the power of the legislative branch by implementing the Appellate Body's report rather than deferring to the U.S. Congress to make any changes to the antidumping law.

In its March 22, 2007, rebuttal comments TKAST argues that the Department's decision to eliminate zeroing is consistent with U.S. law. TKAST asserts that the Department explained that eliminating zeroing is an interpretation of the statute and as such does not require Congressional action. See Final Modification, citing Timken, 354 F.3d 1334, 1341-42; Corus Staal BV v. Department of Commerce, 395 F.3d 1343 (Fed. Cir. 2006); and Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). TKAST maintains that the Department has been upheld when it interprets or applies the statute in a way that does not nullify the statute, as TKAST claims the Department is doing in the current proceeding.

TKAST contends that the United States has consented to resolve disputes over the General Agreement on Tariffs and Trade (GATT) and the Antidumping Agreement, through participation in the Dispute Settlement Understanding. The issue of zeroing was decided by the WTO Appellate Body, which found that zeroing in the context of the current proceedings is inconsistent with Article 2.4.2 of the Antidumping Agreement. TKAST asserts that the United States did not appeal this decision and it is irrelevant whether petitioners disagree with the result. TKAST notes that the United States is authorized to implement adverse WTO decisions, and has implemented the Appellate Body decision by invoking the relevant procedures under sections 123 and 129 of the URAA. TKAST asserts that the Department has decided to bring its practice of zeroing into compliance with WTO requirements and the methodology enunciated in the Final Modification.

TKAST asserts that in the Initiation Notice, the Department provided a rationale for this change of practice when it explained that it was eliminating zeroing from the proceedings in question to ensure that its margin calculation is not inconsistent with the findings of the panel. See Implementation of the Findings of the WTO Panel in US Zeroing (E.C.): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures, 72 FR 9306 (March 1, 2007) (Initiation Notice). TKAST contends that the Department solicited and analyzed public comments in the Final Modification in compliance with the procedural framework of Section 123 of the URAA. TKAST notes that the Final Modification addressed interested party comments, including petitioners' argument against implementing the change in the zeroing methodology, and rejected this argument.

Department Position: For the reasons adopted in the Final Modification, the Department determines that it has the authority to implement the WTO panel report by modifying its methodology in this determination and providing an offset for non-dumped comparisons when using the average-to-average comparison methodology in an investigation. For a further discussion of this issue and the Department's response, see Final Modification.

Comment 3: The CIT Remand

On May 25, 2007, TKAST submitted its comments in response to the Department's April 19, 2007, request. As explained above under Comment 1, TKAST alleges that the Department incorrectly applied the AFA rate to a gross rather than net price, for certain sales made through TKAST's affiliate Ken-Mac. TKAST contends that the Department should apply the findings of the CIT, which ordered the Department to calculate a net price for these un-verified sales as part of a remand determination. See TKAST's May 25, 2007, case brief citing to CIT Remand Determination at 1007.

TKAST argues that the Department, pursuant to the CIT Remand Determination, recalculated the AUV for TKAST's sales through Ken-Mac taking into consideration verified selling expenses that were netted from the gross U.S. price. TKAST argues that the Department should apply the same methodology for this proceeding and apply the AFA rate to a net U.S. price for TKAST's downstream sales. Additionally, TKAST claims that the AFA rate should be applied to the net U.S. price of the 84 unreported sales.

Department Position: The Department disagrees with TKAST and will not make any changes to this section 129 determination based on the CIT Remand Determination. The issues presented in the CIT Remand Determination were not in dispute before the WTO panel. Furthermore, the Department did not amend its final determination in the less-than-fair-value investigation to reflect the CIT Remand Determination because the CIT dismissed the litigation without a final and conclusive court decision. Thus, the Department's original treatment of the sales through Ken-Mac became final and conclusive following the dismissal of the domestic litigation. As explained in Comment 1, the only issue in this 129 determination is zeroing. Accordingly, the Department was instructed by the U.S. Trade Representative to issue determinations to render the original final determination in this matter not inconsistent with the findings of the Panel in US - Zeroing (EC). The Department was not instructed by the U.S. Trade Representative to adjust the final determination to account for the CIT's findings in the CIT Remand Determination. Thus, the issues in the CIT Remand Determination are outside the scope of this section 129 proceeding.

FINAL ANTIDUMPING MARGIN

The recalculated margin as well as the all-others rate, unchanged from the Preliminary Results for Italy SSSS, is as follows:

TKAST	2.11 percent
All-Others Rate	2.11 percent

RECOMMENDATION

In light of the Panel’s report, we recommend implementing the recommendations and rulings of the DSB by applying the methodology in the Final Modification.

Agree _____ Disagree _____

David M. Spooner
Assistant Secretary
for Import Administration

Date