

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

FROM: Edward C. Yang  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Administrative Review of Solid Urea from the Russian Federation  
for the Period of Review July 1, 2008, through June 30, 2009

### Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on solid urea from the Russian Federation for the period of review (POR) July 1, 2008, through June 30, 2009. The sole respondent is MCC EuroChem (EuroChem). We recommend that you approve the positions described in this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments from parties:

1. Presumption of Reimbursement
2. CEP Offset
3. Date of Sale
4. Zeroing
5. Assessment of Antidumping Duties

### Background

On April 15, 2010, the Department of Commerce (the Department) published its *Preliminary Results* of this review in the *Federal Register*. See *Solid Urea From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 19610 (April 15, 2010) (*Preliminary Results*). We conducted a verification of EuroChem's response concerning constructed export-price (CEP) sales at EuroChem Trading USA's facilities in Tampa, Florida, on June 14, 2010, and June 15, 2010.

We invited parties to comment on the *Preliminary Results*. On June 30, 2010, we received case briefs from the petitioners, the Ad Hoc Committee of Domestic Nitrogen Producers and its individual urea-producing members, CF Industries, Inc., and PCS Nitrogen (the petitioners), and from EuroChem. On July 12, 2010, we received rebuttal briefs from the petitioners and EuroChem. On July 13, 2010, we held a public hearing.

## Other Abbreviations

The Act -	The Tariff Act of 1930, as amended
CAFC -	Court of Appeals for the Federal Circuit
CBP -	U.S. Customs and Border Protection
CEP -	Constructed-Export Price
CIT -	Court of International Trade
EP -	Export Price
I&D Memo -	Issues and Decision Memorandum accompanying Department's Final Determination
SAA -	Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, at 870, reprinted in 1994 U.S.C.C.A.N. 4040
URAA -	The Uruguay Round Agreements Act
USTR -	U.S. Trade Representative
WTO -	World Trade Organization

## Discussion of the Issues

### **I. Presumption of Reimbursement**

*Comment 1:* The petitioners argue that the Department should presume that duties were reimbursed for the entry associated with the 2008 shipment of solid urea and deduct the amount of the duty from CEP for the final results.

Citing 19 CFR 351.402(f), the petitioners argue that, when an importer does not file a certification of non-reimbursement with CBP, the Department may presume that the exporter or producer reimbursed the antidumping duties. Therefore, they contend, the Department should reduce the EP or CEP by the reimbursed amount. The petitioners argue that, because EuroChem did not file a certificate of non-reimbursement with CBP prior to the liquidation of the 2008 entry, the Department should presume that antidumping duty deposits paid by the importer were reimbursed. According to the petitioners, in every case where the importer has not filed a non-reimbursement certification, the Department presumes that reimbursement took place and, as a routine matter, instructs CBP to double the antidumping duties due, citing the liquidation instructions to CBP discussed in *Nereida Trading Co., Inc. v. United States*, 683 F. Supp. 2d 1348, 1352 (CIT 2010), *Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 70 FR 73727 (December 13, 2005) (*Pipe Fittings*), and *Final Results of Antidumping Duty Administrative Review and Partial Termination of Administrative Review: Circular Welded Non-Alloy Steel Pipe From the Republic of Korea*, 62 FR 55574 (October 27, 1997).

In support of this allegation, the petitioners refer to EuroChem's entry documentation on the record in this review. The petitioners allege that the entry documentation does not include any non-reimbursement certificates.

The petitioners argue further that, regardless of whether the failure to file a non-reimbursement certificate was accidental, negligent, or intentional, it is the responsibility of the importer of record to file complete and correct entry documentation; the failure to file a non-reimbursement certificate creates the presumption that duties have been reimbursed to the importer.

EuroChem counters that the Department is correct to not assume, without record support or an investigation, the reimbursement of antidumping duties. EuroChem explains that, following the Department's issuance of the final results of review, CBP will liquidate the suspended entry at the appropriate rate, as instructed by the Department. EuroChem argues that, at the time CBP finally assesses antidumping duties on these entries, CBP will check its records for a signed non-reimbursement certificate from EuroChem.

EuroChem contends that the petitioners' argument is to the wrong agency and is premature as to that agency. EuroChem states that, in the final results, the Department will adopt its usual courtesy role by warning parties to ensure they have a certificate of non-reimbursement on file at CBP. At that time, EuroChem explains, the Department's warning and subsequent CBP actions are timely to ensure full compliance with U.S. antidumping law.

EuroChem argues that the petitioners should have raised this issue at an earlier stage of the review so that the Department would have the resources to investigate the matter. EuroChem claims that the petitioners are raising this issue belatedly, expecting the Department to reach a decision based on assumption and speculation without any record support.

EuroChem explains that it has not been reimbursed by CBP for any paid antidumping duty deposits nor has EuroChem entered into any agreements or understanding for the payment or for the reimbursement by the manufacturer, producer, seller, or exporter.

EuroChem argues that, on the court appeal of *Pipe Fittings*, the Department concluded that without record support, at the last minute, and without giving the respondent an opportunity to address the issue it cannot assume reimbursement warranting an adjustment to the calculation of the dumping margin.

EuroChem claims that the petitioners are arguing for assessment of antidumping duties that exceed the amount of dumping on that entry which, EuroChem continues, is contrary to section 751(a)(2)(A) of the Act. EuroChem argues further that there is no statutory basis for the Department's reimbursement regulation. Therefore, EuroChem concludes, the regulation is invalid, citing *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 427 F. Supp. 2d 1265, 1267 (CIT 2006).

*Department's Position:* The evidence on the record of this review does not warrant the presumption of reimbursement. While the regulations state that the Secretary may presume that reimbursement has occurred where there is no certificate of non-reimbursement, our standard language in the liquidation instructions instructs CBP to double the antidumping duties due in those instances where CBP finds that the importer has not filed a certificate of non-reimbursement. Thus, additional action from the Department on this issue is unnecessary.

The petitioners are correct that, as a routine matter, the Department will instruct CBP to double the antidumping duties owed in the event that CBP does not have a certificate of non-reimbursement. Specifically, we instruct CBP as follows:

Upon assessment of antidumping duties, CBP should require that the importer provide a reimbursement statement as described in section 351.402(f)(2) of Commerce's regulations. The importer should provide the reimbursement statement prior to liquidation of the entry. If the importer certifies that it has an agreement with the manufacturer, producer, seller, or exporter to be reimbursed antidumping duties, CBP should double the antidumping duties in accordance with the above-referenced regulation. Additionally, if the importer does not provide the reimbursement statement prior to liquidation, CBP should presume reimbursement and double the antidumping duties due.

This language provides explicit direction for CBP to assess the appropriate amount of duties on the subject merchandise during the POR. If CBP finds that the importer has not provided the requisite statement of non-reimbursement, the above language provides CBP with specific direction as to the appropriate assessment procedures.

Concerning the petitioners' argument that the Department should presume reimbursement and therefore deduct the amount of the antidumping duty from CEP, the Department finds that the facts in this case do not warrant such action. For the Department to deduct the amount of the antidumping duty from CEP, "it must be shown that foreign manufacturer either paid antidumping duty on behalf of the United States importer or reimbursed the importer for payment of antidumping duty." *Torrington Co. v. U.S.*, 881 F. Supp. 622, 631 (CIT 1995). "The regulation does not impose upon Commerce an obligation to investigate based on mere allegations." *Id.*; see also *Torrington Co. v. U.S.*, 973 F. Supp. 164, 168 (CIT 1997). Petitioners have not given any evidence of reimbursement and only argue that the Department "may presume" reimbursement. This does not rise to the standard set by the Department and affirmed by the CIT for making an adjustment in the margin calculation pursuant to 19 CFR 351.402(f)(i).

In light of the Department's decision not to deduct the amount of the antidumping duty from CEP and the Department's instructions to CBP, the Department finds that it is not necessary to address EuroChem's other rebuttal arguments on this matter.

## **II. CEP Offset**

*Comment 2:* The petitioners argue that the record evidence in this administrative review does not support the Department's preliminary decision to grant EuroChem a CEP offset for the differences in the selling activities associated with EuroChem's CEP level of trade and its home-market level of trade. The petitioners contend that, because a CEP offset is not justified based on the record evidence, the Department should reexamine this adjustment for the final results of review.

The petitioners argue that, in order to justify a CEP offset, respondents must demonstrate that substantial differences exist between the selling functions performed in the home market for sales to home-market customers and for CEP sales. The petitioners assert that section 773(a)(7)(B) of the Act and 19 CFR 351.412(c)(2) illustrate that the Department grants CEP

offsets in those cases where normal value is established at a more advanced level of trade than CEP. The petitioners argue that, in this administrative review, the differences between home-market and CEP selling activities are not substantial. According to the petitioners, of the thirteen selling activities EuroChem identified, EuroChem claimed that it performs nine of these functions for both home-market and CEP sales. The petitioners argue that EuroChem claims that it performed eight of these selling functions at either the same intensity level for both markets or with only one level of difference in intensity level. The petitioners argue that EuroChem did not provide any support for its reported differences of intensity levels among the selling functions. Thus, the petitioners continue, there is no evidence that an entirely different layer of selling activities amounting to a substantially different selling function exists between home-market sales and CEP sales.

The petitioners cite *Certain Pasta From Italy: Notice of Final Results of the Eleventh Administrative Review and Partial Rescission of Review*, 73 FR 75400 (December 11, 2008), and accompanying I&D Memo at Comment 8 and *Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 50933 (August 29, 2008), to argue that the Department has found in other cases that different levels of intensity of selling activities between the U.S. sales and home-market sales do not automatically support finding different marketing stages or different levels of trade.

EuroChem counters that the Department's decision to grant a CEP offset was correct. EuroChem claims that the petitioners acknowledged that a more advanced level of trade exists when there is another layer of selling activities aggregating to substantially different selling functions; EuroChem argues that such is the case in this review. EuroChem reiterates that it performs far fewer selling functions for its sales to its U.S. affiliate than in its home market. Specifically, EuroChem explains, it performs little or no sales-strategic and economic planning, distributor/dealer training, procurement/sourcing service, order input/processing, or freight/delivery service for its sales to its U.S. affiliate in contrast with its home-market sales. EuroChem asserts that it has explained the differences in selling functions between EuroChem's home-market sales and its CEP sales in the manner requested by the Department in the questionnaire.

EuroChem contends that the petitioners overlook EuroChem's narrative description concerning the differences in selling functions it performs for its home-market sales versus its CEP sales, which explains the differences in intensity levels for the selling functions identified in the chart, as requested by the Department.

EuroChem explains that its questionnaire responses provide the following information that support the Department's determination that the facts of this review warrant a CEP offset: 1) EuroChem's home-market prices to end-users are higher than to distributors because home-market customers' needs are addressed specifically and the orders are tailored to their exact requirements; 2) EuroChem Trading USA covers all aspects of U.S. sales, relieving EuroChem of these responsibilities; 3) all of EuroChem's home-market sales are to end-users and distributors while EuroChem Trading USA is a master distributor which sells to distributors; 4) home-market sales are generally sold in bags while CEP sales are sold in bulk; 5) home-market sales are in smaller quantities than CEP sales, resulting in a higher per-unit selling expense for

home-market sales; 6) EuroChem incurs the risk of non-payment as to home-market sales whereas EuroChem Trading USA incurs such burden for U.S. sales.

EuroChem contends that, although the petitioners cite cases to support their argument, they do not tie these cases to the facts of this administrative review. According to EuroChem, solid urea is as close to a pure commodity as one can get; where there tends to be few large purchasers, the differences in selling functions are all the more significant. EuroChem cites *Stainless Steel Sheet and Strip in Coils From France: Final Results of Antidumping Administrative Review*, 70 FR 7240 (February 11, 2005), amended in *Stainless Steel Sheet and Strip in Coils from France: Amended Final Results of Antidumping Administrative Review*, 70 FR 12850 (March 16, 2005) and accompanying I&D Memo at Comment 1 to demonstrate that the Department has made a CEP-offset adjustment where strategic planning and marketing, customer sales and contacts, production planning and order evaluation, warranty-claim analysis, technical service, sales-related administrative support, and transportation arrangement are not done on CEP affiliate sales or to a lesser degree because the CEP affiliate does them, but are done on home-market sales. EuroChem maintains that the facts of this review comport with the Department's practice.

*Department's Position:* Pursuant to section 773(a)(7) of the Act, we continue to find that a CEP offset is warranted for EuroChem for the final results. In particular, 19 CFR 351.412(c)(2) provides the following guidance:

The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing.

We are satisfied that the levels of intensity EuroChem reported for the selling functions undertaken by the U.S. affiliate warrant an adjustment equal to the CEP offset we applied in the *Preliminary Results*.

It is evident from EuroChem's selling-functions chart that its selling activities for home-market sales are very different from its U.S. affiliate sales. Although we did not verify EuroChem's home-market sales in this review, we verified the responses concerning EuroChem's U.S. affiliate in Tampa, Florida, where the narrative descriptions of the selling functions performed by EuroChem Trading USA, as reported in EuroChem's questionnaire responses, were confirmed. EuroChem demonstrated that it performed far fewer selling activities for the U.S. sales because most U.S. selling functions were performed by the U.S. affiliate.

In our *Preliminary Results*, we explained:

We found that there were significant differences between the selling activities associated with the CEP level of trade and those associated with the home-market level of trade. For example, the CEP level of trade involved little or no sales-strategic and economic planning, distributor/dealer training, procurement/sourcing service, order input/processing, and freight/delivery service. Therefore, we considered the CEP level of trade to be different from the home-market level of trade and at a less advanced stage of distribution than the home-market level of trade.

Although the petitioners argue that the differences in selling functions are not “substantial,” our analysis indicates that the nine selling activities EuroChem identified as having significant differences in intensity between home-market sales and CEP sales, coupled with the narrative description justifying these differences and verified as such, support the application of a CEP offset in this review. Thus, we have made a CEP-offset adjustment for our final results of review.

### **III. Date of Sale**

*Comment 3:* EuroChem argues that the date of sale is the invoice date rather than the date of shipment used by the Department in calculating EuroChem’s dumping margin. EuroChem argues that, in *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27346 (May 19, 1997), the Department’s regulations state that, normally, invoice date will be considered the date of sale.

EuroChem argues that the terms of sale are finalized at the invoice date. EuroChem claims that at verification the Department found that U.S. sales are not confirmed until inspection at the U.S. port, at which point the urea can sit on barges for extended periods until the customer agrees to purchase certain quantities at certain prices. EuroChem states that, until the customer takes possession of the subject merchandise, the sale can be cancelled. EuroChem explains that the risk of loss and title transfer from EuroChem to the U.S. customer only after the invoice has been printed following the customer’s final agreement to purchase the goods.

Citing section 773(a) of the Act, EuroChem argues that the Department is obliged to conduct a “fair comparison” between the U.S. price and home-market price, which includes selecting the appropriate date of sale for comparison. EuroChem explains that, when the sale is executed at the U.S. barge, the U.S. price can be quite different from the price at the time the merchandise left the Russian Federation several weeks earlier and, therefore, the price cannot be known specifically until invoicing.

The petitioners counter that the key terms of sale are set prior to date of shipment and well before the invoice date. Specifically, the petitioners assert, the record establishes clearly that the material terms of sale are fixed firmly in the contracts between EuroChem Trading USA and its U.S. customers. Thus, the petitioners conclude, the Department could reasonably adopt the contract date as the date of sale and, at the latest, the Department should use the shipment date as the date of sale in its final results.

The petitioners argue that EuroChem is mistaken that the Department’s regulations establishes a preference for using date of invoice as date of sale. Rather, the petitioners continue, 19 CFR 351.401(i) states that, normally, the Department will use the date of invoice unless the Department is satisfied that “a different date better reflects the date on which...the material terms of sale” are established. The petitioners argue that the record evidence demonstrates that the material terms of sale are established by the sales contracts in this review, which precede the shipment dates. Thus, they assert, the Department reasonably identified the appropriate date of sale as the date of shipment.

Further, the petitioners contend, the Department's well-established practice is to use the shipment date as the date of sale when the shipment date precedes the invoice date, citing numerous decisions in which the Department articulated and adopted its date-of-sale methodology. The petitioners then provide a list of decisions in which the Department has adopted the shipment date as the date of sale even where the terms of sale were subject to change up to the invoice date.

The petitioners assert that the sales documentation included in EuroChem's responses contradict EuroChem's claims that the order can be cancelled at any time until invoicing. The petitioners argue that the terms of the signed contract make clear that the material terms of sale are fixed as of the date of contract, which precedes the shipment dates. The petitioners explain that prior practice demonstrates that the Department has determined that contracts that set prices (or price adjustments based on specified published indices) set the price terms for purposes of determining date of sale because there is nothing further that the parties need to negotiate or agree upon concerning the price of goods sold, citing, among others, *Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip From France*, 52 FR 812 (January 9, 1987) (*Brass Sheet*).

The petitioners refer to EuroChem's original and supplemental responses on the record of this review to demonstrate that sales contracts between EuroChem Trading USA and the U.S. customers are signed prior to the date of shipment of subject merchandise, specifying all the key terms of sale, including price (through pricing formulas), quantity, and delivery terms. The petitioners allege that the final delivery of these transactions illustrate that the price, quantity, and delivery terms articulated in the sales contracts conform precisely to what was delivered to these customers. Therefore, the petitioners conclude, the record evidence demonstrates that the price terms were fully set by the sales contracts and, once the contracts were complete, the prices "were no longer within the control of the parties to alter," quoting *Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan*, 61 FR 14064 (March 29, 1996) (*Polyvinyl Alcohol From Taiwan*).

Moreover, the petitioners contend, EuroChem is confusing the terms of the sale with the terms of delivery when it states that urea can sit on barges for extended periods of time until the customer agrees to purchase certain quantities. The petitioners reiterate that the contracts clearly specify the total quantity to be sold and require the buyer to take the goods. In other words, the petitioners state, the urea is not sitting on the barge awaiting sale; it has been sold and is awaiting delivery.

Additionally, the petitioners assert, the contracts do not indicate that the sale is only final upon adequate inspection. Rather, the petitioners claim, EuroChem's contracts make clear that the buyer is obliged to purchase the goods at the price and quantity specified if the goods meet the contract specifications. The petitioners assert that this is consistent with EuroChem's own October 22, 2009, questionnaire response, in which EuroChem stated that "subject merchandise was destined for a particular U.S. customer in the sale being reported, in particular corresponding sales contracts were already signed..." Therefore, the petitioners conclude, the Department's

decision to use the date of shipment as date of sale was appropriate and the Department could reasonably use the contract date as the date of sale in this review.

*Department's Position:* For these final results, we have reconsidered and reexamined the record evidence based on comments by the petitioners that we could arguably use the contract date as the date of sale because the material terms of sale are fixed firmly in the contracts between EuroChem Trading USA and its U.S. customers.

The Department's regulations at 19 CFR 351.401(i) state:

In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

In keeping with the Department's normal practice not to consider dates subsequent to the date of shipment from the factory as appropriate for date of sale because, once merchandise has been shipped, the material terms of sale are established, in the *Preliminary Results* the Department used the date of shipment as the date of sale. Upon reexamining the record evidence, it is clear that, prior to shipment, the material terms of sale were established through confirmed and signed sales agreements and contracts. The record indicates that EuroChem and its customers enter into the contract with the understanding that, due to market volatility, the final price will be determined at invoicing based on specific formulae and market publications. Prior practice demonstrates that the material terms of sale are indeed established in those cases where contract terms allow for price adjustments based on specified published indices, as is the case in the instant review, because there is nothing more for the parties to negotiate. See, e.g., *Brass Sheet, Notice of Final Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadiene Rubber From Mexico*, 64 FR 14872, 14880 (March 29, 1999), and *Polyvinyl Alcohol From Taiwan* at 14067.

We do not find anything on the record that supports EuroChem's claims that the customer is free to break its contractual obligations until taking possession of the subject merchandise. To the contrary, record evidence illustrates that the sales contracts specify the quantity and price to a particular customer to which the urea is being delivered at the time of shipment. While EuroChem reiterated its position at verification, we do not make any determinations at verification, contrary to EuroChem's claims. Therefore, upon reexamination of information on the record, we have determined that the material terms of sale are established by the contracts between EuroChem Trading USA and the U.S. customers. Thus, the date of the sales contract is the most appropriate date of sale in this review. These facts are consistent with the 2006-2007 new-shipper review we conducted with respect to EuroChem where we determined that the contract date was the most appropriate date of sale for U.S. sales. See *Solid Urea from the Russian Federation: Final Results of Antidumping Duty New-Shipper Review and Rescission of Antidumping Duty Administrative Review*, 73 FR 29736 (May 22, 2008). We have revised our calculations to reflect this change from the *Preliminary Results*.

#### IV. Zeroing

*Comment 4:* EuroChem claims that the Department's zeroing practice is contrary to U.S. law and, therefore, the Department should not zero EuroChem's negative margins associated with its sales of subject merchandise in the final results of review. EuroChem argues that the statutory objective between investigations and administrative reviews are the same; therefore, the Department should not continue zeroing in administrative reviews as it has abandoned its zeroing practice during investigations. EuroChem refers to several court decisions to argue that U.S. government agencies cannot interpret the same statutory language and objective inconsistently.

EuroChem argues that, where a statute is ambiguous, U.S. courts defer to a government agency's interpretation of that statute as long as that interpretation is reasonable. According to EuroChem, the U.S. antidumping statute implements U.S. obligations to comply with the WTO antidumping code, citing the SAA. Because the WTO Appellate Body has ruled that zeroing violates the WTO Antidumping Agreement, EuroChem argues, the U.S. statute cannot be reasonably interpreted as allowing zeroing. EuroChem cites *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), to argue that the U.S. Supreme Court holds that a "reasonable interpretation" of statutory authority must be consistent with U.S. international obligations, if possible.

EuroChem refers to *Body Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, at paragraphs 132-135, 263(a)(i), WT/DS294/AB/R (April 18, 2006), and Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, at paragraphs 8.2-8.4, WT/DS294/R (October 31, 2005), to argue that WTO decisions hold that the United States may not zero in administrative reviews. EuroChem contends that U.S. officials have said that the United States intends to bring itself into compliance with the WTO with regards to zeroing. EuroChem suggests that, in order to comply with the WTO, the Department should cease its zeroing practice immediately, which EuroChem claims can be done within the time frame of this administrative review. EuroChem contends that, if the Department has not yet reached a decision regarding the issue of zeroing during administrative reviews, the Department should not issue the final results of review in this case before the statutorily permitted period for a decision, including any extensions the statute allows.

EuroChem adds that the Department should not zero negative dumping margins for those products that are subject to extreme price volatility where different rules governing "normal" business practices apply. EuroChem continues that, because solid urea is one of those goods subject to such price volatility, the Department should not zero negative margins with regards to the administrative reviews of the order on solid urea.

The petitioners counter that the Department has not altered its zeroing policy and, if it does, Section 129 of the URAA, 19 USC 3558, specifies that such alterations will only be applicable prospectively, not retrospectively, and would therefore not affect the final results of the instant review. The petitioners cite *Andaman Seafood Co., Ltd. v. United States*, 675 F. Supp. 2d 1363 (CIT 2010), where the court upheld the position of the United States that it would only apply changes to antidumping practice required for compliance with international commitments prospectively. Because EuroChem's shipments in this review entered prior to any future date

that USTR may direct the Department to implement any WTO determination and eliminate zeroing in administrative reviews, the petitioners conclude, such a decision would not lawfully apply to the entries subject to this review. The petitioners state that the Department has made clear that it will continue to apply its current zeroing practice in administrative reviews unless and until the USTR directs it to do otherwise. Thus, they conclude, the Department should adhere to its long-established prior practice in this review.

*Department's Position:* We have not changed our calculation of the weighted-average dumping margins for these final results of review with respect to our zeroing methodology. Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value exceeds the export price and constructed export price of the subject merchandise.” Outside the context of antidumping investigations involving average-to-average comparisons, we interpret this statutory definition to mean that a dumping margin exists only when normal value is greater than EP or CEP. As no dumping margins exist with respect to sales where normal value is equal to or less than EP or CEP, the Department does not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held repeatedly that this is a reasonable interpretation of the statute. See, e.g., the following decisions: *Koyo Seiko Co., v. United States*, 551 F.3d 1286 (CAFC 2008); *SKF USA Inc. v. United States*, 537 F.3d 1373 (CAFC 2008); *NSK Ltd. v. United States*, 510 F.3d 1375 (CAFC 2007) (*NSK*); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (CAFC 2007); *The Timken Company v. United States*, 354 F.3d 1334, 1341-1342 (CFC 2004), *cert. denied* 543 U.S. 976 (2004) (*Timken*), *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (CFC 2005) (*Corus I*), *cert. denied* 546 U.S. 1089 (2006).

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.” We apply these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds EP or CEP, and dividing this amount by the value of all sales.

The use of the term “aggregate dumping margins” in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular “dumping margin” in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the normal value permitted to offset or cancel the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to recognize that the weighted-average margin will reflect any non-dumped merchandise examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

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 interpreted 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 1343, *Corus Staal BV v. United States*, 502 F.3d 1370, 1374-75 (CAFC 2007) (*Corus II*), and *NSK*, 510 F.3d at 1381.

EuroChem argues that the WTO Appellate Body has ruled that “zeroing” is inconsistent with U.S. obligations under the Antidumping Agreement. The CAFC has held that WTO reports are without effect under U.S. law “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA. See 19 USC 3538 (2010). See also *Corus I*, 395 F.3d at 1347-49; accord *Corus II*, 502 F.3d at 1375, and *NSK*, 510 F.3d at 1379-80.

Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 USC 3538 (2010). As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department’s discretion in applying the statute. See 19 USC 3538(b)(4) (2010) (stating implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g) (2010) and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722, 77724 (December 27, 2006). With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

For the final results of review, we have adhered to our normal zeroing policy. If we alter our zeroing policy, any alterations would not be applicable retrospectively but, in accordance with 19 USC 3558, would apply prospectively.

## **V. Assessment of Antidumping Duties**

*Comment 5:* Regarding the single entry of subject urea that was liquidated, EuroChem argues that CBP liquidated this entry at the all-others rate for solid urea from the Russian Federation. EuroChem claims that, in response to CBP’s actions, EuroChem filed a protest. According to EuroChem, CBP will decide the final antidumping duty owed following the issuance of the final results of review.

The petitioners counter that there is no evidence to support EuroChem’s claims that CBP has liquidated certain entries at the all-others rate for solid urea from the Russian Federation and, therefore, they claim EuroChem’s argument must be disregarded.

The petitioners contend further that the Department’s decision to assess all antidumping duties on the remaining unliquidated entry is supported by prior precedent, as explained in the Department’s *Preliminary Analysis* memorandum.

*Department's Position:* We will instruct CBP to assess the entire amount of antidumping duties for the POR on the single unliquidated entry as is our practice. See *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 70 FR 72789 (December 7, 2005), and the accompanying I&D Memo at Comment 7, *Carbazole Violet Pigment 23 from India: Final Results of Antidumping Duty Administrative Review*, 73 FR 19811 (April 11, 2008), and the accompanying I&D Memo at Comment 1, and *Third Administrative Review of Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 46565 (September 10, 2009), and the accompanying I&D Memo at Comment 7. The language of the liquidation instructions we will issue to CBP following the publication of the final results of review will specify the appropriate amount of duties to assess on all merchandise subject to this review on the single unliquidated entry to ensure CBP does not over- or under-collect antidumping duties on applicable entries.

Recommendation

Based on our analysis of the responses received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review in the *Federal Register*.

Agree   X  

Disagree \_\_\_\_\_

**/S/RKL**

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Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

August 13, 2010

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Date