

February 18, 2011

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

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

RE: Certain Lined Paper Products from India

SUBJECT: Issues and Decision Memorandum for the Final Results in the
Third Antidumping Duty Order Administrative Review of Certain
Lined Paper Products from India

Summary

We have analyzed the case and rebuttal briefs of the petitioner¹ and respondents² for the final results in the third administrative review of certain lined paper products (CLPP) from India. We recommend that you approve the positions we have developed in the “Department’s Position” sections of this memorandum.

Background

On October 21, 2010, the Department of Commerce (the Department) published in

¹ The petitioner in this administrative review is the Association of American School Paper Suppliers and its individual members (petitioner).

² The respondents in this review include two mandatory respondents, Navneet Publications (India) Ltd. (Navneet), and Super Impex, and 29 manufacturers and exporters (collectively, the respondents) of the subject merchandise: Abhinav Paper Products Pvt. Ltd.; American Scholar, Inc. and/or I-Scholar; Ampoules & Vials Mfg. Co., Ltd.; Bafna Exports; Cello International Pvt. Ltd. (M/S Cello Paper Products); Creative Divya; Corporate Stationery Pvt. Ltd.; D.D International; Exmart International Pvt. Ltd.; Fatechand Mahendrakumar; FFI International; Freight India Logistics Pvt. Ltd.; International Greetings Pvt. Ltd.; Lodha Offset Limited; Magic International Pvt. Ltd.; Marigold ExIm Pvt. Ltd.; Marisa International; Paperwise Inc.; Pioneer Stationery Pvt. Ltd.; Premier Exports; Riddhi Enterprises; SAB International; SAR Transport Systems; Seet Kamal International; Solitaire Logistics Pvt. Ltd. (Eternity Int’l Freight, forwarder on behalf of Solitaire Logistics Pvt. Ltd.); Sonal Printers Pvt. Ltd.; Swati Growth Funds Ltd.; V & M; and Yash Laminates (collectively non-selected respondents).

the Federal Register the preliminary results of the antidumping duty administrative review for certain lined paper products (CLPP) from India.³ The period of review (POR) is September 1, 2008, through August 31, 2009. We invited parties to comment on our Preliminary Results. On November 18, 2010, Super Impex submitted its case brief, and on November 23, 2010, petitioner and Navneet submitted their case briefs. On December 13 and 14, 2010, Super Impex and petitioner, respectively, submitted their rebuttal briefs.

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A. Super Impex

- Comment 1: Methodology for Calculations of Interest, Selling, General & Administrative (G&A) Expenses, and Profit

In its case brief, petitioner argues that the Department unlawfully relied on section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended (the Act), to calculate the values for selling expenses, G&A expenses, interest expenses, and profit. Petitioner points out that the Department's Preliminary CV Calculation Memorandum (CV Memo) indicates that it calculated Super Impex's interest (financial) expenses based on the company's own data, and that the selling expenses and profit are based on a simple average of ratios derived from the financial statements of Navneet and Blue Bird. However, petitioner contends that the Department did not specifically identify the statutory calculation methodology used, as envisioned by the Statement

³ See Certain Lined Paper Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review, 75 FR 64988 (October 21, 2010) (Preliminary Results).

of Administrative Action (SAA), or explained the basis for its selection. Petitioner asserts that in accordance with section 773(e) of the Act, the Department must calculate amounts for selling expenses, G&A expenses, interest expenses, and profit using the preferred method or one of the following three methods: (1) actual amounts incurred by the respondent for home market sales of goods in the same general category of merchandise as the like product, (2) weighted average actual amounts incurred by other reviewed producers/ exporters for home market sales of the like product or (3) any “other reasonable method.” According to petitioner, the Department has not explained its decision to calculate imputed interest expenses using Super Impex’s underlying loan data, or explained why the calculations are reasonable in accordance with section 773(e)(2)(B)(iii) of the Act. Therefore, petitioner maintains that the Department should justify its chosen interest rate and should state why its chosen methodology is reasonable overall. Thus, petitioner urges the Department to clearly state which of the statutory methodologies are being used to determine each value, and explain the basis for selection in the final results.

Additionally, petitioner argues that the Department has not explained its decision to use a different method to calculate G&A and interest expenses than it used in calculating selling expenses and profit. Petitioner notes that while the statute does not preclude the Department from using more than one methodology under section 773(e)(2)(B)(iii), the SAA requires the Department to divulge its reasoning when this sub-section is used. Furthermore, petitioner argues that the Department should explain in the final results why the use of the Navneet and Blue Bird (India) Limited (Blue Bird) financial statements to calculate Super Impex’s selling expenses and profit is reasonable. In addition, petitioner argues that the Department should also explain why the use of different methods to calculate these expenses is reasonable.

Moreover, petitioner claims that the Department’s methodology fails to measure price discrimination, and clearly does not lead to the calculation of the most accurate dumping margin. Thus, petitioner argues that the preliminary methodology is not only at odds with the Department’s construction of the Tariff Act, but it fails to achieve the agency’s statutory goal of calculating accurate dumping margins. As such, the methodology is unreasonable, and should be altered for the final results.

Contrary to petitioner’s argument that the Department’s calculation methodology is unlawful, Super Impex asserts that the Department’s methodology in utilizing Super Impex’s own data to calculate the G&A and interest expenses is correct, and is consistent with the Department’s normal practice, and in accordance with section 773(f) of the Act. In addition, Super Impex points out that in deriving the interest expenses, the Department has adjusted Super Impex’s actual interest expenses by adding an amount of imputed interest which the Department calculated based on the verified information of Super Impex’s debt-free loans taken from its affiliates. Hence, Super Impex submits that the Department has considered both actual and imputed interest expenses, in accordance with section 773(e)(2)(b)(iii) of the Act. Therefore, Super Impex argues that the Department should continue with this method in the final results.

Department’s Position:

As discussed in the Preliminary Results, respondent Super Impex did not have viable home or third country markets during the POR. Therefore, the Department used constructed value (CV)

as the basis for calculating normal value (NV) for Super Impex, in accordance with section 773(a)(4) of the Act. Consistent with the Department's practice, we calculated the CV G&A expenses and interest expenses based on Super Impex's own financial data.⁴ With respect to selling expenses and profit, the Department also followed its long-standing practice by relying on the profit rates and selling expenses calculated for Blue Bird and Navneet. See id.

We disagree with petitioner's interpretation that we must use the same methodology under section 773(e)(2)(B) of the Act to calculate G&A and financial expenses that we use to calculate selling expenses and profit. With regard to selling expenses and profit, the use of Super Impex's own data would not be representative of the costs associated with selling the foreign like product since Super Impex did not have a viable home or third country market. By definition, selling expenses and profit rates are closely tied to the sale of the product and the comparison market under review. Thus, the use of Super Impex's own data would not reflect "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review" in accordance with section 773(e)(2)(A) of the Act. Accordingly, we used the financial statements of another Indian producer of lined paper to calculate surrogate selling expense and profit ratios for Super Impex pursuant to section 773(e)(2)(B)(iii) of the Act.

In contrast to selling expenses and profit, G&A and financial expenses are general in nature, are related to the company's operations as a whole, and are not specifically tied to the products or markets where the subject merchandise and foreign like product are sold. Consequently, a company incurs G&A and financial expenses in the ordinary course of business in order to support its overall day-to-day operations. Thus, unlike selling expenses and profit, the fact that a respondent does not have a viable comparison market does not negate the use of its own data to calculate G&A and financial expenses. Accordingly, while we were not able to use Super Impex's own data to calculate selling expenses and profit, we were able to use Super Impex's own data for the calculation of the G&A and financial expense ratios.

As a general rule, there is a preference for the use of a company's own data when a respondent has usable data on the record. Section 773(f)(1) of the Act recognizes the preference of a respondent's books and records as long as they are in accordance with generally accepted accounting principles (GAAP) and are not distortive.⁵ Section 773(e)(2)(B) of the Act simply states that, "if actual data are not available" with respect to the preferred method, then one of three alternatives may be used, presumably as a surrogate for the unavailable data. It does not state that the Department should use surrogate data when a company's actual data is available

⁴ See, e.g., Certain Lined Paper Products From India: Preliminary Results of the First Antidumping Duty Administrative Review, 73 FR 58548, 58553 (October 7, 2008) (CLPP from India AR1 Preliminary Results); unchanged in Certain Lined Paper Products from India: Notice of Final Results of the First Antidumping Duty Administrative Review, 74 FR 17149 (April 14, 2009) (CLPP from India AR1). See also Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 66 FR 42507 (August 13, 2001), and accompanying Issues and Decision Memorandum at Comment 1 (Mushrooms From India 2001).

⁵ See Notice of Final Determination of Sales at Less than Fair Value: Fresh Atlantic Salmon from Chile, 63 FR 31411 (June 9, 1998), and Silicon Metal From Brazil: Preliminary Results of Antidumping Duty Administrative Review and Intent Not To Revoke in Part, 62 FR 42759, 42762 (Aug. 8, 1997), unchanged in Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil, 63 FR 6899 (February 11, 1998).

and on the record, nor does it state that we must use the same source of data for G&A and financial expenses that we use for selling expenses and profit. As such, for G&A and financial expense, we have determined that it is reasonable and appropriate to use Super Impex's own data to calculate its ratios in accordance with section 773(f) of the Act for the final results. At the same time, we also find it reasonable and appropriate to calculate selling expenses and profit under section 773(e)(2)(B)(iii) of the Act.⁶

With respect to petitioner's arguments that the Department failed to explain its decision and reasonableness in its calculation of imputed interest, we disagree. At the Preliminary Results, based on our verification, we found that Super Impex did not take any loans from unaffiliated entities. Rather, we found that Super Impex had incurred interest-free intercompany fund/loan transfers between Super Impex and its affiliate.⁷ For purposes of the Preliminary Results, we added to Super Impex's reported interest expenses an imputed interest to capture the amount of interest-free loans taken by Super Impex from its affiliates. Because Super Impex did not incur any borrowings from unaffiliated parties during the POR, we derived the imputed interest expense using an interest rate of 12 percent as provided in Super Impex's Deed of Partnership at 3.⁸ Because the Department has verified Super Impex's financial data including its interest-free loans, we have determined that it is reasonable to use Super Impex's records to calculate an imputed interest expense and that the calculated imputed interest expense reflects the cost associated with the production and sale of the subject merchandise.

Comment 2: Whether to Include Cello Writing Instruments & Containers Private Ltd.'s Financial Data

Petitioner argues that the Department declined to use the financial statements of Cello Writing Instruments & Containers Private Ltd. (Cello Writing) in calculating aspects of CV although record evidence shows that Cello Writing is part of a larger entity that produces merchandise in the same general class as the foreign like product. Thus, petitioner urges the Department to include Cello Writing's expense and profit ratios in the Department's final results calculations.

Super Impex disagrees with petitioner's contention that the Department should use the financial statements of Cello Writing in calculating aspects of CV. Super Impex believes that the Department is correct in its approach of not using the financial statements of Cello Writing because this company is not a producer of subject merchandise and is not in the business of manufacturing and selling products of the same general category as the subject merchandise (*i.e.*, notebooks).

⁶ See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 15 (Warmwater Shrimp from Thailand); see also Mushrooms From India 2001 at Comment 1.

⁷ See the Memorandum to File Re "Verification of the Sales Responses of Super Impex, Palghar" dated October 7, 2010.

⁸ See Super Impex's revised Public Version of its first supplemental response dated June 7, 2010, at Exhibit A1-3(a) at 3.

Department's Position:

We disagree with petitioner that we should use the financial statement of Cello Writing in calculating Super Impex's selling expenses and profit. In determining the most appropriate profit rate under section 773(e)(2)(B)(iii) of the Act, the Department weighed several factors in the instant case. Among them are: (1) the similarity of the potential surrogate company's business operations and products to the respondent; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; (3) the contemporaneity of the surrogate data to the POI; and (4) the similarity of the customer base. With respect to Cello Writing's financial statements, we continue to find that the business operations and products produced by this company do not include merchandise under consideration or even products in the same general category as the merchandise under consideration. Although the financial statements at issue indicate that Cello Writing is affiliated with "Cello International Pvt. Ltd.," and "Cello Paper Products," two companies that produce subject merchandise and are named as respondents in this review, the financial statements at issue only provide information with respect to Cello Writing. Further, the record provides no indication that the operations of Cello Writing are consolidated with any of its affiliates that produce subject merchandise. In light of the above, we find that the selling expenses and profit information of Cello Writing is not of probative value and not appropriate for use in calculating aspects of CV. Therefore, consistent with the preliminary results, we continue to exclude Cello Writing's financial statements from the calculation of Super Impex's selling expenses and profit, in accordance with section 773(e)(2)(B)(iii) of the Act.

Comment 3: Financial Statement(s) for Use in Determining CV Selling Expense and Profit

At the Preliminary Results, we calculated the CV selling expense and profit ratios for Super Impex based on Blue Bird and Navneet's 2008-2009 financial statements, which were placed on the record by Super Impex. Both petitioner and Super Impex disagree with the Department's approach. Petitioner argues that the Department should have also included Cello Writing's financial statements, which it has placed on the record as another surrogate. For reasons discussed in Comment 2 above, we continue to find that Cello Writing is not a suitable surrogate company for purposes of derivation of CV selling expense and profit ratios.

Super Impex asserts that for this review the Department should have calculated the CV profit ratio based on Blue Bird's profit instead of the simple average of the profit ratios of Blue Bird and Navneet. In support of its argument, Super Impex cites to the Department's decision in CLPP from India AR1 Preliminary Results⁹ where the Department relied solely on Blue Bird's financial information in its derivation of CV selling expense and profit ratios for Kejriwal Paper Ltd. (Kejriwal), despite that Navneet was also a producer of subject merchandise and its financial information was publicly available. Moreover, Super Impex argues that Blue Bird's revenue generated from home market sales of products of the same general category as the products under review accounted for more than 60 percent of total sales revenue, whereas the revenue generated by Navneet accounted for approximately 31 percent of total sales revenue.

⁹ See 73 FR at 58553. The decision was unchanged in CLPP from India AR1.

Accordingly, Super Impex claims that Blue Bird is more representative of home market sales of subject merchandise than Navneet and therefore, the Department should use the profit percentage of Blue Bird in calculating CV profit ratio in the final results.

In addition, Super Impex points out that only Navneet's stationary division sells the same general category of products which are under review. Thus, Super Impex argues that in case that the Department decides to use Navneet's financial data, it is more appropriate for the Department to rely on the profit specifically relating to Navneet's stationary division, as available on the record. Super Impex argues that the Department inaccurately calculated Navneet's profit ratio because instead of only using the financial information for the stationary division for calculating CV profit, the Department calculated the CV profit based on Navneet's entire operation, which is comprised of four different divisions, three of which do not produce or sell subject merchandise. Super Impex contends that its analysis of record evidence indicates that Navneet's CV profit for the stationary division is 7.02 percent and Blue Bird's CV profit is 4.87 percent. Hence, Super Impex asserts that the profit earned in the home market from sales of products of the same general category as the product under review is in the range of 4.87 to 7.02 percent. Citing Mushrooms from Indonesia (1998)¹⁰ where the Department made certain adjustments to arrive at the home market profit percentage, Super Impex argues that the 21.61 percent overall profit percentage that the Department calculated in its preliminary results for Navneet is inappropriate, particularly since record evidence allows the Department to calculate a more accurate CV profit. Furthermore, Super Impex counters that the 21.61 percent profit percentage is not in accordance with section 773(e)(2)(B)(iii) of the Act, because it is in excess of the profit normally realized in connection with the sale for consumption of the merchandise that is in the general category of products as the subject merchandise. Therefore, Super Impex urges the Department to consider Navneet's CV profit percentage as 7.02 percent.

With respect to Super Impex's first argument, petitioner argues that Super Impex's reference to CLPP from India AR1 does not support its argument in that when one company has a higher saturation of sales, the lower saturated company should be excluded. Moreover, petitioner states that in CLPP from India AR1, Navneet's financial statements were not on the record because the company was not a mandatory respondent. Petitioner cites to a case it claims is evidence that the Department does not limit its analysis to home market sales, but also looks to U.S. sales.¹¹

With respect to Super Impex's second argument, petitioner contends that Super Impex's argument assumes that Blue Bird and Navneet's individual segments have profit experiences that can be calculated and compared. However, petitioner argues that neither Blue Bird nor Navneet's financial statements permit for segment-specific profit calculations or comparisons.

¹⁰ See Notice of Final Determination of Sales at Less Than Fair Value of Certain Preserved Mushrooms from Indonesia, 63 FR 72268 (December 31, 1998) (Mushrooms from Indonesia (1998)), and accompanying Issues and Decision Memorandum at Comment 2.

¹¹ See Notice of Preliminary Results and Partial Recession of Antidumping Duty Administrative Review: Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 71 FR 45017, 45021-22 (August 8, 2006) (Pasta from Italy) (calculating a weighted average CV ratio), unchanged in Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 72 FR 7011 (February 14, 2007).

Rather, petitioner claims that prior precedent indicates that the Department does not have a practice of parsing out divisional or segment-oriented data or of rejecting financial statements from companies that sell multiple products.¹²

Petitioner argues that Super Impex's argument regarding the profit cap lacks any basis in law or logic. Petitioner contends that for the Department to accept this argument, the Department would have to conclude that Congress intended the agency to (a) calculate CV based only on the financial statements of companies that sell a single class of product, or (b) to determine divisional profits for any companies selling multiple product lines. Petitioner also contends that this conclusion has no basis in the Tariff Act or in the legislative history. Petitioner argues that Super Impex's cite to Mushrooms from Indonesia (1998) is unavailing because in that case the Department made an adjustment using known, quantifiable values from within Indofood's financial statements. However, petitioner asserts that in the instant case, the values that Super Impex proposes are not taken from audited financial statements, but rather, they are based on speculative allocations of data. Thus, petitioner argues these values are unreliable and unusable, and should be rejected in the final results.

Department's Position:

We have revisited our determination at the Preliminary Results regarding the calculation methodology for CV selling expenses and profit based on Blue Bird and Navneet's financial information. For these final results, we have determined that Blue Bird's financial information constitutes the best available information on the record, in accordance with section 773(c)(1) of the Act.

As noted earlier, Super Impex did not have viable home or third country market sales of the foreign like product. Therefore, the Department has not determined the CV profit under section 773(e)(2)(A) of the Act, which requires sales by the respondent to be made in the ordinary course of trade, for consumption in the foreign country. In situations where we cannot calculate CV profit under section 773(e)(2)(A) of the Act, section 773(e)(2)(B) of the Act sets forth three alternatives. The SAA at 840 (H.R. Doc. 103-316 (1994)) states that "section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods" (emphasis added).

Section 773(e)(2)(B)(i) of the Act specifies that profit may be calculated based on "actual amounts incurred by the specific exporter or producer ... on merchandise in the same general category" as subject merchandise. Super Impex produces both merchandise under consideration and other products that could be considered to be in the same general category (e.g., index cards). However, there is insufficient information on the record for us to determine the profit rate for Super Impex's sales of its non-subject merchandise because sales of non-subject merchandise were not required to be reported.

Section 773(e)(2)(B)(ii) of the Act (alternative (ii)) provides an alternative methodology and specifies that profit may be calculated based on "the weighted average of the actual amounts

¹² See Notice of Final Results of Antidumping Duty New Shipper Review: Honey from the People's Republic of China, 68 FR 62053 (October 31, 2003), and accompanying Issues and Decision Memorandum at Comment 3.

incurred and realized by {other} exporters or producers that are subject to the investigation or review” However, we could not calculate selling expenses and profit based on this alternative because there is only one other respondent in this case and relying on that respondent’s indirect selling expenses and profit would reveal the business-proprietary nature of that information.

Thus, we must calculate CV profit for Super Impex under section 773(e)(2)(B)(iii) of the Act (“alternative (iii)”). Pursuant to alternative (iii), the Department has the option of using any reasonable method, as long as the result is not greater than the amount realized by exporters or producers “in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,” an amount referred to as the “profit cap.” The profit cap cannot be calculated in this case because we do not have information allowing us to calculate the amount normally realized by exporters or producers in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category. Therefore, as facts available we are applying alternative (iii), without quantifying a profit cap. This decision is consistent with the Department’s decision in previous cases involving similar circumstances.¹³

As noted above, to determine the most appropriate profit rate under alternative (iii), the Department has weighed several factors in the instant case. Among them are: (1) the similarity of the potential surrogate company’s business operations and products to the respondent; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; (3) the contemporaneity of the surrogate data to the POR; and (4) the similarity of the customer base. The greater the similarity in business operations and products, the more likely that there is a greater correlation in the profit experience of the two companies.

While both Blue Bird and Navneet’s 2008-2009 financial information is contemporaneous with the POR and publicly available, and while both companies are producers of subject merchandise, given the significance of Navneet’s Book Publishing Division, we have determined that Navneet’s 2008-2009 financial statements are not suitable for use in deriving the surrogate selling expense and profit ratios for these final results.

As Super Impex has pointed out, in addition to producing stationary products, Navneet has three other divisions producing non-subject merchandise. Of the three non-stationary divisions, Navneet’s Book Publishing Division accounted for more than 50 percent of the company’s sales during the POR. As evidenced by Navneet’s 2008-2009 Annual Report, the majority of Navneet’s turnover is generated by the Book Publishing Division (at Rs. 26,953 Lacs) as opposed to the Stationery Division (at Rs. 22,975 Lacs).¹⁴ By contrast, Super Impex is a small partnership firm which is engaging in only the manufacturing of school note books and paper

¹³ See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel, 66 FR 49349 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 8; and Frozen Concentrated Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 66 FR 51008 (October 5, 2001), and accompanying Issues and Decision Memorandum at Comment 3.

¹⁴ See Super Impex’s July 7, 2010 submission at Exhibit D2-7(b) at 46.

products (composition books, filler paper, index cards, etc.).¹⁵ In light of these differences, the Department agrees with Super Impex that ratios determined using Blue Bird's financial information is more representative of the experience of Super Impex than ratios determined using Navneet's financial data.

The records show, and both Super Impex and petitioner agree, that Blue Bird is a producer of stationery products; its financial information is contemporaneous with the POR; and its data is sufficiently complete and accurate for the purpose of calculating surrogate financial ratio and selling expenses. Therefore, based on the totality of our analysis, we find that Blue Bird's financial information constitutes the best available information on the record of this review for purposes of calculating surrogate selling expense and profit ratios.

For purposes of these final results, we have rejected the financial information of Navneet and Cello Writing, and relied solely on Blue Bird's financial information for derivation of CV selling expenses and profit ratios. Accordingly, Super Impex's arguments regarding profit cap and whether the Department should rely on Navneet's Stationary Division-specific profit are moot.

Comment 4: Simple Average versus Weighted Average

At the Preliminary Results, we calculated the CV selling expenses and profit ratio by using a simple average of Blue Bird's and Navneet's selling expenses and profit ratios.

Super Impex contends that the Department erred in this calculation. According to Super Impex, if the Department continues to rely on both Navneet and Blue Bird financial statements, instead of using the simple average method, the Department should follow its practice in Pasta from Italy¹⁶ by applying a weighted average method to calculate the CV selling expenses and profit ratios for Super Impex. Specifically, Super Impex argues that Blue Bird has more domestic sales of notebooks compared to Navneet, hence Blue Bird is more representative of sales in the domestic market. Therefore, Super Impex urges the Department to follow its practice in Pasta from Italy in the final results by applying a weighted average method with more weight given to Blue Bird's selling expenses and profit in the CV calculation.

Petitioner argues that Super Impex's cite to Pasta from Italy is misplaced. Petitioner asserts that the Department appears to have relied on business proprietary information submitted in a prior segment of the proceeding in Pasta from Italy. Petitioner also asserts that the Department does not explicitly identify either the data that is being averaged or the methodology for weighting the data. In addition, petitioner claims that it also appears that the Department's decision to use a weighted-average in Pasta from Italy was at least partially borne from the need to prevent disclosure of business proprietary information. In contrast, petitioner argues that in the instant case, the Department is relying upon publicly available financial statements as its source for financial aspects of CV. Petitioner also disagrees with Super Impex's arguments and conclusions with respect to a weighted-average ratio using a subset of Navneet's financial

¹⁵ See Super Impex's March 9, 2010 submission at page A-5.

¹⁶ See Pasta from Italy.

statements. Petitioner argues that respondent's proposed methodology is not an apple-to-apples comparison because it compares company-wide data from one company to divisional financial data from another company. Thus, the result is profit and selling expense factors that are expressed on a mixed basis, which is unsuitable for averaging. Finally, petitioner states that although the weight-averaging methodology used in Pasta from Italy is currently under appeal, prior precedent shows that the Department has previously used a simple average and that practice was upheld by the Courts.¹⁷

Department's Position:

As discussed above in Comments 2 and 3, for the final results the Department did not use Navneet's or Cello Writing's financial statements as a proxy to derive CV selling expenses and profit ratios. Rather, the Department only relied on the financial statement of Blue Bird in its calculation of CV selling expenses and profit ratios for these final results. Therefore, because we are relying on a single financial statement, the issue of using simple or weighted average is moot.

Comment 5: Treatment of Selling Expenses and Circumstances of Sales (COS) Adjustment in a CV Scenario

Petitioner states that the Department correctly decided to include selling expenses in its buildup of CV, and wrote programming language to include these expenses. However, petitioner contends that the programming language contains conflicting statements that produced a result that is contrary to section 773(e) of the Act. According to petitioner, it appears that the programming error may have occurred in the context of a COS adjustment, which would be inappropriate in the instant case. Petitioner claims that when calculating NV in all non-market economy (NME) cases, the Department states that "because the selling expense component of NV is based on a surrogate value, the Department cannot accurately calculate differences in circumstances of sale and, thus, makes no adjustment for such differences."¹⁸ Petitioner argues that there should be no difference with respect to the Department's inability to make COS adjustments in the instant case. Petitioner contends that neither the statute nor the Department's regulations direct the Department to perform COS adjustments differently in market and non-market proceedings. See section 773(e)(2)(B)(iii) of the Act and 19 C.F.R. § 351.410. Thus, petitioner argues that for the final results, the Department should refrain from making a COS adjustment, or, if it does, it should explain how identically sourced surrogate selling expenses can be deemed accurate in a market economy (ME) proceeding, yet inaccurate in a NME proceeding. Moreover, petitioner claims that all of Super Impex's sales are export price (EP) sales and that the Department does not make adjustments for indirect selling expenses with respect to such sales. Rather, COS adjustments are limited to direct selling expenses.¹⁹ In addition, petitioner claims that the Department separately accounts for differences between

¹⁷ See Rhodia, Inc. v. United States, 26 CIT 1107, 1111, 240 F. Supp.2d 1247, 1251 (2002).

¹⁸ See Department's Antidumping Manual at Chapter 10, page 11.

¹⁹ See Preliminary Results of Antidumping Duty Administrative Review: Circular Welded Carbon Steel Pipes and Tubes From Taiwan, 75 FR 32911, 32913 (June 10, 2010).

markets for commissions through its commission offset. Therefore, petitioner believes that the adjustment is erroneous, and should be corrected for the final results.

On the other hand, petitioner argues that if the Department deems that a COS adjustment is appropriate, then COS should be calculated by first distinguishing indirect and direct selling expenses and commissions, then separate selling expense variables should be calculated. Petitioner submits that based on its review of Blue Bird and Navneet's financial statements only advertisement and commissions might potentially be direct expenses.

With respect to advertising expense, petitioner further states that the Department employs a two-part test to determine the nature of advertising expenses.²⁰ First, it must determine that the advertising is directed to the customer's customer and second, it must determine that advertising expenses are specifically related to sale of the subject merchandise.²¹ Petitioner argues that given the record evidence, the Department cannot determine that either prong of its test has been tolled based merely on the generalized line item listed on the financial statements. Therefore, even if a COS adjustment were appropriate, advertising expenses should be considered as indirect selling expenses, and commissions represent a miniscule amount of the total selling expense pool. Thus, in sum, petitioner argues that even if a COS adjustment were appropriate, substantially all, if not all, of the Navneet/Blue Bird selling expenses are indirect.

Super Impex contends that it is the Department's normal practice to allow COS adjustments in the CV scenario. Therefore, the Department is correct allowing a COS adjustment in its calculation of Super Impex's selling expenses. Moreover, Super Impex contends that the COS adjustment allowed for Super Impex cannot be compared with NME cases, as the Department has separate guidelines for ME and NME cases as noted in Chapter 8 of the Department's Antidumping Manual.

Department's Position:

We agree with petitioner that the Department's SAS programming for the Preliminary Results has conflicting language in that the intended deduction of direct selling expense was commented out and as a result, the entire selling expenses were inadvertently deducted from the total CV. We also agree with petitioner that the Department did not properly identify direct selling expenses from the two surrogate financial statements of Blue Bird and Navneet in the Preliminary Results. For purposes of these final results, we have corrected the programming language, and we have only deducted the selling expenses that we can clearly identify as direct selling expense from the surrogate financial statement of Blue Bird.

Section 351.410 of the Department's regulations governs adjustments for differences in COS, which are specified by section 773(a)(6)(C)(iii) of the Act. See 19 C.F.R. §351.410. COS

²⁰ See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Japan, 64 FR 30574 (June 8, 1999), and accompanying Issues and Decision Memorandum at Comment 5.

²¹ See Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada, 70 FR 12181 (March 11, 2005), and accompanying Issues and Decision Memorandum at Comment 6.

adjustments consist of the following items: (1) direct selling expenses such as commissions, credit expenses, guarantees, and warranties that result from, and bear a direct relationship to, the particular sale in question; (2) assumed expenses, which are selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses; and (3) a reasonable allowance for other selling expenses when commissions are paid in one market under consideration but not the other market under consideration.

In the instant case, Super Impex reported four direct selling expenses: foreign bank charges, Indian bank charges, commissions, and letter of credit charges.²² Blue Bird, the surrogate company, also reported four selling expenses: travelling & conveyance, bad debts, advertisement, and commission on sales.²³ We revisited our COS adjustment in the Preliminary Results, and we agree with petitioner that the only selling expense that can be clearly identified as a direct selling expense and is qualified for a COS adjustment is commission. Therefore, as discussed further below, in accordance with 19 C.F.R. §351.410, we have made a COS adjustment for commission only to the calculated total CV for these final results.

We disagree with petitioner's argument that because COS adjustments are not allowed in NME cases, we should therefore not make any COS adjustment in this, a ME case. As explained above, the statute and the regulations specifically provide for COS adjustments when the exporter incurs certain expenses in either the U.S. or comparison market that it does not incur when selling to the other. See section 773(a)(6)(C)(iii) of the Act; 19 C.F.R. §351.410. In an NME administrative review, however, in order to make a COS adjustment for commissions (or any other selling expenses) paid by the surrogate producer(s), but not by the NME respondent under review, the Department would have to collect and rely on data with respect to the NME respondent's indirect selling expenses incurred in the NME foreign market for sales to the United States. Such expenses, however, would be based on the NME's internal pricing, which the Department does not utilize for purposes of antidumping calculations because such pricing reflects internal transactions in an NME country that are considered unreliable. See section 771(18)(A) of the Act; see also Shandong Huarong Machinery Co., Ltd. et. al., v. United States, Slip Op. 07-169 at 34 (CIT November 2007). Accordingly, the Department is precluded from making COS adjustments in the NME context, because the necessary data to calculate such adjustments cannot be relied upon due to the fact that the relevant expenses are incurred and priced under non-market economy conditions.²⁴

In this case, the Department is not precluded from making COS adjustments, so long as the level

²² See Super Impex's section C response dated March 30, 2010, at pages C-35-36, and C-39-C41.

²³ See Memorandum to Melissa Skinner, Director, AD/CVD Operations, Office 3, Import Administration, Through James Terpstra, Program Manager, from Cindy Robinson, Case Analyst, Titled "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Super Impex Paper Limited," (COP_CV Memo), dated October 7, 2010.

²⁴ See Final Results of Redetermination Pursuant to Court Remand: Shanghai Eswell Enter. Co., Ltd. v. United States, Court No. 05-00439, Slip Op. 07-138 (CIT September 13, 2007) at 12, dated February 11, 2008, *sustained following remand*, Shanghai Eswell Enter. Co., Ltd. v. United States, No. 05-00439, Slip. Op. 08-124 (CIT November 18, 2008), *aff'd* Shanghai Eswell Enterprise Co., Ltd. v. United States, 350 Fed. Appx. 473 (Fed. Cir. November 5, 2009).

of detail in the financial statements allows for identification of direct selling expenses, because this is a ME case using ME financial statements. As discussed above, both Super Impex and Blue Bird incurred commission expenses. In addition, Super Impex classified its reported commission expense as a direct selling expense. Thus, because Super Impex's and Blue Bird's financial statements both identify commission expense as a selling expense, we have made a COS adjustment for commissions in these final results, pursuant to 19 C.F.R. §351.410.

Comment 6: Calculation of Countervailing Duty (CVD) Adjustment

Petitioner claims that the CVD offset submitted by Super Impex and used by the Department in the preliminary results calculation is inaccurate. Therefore, petitioner argues that for the final results the Department should revert to its normal methodology. Petitioner also states that because it is the Department's practice to use the most recently published CVD rate rather than the rate in effect at the time of entry, the Department should update the CVD rate it uses, to the extent that there is a change.

Super Impex claims that it calculated the adjustment amount based on the actual applicable duty rate on which the goods are entered into the United States. Moreover, Super Impex asserts that the Department verified this calculation and did not find anything wrong with it. Furthermore, Super Impex asserts that the rate it used in its calculation is the most recent applicable CVD rate.

Department's Position:

At the Preliminary Results, the Department adjusted the export price by adding an amount equal to the CVD rate attributed to export subsidies in the most recently completed CVD administrative review of CLPP from India, in accordance with section 772(c)(1)(C) of the Act. Because Super Impex was not individually reviewed by the Department during the original CVD investigation or in any subsequent administrative reviews, it does not have its own CVD rate. Therefore, the CVD "All Others Rate" of 9.42 percent is applicable to Super Impex. The CVD "All Others Rate" was established in the original investigation and has never been changed.²⁵

Super Impex did not report "Entered Value" in its U.S. sales database. In such circumstances, the Department normally estimates the entered value by deducting international freight expense and marine insurance from respondent's reported net U.S. selling price. However, in this case, Super Impex reportedly used the following formula to calculate its reported U.S. Dollar value for its CVD duties paid:

$$\text{CVDU} = (\text{gross unit price} - \text{international freight} - \text{marine insurance}) * 0.0942. \text{ }^{26}$$

²⁵ See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from India, 71 FR 45034 (August 8, 2006).

²⁶ Super Impex did not report any billing adjustments or discounts or rebates and therefore, gross U.S. selling price is the same as net U.S. selling price.

Because the reported formula and the CVD rate are accurate, at the Preliminary Results, the Department used the CVD amounts reported by Super Impex as the CVD offset. Upon reexamination, we agree with petitioner that, despite Super Impex's claim of using the correct formula and rate, its reported U.S. Dollar value of CVD amounts were not accurate. For these final results, we have applied the correct formula and rate as stated above to Super Impex's database to calculate the CVD offset. See Super Impex's Calculation Memo for further details.²⁷

B. Navneet

Comment 7: Revised Sales Databases

Navneet claims that in its preliminary results margin program calculations, the Department used the home market and U.S. sales databases from the April 6, 2010, original submission instead of the revised sales databases submitted on June 11, 2010. Moreover, Navneet states that because the Department accepted the June 11, 2010, supplemental questionnaire response and the sales databases without comment or objection, it is assumed that the Department's use of the superseded April 6, 2010, databases was an inadvertent error.

Petitioner did not comment on this issue.

Department's Position:

We agree with Navneet that the Department inadvertently used the home market and U.S. sales databases from the April 6, 2010, submission in its preliminary results margin program calculations. We have corrected this programming error and have used the home market and U.S. sales databases from the June 11, 2010, submission in the final results margin program calculations.

Comment 8: Navneet's Model Match Sub-Codes

Navneet argues that the Department's standard coding for product characteristics is too narrow. Hence, Navneet provided additional codes that it contends are essential because they provide sufficient detail to identify characteristics that have potentially substantial cost and price impacts on the end products. According to Navneet, in the case of binding type, the standard codes do not distinguish between single or double wire. In the case of cover materials, the standard codes do not distinguish between (1) printed and varnished paper board, (2) printed and laminated paper board, and (3) printed polypropylene covers and foiled polypropylene covers. Navneet asserts that a skewed analysis could result if the distinctions are not recognized in the matching because there could be a significant price differential between the product sold in the United States and the product sold in India due to the greater cost of the Indian product. Thus, Navneet posits that in order to ensure the most accurate product matching and price comparison, the Department should use Navneet's additional product codes in the final results.

²⁷ See Memorandum to file, through James Terpstra, Program Manager, from Cindy Robinson, Case Analyst, Titled "Analysis Memorandum for Super Impex, RE: Final Results of Antidumping Duty Administrative Review of Certain Lined Paper Products from India," "Super Impex's Calculation Memo," dated February 18, 2011.

Petitioner counters that the sub-codes submitted by Navneet do not represent entirely new materials that are not otherwise provided for in the Department's initial questionnaire, but breakouts of materials already included in the model-match criteria. Petitioner also counters that the worksheets related to the new sub-codes submitted by Navneet lack any narrative explanation, and moreover do not indicate the sources of the values used in the cost-buildups contained therein. Thus, according to petitioner, this information is insufficient to demonstrate that the proposed codes reflect "meaningful differences in physical characteristics, cost, and use" that would justify a change in the model-match criteria. Therefore, petitioner contends that the Department should follow its prior practice, and continue to deny Navneet's proposed changes to the model-match criteria.

Department's Position:

The codes listed in the Department's questionnaire are not considered to be all inclusive and, thus, allow respondents to report other materials that are used in the production of subject merchandise. Accordingly, the "other" category is provided to allow for separate coding of completely different material. However, in this instance, the additional codes submitted by Navneet are included in the original codes in the initial questionnaire, and do not represent "other" materials used. The codes for the control numbers (CONNUMs) assigned to each reported sales transaction should be based on the model match physical characteristics established in the investigation. Therefore, we have collapsed the sub-codes provided by Navneet into the appropriate codes noted in the initial questionnaire, which is consistent with the Department's practice of using the same CONNUM for products sharing identical product physical characteristics.²⁸

Comment 9: Treatment of Merchandising Expense

Navneet argues that the Department misconstrues Navneet's merchandising efforts as indirect selling expenses. Navneet asserts that merchandising is not selling, but rather, is advertising. Further, Navneet asserts that its merchandising effort does not involve its sales staff. Its merchandising is a form of hands-on, direct to the consumer, retail-level advertising that is directed at Navneet's customers' downstream customers. Thus, this merchandising activity should be recognized as a direct rather than an indirect selling expense.

Navneet declares that the Department has long considered advertising that is aimed not at one's own customers, but at the downstream customers of one's own customers, to be direct advertising which must be deducted from the home market price as a circumstance of sale adjustment.²⁹ Navneet notes that the SAA³⁰ states that the Department will employ the

²⁸ See Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review, 75 FR 7563 (February 22, 2010) (CLPP Second Review), and accompanying Issues and Decisions Memorandum at Comment 3.

²⁹ See Notice of Final Determination of Sales At Less Than Fair Value: Live Swine from Canada, 70 FR 12181 (March 11, 2005), and accompanying Issues and Decision Memorandum at Comment 6; Notice of Final Determination of Sales At Less Than Fair Value: Certain Pasta from Italy, 61 FR 30326 (June 14, 1996), and Color Television Receivers, Except for Video Monitors, From Taiwan; Final Results of Antidumping Duty Administrative Review, 58 FR 34415 (June 25, 1993).

circumstance of sale adjustment to adjust for differences in direct expenses and differences in selling expenses of the purchaser assumed by the foreign seller. Navneet argues both merchandising and direct advertising are aimed at the general public, and involve the assumption by Navneet of marketing expenses that would otherwise be the responsibility of the distributors or the individual retailers.

Navneet contends that merchandising fully complies with the standard two-part test for determining whether marketing expenses are direct or indirect in that (1) Navneet's merchandising is aimed at Navneet's customers' customers, and (2) the merchandising efforts are directly related to promotion of Navneet's subject merchandise in India. Thus, Navneet argues that its merchandising expenses are direct selling expenses, just like its other direct advertising expenses, and the Department should make this correction in the final results.

Navneet claims that the Department has explicitly recognized the same kind of merchandising expenses as direct selling expenses in other cases, and argues that the same factual situation exists in the instant case.³¹ Navneet claims that the merchandising efforts are within the class of expenses that the Department traditionally has recognized as direct expenses, as it is compelled to do by the Act's requirement that the Department adjust the home market price for "selling expenses of the purchaser assumed by the foreign seller." Accordingly, Navneet argues that in the final results, the Department should treat Navneet's merchandising expenses as direct selling expenses.

Petitioner contends that Navneet does not cite a single case indicating that the Department equates merchandising personnel salaries with advertising expenses or that the Department has applied its two-pronged test for determining whether advertising expenses constitute direct or indirect costs to salaries of any kind. Petitioner also contends that Fresh Kiwi From New Zealand makes no mention of merchandising activities. Rather, it simply indicates that "direct advertising" expenses were deducted from the constructed export price (CEP). Petitioner further contends that there is also no indication that the Department treated salaries as direct selling expenses in Canned Pineapple Fruit From Thailand or Frozen Concentrated Orange Juice From Brazil. Petitioner asserts that in both cases, the Department made a circumstances of sale (COS) adjustment to account for "merchandising expenses," but did not describe the expenses, and did not associate them with salaries of any kind. Thus, petitioner asserts Navneet does not provide support for its arguments that the Department should deviate from its normal practice of treating

³⁰ SAA, H.R. Doc. 103-316 at 828, reprinted in 1994 U.S.C.C.A.N. at 4167.

³¹ See Fresh Kiwifruit From New Zealand; Preliminary Results of Antidumping Duty Administrative Review, 61 FR 15922, 15922 (April 10, 1996) (Fresh Kiwifruit from New Zealand), unchanged in Fresh Kiwifruit From New Zealand; Final Results of Antidumping Administrative Review, 61 FR 46438 (September 3, 1996); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Canned Pineapple Fruit From Thailand, 60 FR 2734, 2738 (January 11, 1995) (Canned Pineapple Fruit from Thailand), unchanged in Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand, 60 FR 29553 (June 5, 1995); and Frozen Concentrated Orange Juice From Brazil; Preliminary Results of Antidumping Duty Administrative Review, 55 FR 1071 (January 11, 1990) (Frozen Concentrated Orange Juice from Brazil), unchanged in Frozen Concentrated Orange Juice From Brazil; Final Results of Antidumping Duty Administrative Review, 55 FR 26721 (June 29, 1990).

salaries for marketing personnel as indirect selling expenses. Likewise, petitioner asserts that Navneet does not provide support for its argument that the Department's two-pronged test to determine whether advertising expenses are direct or indirect selling expenses should be applied to such salaries.

On the other hand, petitioner contends that even if the Department were to determine that salaries could potentially represent a direct selling expense, the Department should continue to treat Navneet's merchandising activities as indirect selling expenses. Petitioner further contends that although Navneet provided a description of its merchandising personnel's work, it provided no documentation to support this description. Furthermore, petitioner asserts that Navneet did not point to any information on the record to support its position. Thus, petitioner asserts that Navneet failed to demonstrate that its merchandising activities are directed at its customer's customer, consistent with the two-pronged test.³² Therefore, petitioner argues that Navneet's arguments are without merit and that the Department should continue to treat these salaries as indirect selling expenses for the final results.

Department's Position:

As explained above, section 351.410 of the Department's regulations governs adjustments for differences in COS, which are specified by section 773(a)(6)(C)(iii) of the Act. COS adjustments consist of the following items: (1) direct selling expenses such as commissions, credit expenses, guarantees, and warranties which result from and bear a direct relationship to the particular sale in question; (2) assumed expenses, which are selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses; and (3) a reasonable allowance for other selling expenses when commissions are paid in one market under consideration but not the other market under consideration. See 19 CFR § 351.410.

In the instant case, Navneet reported that it employs its own retail marketing personnel, who assist retailers as merchandisers and sales facilitators at the retail/consumer level.³³ Thus, these employees are paid a salary regardless of whether or not a sale is made, and their salaries are not linked to a particular sale. The Department's policy is to treat sales expenses that are incurred regardless of whether sales are made and that are not linked to a particular sale, such as salesman's salaries, as indirect selling expenses.³⁴ Moreover, these salaries are not assumed expenses like advertising. Advertising is an "assumed" expense where the producer pays for advertising aimed at its customer's customer; in doing so, the producer "assumes" these expenses on behalf of the customer. Crucially, Navneet reported its merchandising expenses separate from, and in addition to, advertising expenses (for which the Department made a COS

³² See 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 Issues and Decision Memorandum at Comment 2. See also Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy, 61 FR 30326 (June 14, 1996).

³³ See Questionnaire Response dated April 6, 2010, at page A-11.

³⁴ See Stainless Steel Bar from India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 52294 (September 9, 2008), and accompanying Issues and Decision Memorandum at Comment 4.

adjustment, consistent with 19 CFR § 351.410).³⁵ The merchandising expenses reported by Navneet, *i.e.*, the salaries of Navneet’s retail marketing personnel, are expenses incurred by Navneet (the producer) to sell to its primary customers (the retailer), rather than to the customer’s customer (the retailer’s customer). As such, these expenses represent efforts by Navneet’s employees to increase sales from Navneet to Navneet’s direct customer. Even if part of the activity of Navneet’s employees is aimed at the customer (the retailer) increasing its sales to other customers, this activity does not translate these salaries into expenses “assumed” by Navneet on behalf of its customers. Therefore, the Department’s position in the preliminary results remains unchanged. Thus, for the final results we continue to treat Navneet’s merchandising activity as an indirect selling expense.³⁶

Comment 10: Treatment of Negative Dumping Margins (Zeroing)

Navneet argues that prior to calculating the average dumping margin, the Department adjusted the numbers in an unfair and highly distortive way: in deriving the “average dumping margin” from the sum of all the individual potentially uncollected dumping duties (PUDDs), the Department used only those PUDDs whose inclusion in the overall average would guarantee a positive dumping margin, and simply ignored any negative PUDDs that would tend to lower or eliminate a positive margin. Thus, Navneet argues that the Department systematically increased the calculated dumping margin for every product with a negative PUDD by setting negative margins to zero before the final calculation results in the average margin being distorted upward. Notwithstanding a *de minimis* rate in the Preliminary Results, Navneet claims that the Department’s methodology risks creating a positive margin. Navneet asserts that although this “zeroing” methodology is the Department’s longstanding practice, it is unfair, forbidden by recent WTO Appellate Body rulings, and is not required by U.S. statute. Therefore, Navneet contends that the Department should revise its practice and align its interpretation of the statute with the United States’ obligations under international law.

Navneet states that in August 2009, the WTO Appellate Body specifically condemned the Department’s continued use of its zeroing methodology in administrative reviews, and called on the United States to bring its antidumping methodology into compliance with its obligations under the WTO Agreements by abandoning zeroing.³⁷ Thus, Navneet reasons that the Department has the authority to revise its practice, and that the Department should exercise its authority in this case to bring its practice into compliance by abandoning zeroing for the final results margin calculation.

Citing to Timken, Navneet notes that the courts have held that the Department is not barred by U.S. statute from zeroing, and that zeroing is a permissible interpretation of the U.S. Antidumping Statute.³⁸ Navneet asserts, however, that Timken made clear that the Antidumping

³⁵ See Questionnaire Response dated February 10, 2010, at page B-48.

³⁶ See also CLPP Second Review at Comment 6.

³⁷ See, Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews, ¶ 213, WT/DS322/AB/RW (August 18, 2009).

³⁸ See Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken).

Law also does not require the Department to employ zeroing to cancel out negative margins. Moreover, Navneet asserts that the Federal Circuit subsequently confirmed that the Department's zeroing methodology was only a permissible, but not a required, interpretation of the Antidumping Law.³⁹ Thus, Navneet concludes that since zeroing is under specific condemnation by the WTO, and since the courts have held that the Department is not required to continue zeroing under the statute, the Department should abandon zeroing.

Moreover, Navneet argues that it is a fundamental principle of statutory construction that, where faced with competing interpretations of a statutory provision, an interpretation that is consistent with international law is to be favored over an interpretation that constitutes a violation of international law. Navneet states that the Federal Circuit has directed in the context of the GATT that GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.⁴⁰ Navneet also states that the Court of International Trade specifically applied the principle to the Department, declaring that "a party may reasonably assume that the agency will interpret U.S. law so as to avoid a conflict with international obligations."⁴¹

Navneet contends that this concept is also in line with the instruction of the Supreme Court in an 1804 case stating that "{i}t has also been observed that 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 construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."⁴² Navneet asserts that this admonition should guide the Department's consideration of its continued use of zeroing.

Navneet argues that because there is no longer any reasonable doubt what the U.S. obligations under the "law of nations" is with regard to zeroing, the Department should interpret the law accordingly, and exercise its discretion to comply with the international proscription of zeroing in administrative reviews. Further, Navneet contends that only by including the individual margin results from the analysis of the U.S. sales of all products, including those with negative margins, can the Department ensure that the margin calculation will apply U.S. law in conformity with WTO rules and the underlying U.S. commitments.

Petitioner states that the Department's practice of setting the value of negative transaction-specific dumping margins to zero has been approved several times by the U.S. Court of International Trade and by the Court of Appeals for the Federal Circuit.⁴³ Petitioner contends

³⁹ See Corus Staal BV v. United States, 395 F.3d 1343, 1346-1347 (Fed. Cir. 2005) (Corus I), cert. denied, 126 S. Ct. 1023 (January 9, 2006).

⁴⁰ See Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

⁴¹ See Timken Co. v. United States, 240 F. Supp. 2d 1228, 1242 (CIT 2002).

⁴² See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118, 2 L. Ed. 208 (1804).

⁴³ See, e.g., Corus I, 395 F.3d at 1349.

that Navneet’s arguments are not persuasive. According to petitioner, WTO rulings with respect to zeroing do not obligate the Department to take any action, hence, Navneet’s claim that the WTO has found that zeroing is “unfair” is irrelevant. Petitioner states that reviewing courts have repeatedly found that zeroing is acceptable under applicable U.S. law. Furthermore, it is the Department’s duty to enforce and apply U.S. law, as embodied in the Act. Petitioner asserts that although the Department has the power to alter its practice to conform to WTO agreements, the mechanism for doing so – the Section 123 process – has not been invoked with respect to the use of zeroing in administrative reviews. In addition, petitioner claims that even if the Department wanted to change its zeroing methodology in administrative reviews as a result of the WTO’s decisions, Congress has laid out a very specific method for the agency to follow in accordance with 19 U.S.C. §§ 3538(b) and 3533(g). Citing to Carbon Steel Pipe and Tube from Turkey, petitioner asserts that the Department has explained that this process has not been employed with respect to offsetting in administrative reviews.⁴⁴ Therefore, petitioner contends that contrary to Navneet’s suggestion, the Department may not simply choose to forego zeroing. Thus, petitioner argues that the Department should continue to calculate Navneet’s antidumping duty margin using zeroing, just as it did in the prior review.

Department’s Position:

We have not changed our calculations of the weighted-average dumping margin as suggested by Navneet for these final results of review. 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.” Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than export price or constructed export price. As no dumping margins exist with respect to sales where NV is equal to or less than export price or constructed export price, the Department will not permit these “transactions with negative margins” to offset the amount of dumping found with respect to other sales. The Federal Circuit has held that this is a reasonable interpretation of the statute.⁴⁵

Section 771(35)(B) of the Act defines weighted-average dumping margin as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds export price or constructed export price, 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 export price or constructed export price exceeds the NV permitted to offset or

⁴⁴ See Certain Welded Carbon Steel Pipe and Tube From Turkey: Notice of Final Antidumping Duty Administrative Review, 75 FR 64250 (October 19, 2010) (Carbon Steel Pipe and Tube From Turkey), and accompanying Issues and Decision Memorandum at Comment 1.

⁴⁵ See Timken, 354 F.3d at 1342; Corus I, 395 F.3d at 1347-49.

cancel out the dumping margins found on other sales.

This does not mean that “transactions with negative margins” are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any “transactions with negative margins” 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 “transactions with negative margins” is included in the numerator. Thus, a greater amount of “transactions with negative margins” results in a lower weighted-average dumping margin. 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.” 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.⁴⁶

The Department notes that it recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations in its Final Modification.⁴⁷ In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews.⁴⁸ Thus, because the Final Modification only affected antidumping investigations involving average-to-average comparisons, the Department has continued to deny any offsets of non-dumped transactions in this administrative review.

Navneet has cited a WTO dispute-settlement report finding the denial of offsets by the United States to be inconsistent with the WTO Antidumping Agreement. As an initial matter, the Federal Circuit 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.⁴⁹ Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 U.S.C. § 3538. 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, where implementation of WTO reports is discretionary. See 19 U.S.C. § 3538(b)(4) (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 U.S.C. § 3533(g). See, e.g., Final Modification.⁵⁰ With regard to the denial of

⁴⁶ See Timken, 354 F.3d at 1343; Corus I, 395 F.3d 1343; Corus Staal BV v. United States 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); and NSK Ltd. v. United States, 510 F.3d 1375 (Fed. Cir. 2007) (NSK).

⁴⁷ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Final Modification).

⁴⁸ See Final Modification, 71 FR at 77724.

⁴⁹ See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; NSK, 510 F.3d at 1375.

⁵⁰ See Final Modification, 71 FR at 77724.

offsets in administrative reviews, the United States has not adopted a change in its well-established practice in response to the WTO finding upon which Navneet relies. Accordingly, there is currently no alternative dumping margin calculation methodology.

We note that the United States has initiated the process set forth in section 123 for responding to the WTO finding that Navneet is citing.⁵¹ Section 123(g) specifies that the regulation or practice that the WTO panel or Appellate Body has found inconsistent with the WTO Agreements “may not be amended, rescinded, or otherwise modified . . . unless and until” the elaborate procedures detailed in the subsection have been complied with 19 U.S.C. § 3533(g)(1) (emphasis added). The statute requires the United States Trade Representative to consult with the appropriate congressional committees, agency and department heads, and private sector advisory committees, and to provide an opportunity for public comments, before determining whether or how to respond to a WTO report. See 19 U.S.C. § 3533(g)(1)(A)-(E). In addition to these requirements, Congress provided that no regulation or practice may be amended, rescinded or otherwise modified unless and until, the final rule or other modification has been published in the Federal Register. See 19 U.S.C. § 3533(g)(1)(F). Accordingly, the United States is responding to the WTO reports pursuant to a specific statutory process under section 123. The Department, therefore, declines Navneet’s suggestion in the context of this administrative review to short-circuit or otherwise prejudge the outcome of that statutory process.

For all these reasons, the WTO Appellate Body report regarding “zeroing” does not establish whether the Department’s denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department’s interpretation of the Act described above, in the event that any of the export 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 to other U.S. transactions.

⁵¹ See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (December 28, 2010).

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the Federal Register.

AGREE _____ DISAGREE _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date