

DATE: March 29, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Antidumping Duty Administrative Review of Polyethylene
Terephthalate Film, Sheet, and Strip from the United Arab
Emirates: Issues and Decision Memorandum for the Final Results

I. Summary

We have analyzed the comments of the interested parties in the antidumping duty administrative review of polyethylene terephthalate film (PET Film) from the United Arab Emirates (UAE). As a result, we have made changes to the margin calculation for the respondent, JBF RAK LLC (JBF). We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

II. Background

On December 7, 2011, the Department of Commerce (the Department) published the preliminary results of the antidumping duty administrative review of PET Film from the UAE.¹ The period of review (POR) is November 1, 2009, through October 31, 2010.

The Department received a timely case brief from JBF on January 6, 2012 (JBF Case Brief). Dupont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc. and Toray Plastic (America), Inc. (collectively, Petitioners) filed a timely rebuttal brief with the Department on January 11, 2012 (Petitioners’ Rebuttal Brief). Based on our analysis of the comments received, the weighted average margin for JBF changed from the calculated margin in the Preliminary Results. The revised margin is published in the accompanying Federal Register notice.

¹ See Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review, 76 FR 76365 (December 7, 2011) (Preliminary Results).

III. Discussion of the Issues

Comment 1: Zeroing

JBF argues that the Department erred by applying its zeroing methodology, which is contrary to law and the United States' World Trade Organization (WTO) obligations.² JBF maintains that in two cases before the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), Dongbu Steel Co. Ltd. v. United States, 635 F.3d 1363 (Fed. Cir. 2011) (Dongbu) and JTEKT Corporation v. United States, 642 F.3d 1378 (Fed. Cir. 2011) (JTKET), the Department failed to provide sufficient legal justification as to why it interprets section 771(35) of the Tariff Act of 1930, as amended (the Act), differently in investigations and reviews.³ Moreover, JBF notes that on December 28, 2010, the Department published a Federal Register notice stating that it intended to change its antidumping methodology to eliminate the practice of zeroing in administrative reviews.⁴ According to JBF, this notice acknowledges the Department's recognition that the practice of zeroing must be changed to meet its WTO obligations.⁵

Petitioners hold that JBF provided no legitimate basis for the Department to depart from the practice of zeroing in the final results of this administrative review.⁶ According to Petitioners, Dongbu and JTKET reaffirmed the Department's prerogative to use zeroing in administrative reviews, so long as the Department explains how the practice is consistent with the antidumping statute.⁷ Noting that Antidumping Proceedings⁸ is a proposed rule and that no final rule has been adopted that would preclude zeroing in this case,⁹ Petitioners argue that the Department should not revise its zeroing methodology used to calculate the preliminary dumping margins in this case.¹⁰

Department Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by JBF, for these final results. 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 normal value (NV) and export price (EP) or constructed export price (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 CFR 351.414 provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison

² See JBF Case Brief at 2-4.

³ See id. at 3.

⁴ See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (December 28, 2010) (Antidumping Proceedings).

⁵ See id. at 4.

⁶ See Petitioners' Rebuttal Brief at 2-3.

⁷ See id.

⁸ See Antidumping Proceedings.

⁹ See Petitioners' Rebuttal Brief at 3.

¹⁰ See id.

methods: average-to-average, transaction-to-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 {EPs and CEPs} 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 Federal Circuit has found in the word “exceeds” as used in section 771(35)(A) of the Act.¹¹ The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.¹² 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 Federal Circuit 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.¹³ 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.”¹⁴ The Federal Circuit 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.”¹⁵ 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 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.¹⁶

In 2005, a panel of the 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

¹¹ See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (Timken).

¹² 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.”); 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.”).

¹³ 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; Serampore, 675 F. Supp. at 1360-61.

¹⁴ 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; PAM, 265 F. Supp. 2d at 1371.

¹⁵ See Timken, 354 F.3d at 1343.

¹⁶ 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.

investigations.¹⁷ 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.¹⁸ 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).¹⁹ 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' arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.²⁰

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 Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.²¹ Moreover, in Corus I, the Federal Circuit 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.²² In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the Federal Circuit 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.²³ 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.²⁴

¹⁷ See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (Oct. 31, 2005) (EC-Zeroing Panel).

¹⁸ See EC-Zeroing Panel.

¹⁹ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006); and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (June 26, 2007) (collectively, Final Modification for Investigations).

²⁰ See EC-Zeroing Panel at 7.284, 7.291.

²¹ See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F.3d 928, 934 (Fed. Cir. 2010).

²² See Corus I, 395 F.3d at 1347.

²³ See Final Modification for Investigations.

²⁴ See id. 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. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews). The Final Modification for Reviews makes clear that the revised methodology will apply to antidumping

The Federal Circuit 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.²⁵ In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.²⁶ The Federal Circuit'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.²⁷ The Federal Circuit 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.²⁸ The Federal Circuit 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.²⁹ 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 Federal Circuit 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.”³⁰

We disagree with JBF that the Federal Circuit'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 Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in Dongbu and JTEKT did not overturn prior Federal Circuit decisions affirming zeroing in administrative reviews, including SKF v. United States, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (SKF), in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in Dongbu and JTEKT, the Department provides in these final results additional explanation for its context-dependent 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

duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review 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.

²⁵ See U.S. Steel Corp. v. United States, 621 F.3d. 1351, 1355 n.2, 1362-63 (Fed. Cir. 2010) (U.S. Steel Corp.).

²⁶ See 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).

²⁷ See id. at 1361-63.

²⁸ 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 777A(d)(1)(B) of the Act.

²⁹ See U.S. Steel Corp., 621 F.3d at 1363.

³⁰ See id. (emphasis added).

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,³¹ 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 Federal Circuit 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.³² 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.³³ 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 of the URAA 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

³¹ The Final Modification for Reviews adopts this comparison method with offsetting as the default method for administrative reviews, however, as explained in footnote 23 this modification is not applicable to these final results.

³² See, e.g., SKF USA, Inc. v. United States, 537 F.3d 1373, 1382 (Fed. Cir. 2008); NSK, 510 F.3d at 1379-1380; Corus II, 502 F.3d at 1372-1375; Timken, 354 F.3d at 1343.

³³ 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.

average-to-average comparisons – is not subject to judicial review.³⁴ 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 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 NV 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 does 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

³⁴ See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992).

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 POR. 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.³⁵ 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 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 EPs 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 Federal Circuit has rejected the above reasons. In fact, the U.S. Court of International Trade recently sustained the Department’s explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations.³⁶ Accordingly, the Department’s interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

³⁵ 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.

³⁶ See Union Steel v. United States, Consol. Court No. 11-00083, slip op. 12-24 (CIT Feb. 27, 2012).

With respect to JBF's claim that the Department's zeroing practice in administrative reviews causes the United States to run afoul of its WTO obligations, the Federal Circuit has held that domestic law trumps international trade agreements and that, if conflict arises between the two, "it is strictly a matter for Congress."³⁷ In fact, through the URAA, Congress has provided a procedure through which the United States may change a regulation or practice in response to a WTO finding that the United States engages in conduct inconsistent with its WTO obligations.³⁸ The discretionary nature of the URAA scheme makes clear that Congress did not intend for WTO rules automatically to trump the Executive Branch's discretion of applying domestic law in a certain manner.³⁹

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.

Comment 2: Deductions from Home Market Price

JBF claims that the Department did not correctly deduct credit expenses from home market gross unit price in the margin program.⁴⁰ Specifically, the Department's program did not take full account of the fact that JBF incurred credit expenses in two currencies in the home market.⁴¹ Petitioners did not comment on this issue.

Department Position:

The Department agrees with JBF and has corrected this error in the margin program.

³⁷ See Corus I, 395 F.3d at 1348-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d at 1380.

³⁸ See 19 U.S.C. § 3533(g).

³⁹ See 19 U.S.C. § 3538(b)(4) (stating that implementation of WTO reports is discretionary).

⁴⁰ See JBF Case Brief at 4-6.

⁴¹ See id.

IV. Recommendation

We recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of this review and the final dumping margin for the reviewed company in the Federal Register.

Agree _____ Disagree _____

Paul Piquado
Assistant Secretary
for Import Administration

Date