ARTICLE 1904 BINATIONAL PANEL REVIEW

Pursuant to the

NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of:	
BINATIONAL PANEL REVIEW OF CARBON AND CERTAIN ALLOY STEEL WIRE ROD FROM CANADA	**Secretariat File No. USA-CDA-2008-1904-02**

DECISION AND ORDER OF THE PANEL

PANEL MEMBERS:

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I. INTRODUCTION

This Binational Panel ("Panel") was established pursuant to Article 1904.2 of the North American Free Trade Agreement ("NAFTA"). The Panel was constituted to review *Carbon and Certain Alloy Steel Wire Rod from Canada: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 26,958 (May 12, 2008) ("Final Determination").

After the issues were briefed and the Panel heard oral argument, on May 11, 2011, the Panel issued its decision, affirming the U.S. Department of Commerce ("Commerce" or "the Investigating Authority") Final Determination with respect to the issue of level of trade but remanding to Commerce with regard to its practice of "zeroing" in the administrative review before the Panel, with instructions to the Investigating Authority to provide an explanation consistent with the remand orders in *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) ("*Dongbu*") and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) ("*JTEKT*"). *See, Carbon and Certain Alloy Steel Wire Rod from Canada: Final Results of Antidumping Duty Administrative Review, Decision and Order of the Panel*, USA-CDA-2008-1904-02 (May 11, 2012) (*"Panel Decision").*

In accordance with Article 1904.8 of NAFTA, for reasons more fully set out below, and on the basis of evidence in the administrative record, the applicable law, the written submissions of the participants, and oral argument at the Panel's hearing, the Panel affirms the investigating authority's Final Determination with regard to the issue of zeroing in this matter.

II. PROCEDURAL BACKGROUND

On July 17, 2012, the Investigating Authority submitted its redetermination and explanation as instructed in the Panel's remand. *Final Results of Redetermination Pursuant to*

Remand, Binational Panel Review of Carbon and Certain Alloy Steel Wire Rod from Canada, USA-CDA-2008-1904-02 (July 17, 2012) ("*Determination on Remand*"). In response, on August 13, 2012, Ivaco filed its *Comments on Final Results of Redetermination Pursuant to Remand, Binational Panel Review of Carbon and Certain Alloy Steel Wire Rod from Canada*, USA-CDA-2008-1904-02 (August 13, 2012) ("*Comments*"), challenging the Investigating Authority's Determination on Remand. The Investigating Authority has since filed its response to Ivaco's Comments. *Response to Comments on Final Results of Redetermination Pursuant to Remand, Binational Panel Review of Carbon and Certain Alloy Steel Wire Rod from Canada*, USA-CDA-2008-1904-02, (August 30, 2012) ("*Response*").[1]

III. STANDARD OF REVIEW

This Panel's authority to review antidumping administrative reviews conducted by Commerce under section 751 of the Tariff Act of 1930 ("the Act") derives from Chapter 19 of NAFTA. 19 U.S.C. §1675. Article 1902 of NAFTA provides that Chapter 19 panels are to apply the domestic antidumping law of the country the decision of which is under review. NAFTA, Article 1902(1). Pursuant to NAFTA Article 1904.3, "the Panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing party would otherwise apply to a review of a determination of the competent investigating authority." When reviewing the determination of the Investigating Authority, the Panel must apply the standard of review and general legal principles established by the courts of that country. NAFTA, Annex 1911. It is well-settled that, where the country of decision is the

[1] Ivaco filed a Motion to Stay Proceedings on July 27, 2012, which the Panel denied on July 30. On August 9, 2012, Ivaco filed a motion seeking to have the Panel re-examine its denial of the motion to stay, which motion the Panel denied on October 10, 2012.

United States, the panel stands in the shoes of the Court of International Trade ("CIT"), and like it, is bound by decisions of the Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit"). *See e.g. Certain Durum Wheat and Hard Red Spring Wheat from Canada: Final Affirmative Countervailing Duty Determination*, USA-CDA-2003-1904-05 (Mar. 10, 2005).

As this Panel is bound by the same standard of review as the CIT, we must apply the standard of review set out in the Act, which establishes that U.S. courts "shall hold unlawful any determination, finding, or conclusion found…[1] to be unsupported by substantial evidence on the record, or [2] otherwise not in accordance with law." 19 U.S.C. §1516a (b)(1)(B)(i); *see also* NAFTA, Annex 1911.

Under the circumstances of a remand, such as this one, the Panel has the power only to "uphold a final determination, or remand it for action not inconsistent with the panel's decision." NAFTA Article 1904.8. *See also*, NAFTA, Article 1904, Panel Rule 73(6). *Jinan Yipin Corp. v. United States*, 637 F. Supp. 2d 1183 (CIT 2009), articulates the standard for reviewing a determination on remand: "The court will sustain [Commerce's] determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Id.* at 1185 (*citing* 19 U.S.C. § 1516a (b)(1)(B)(i)). We review the *Determination on Remand* accordingly.

IV. DISCUSSION

The Investigating Authority's explanation provided in its *Determination on Remand* rests on three points. The first point or argument is that Commerce's interpretation of the relevant statutory provision, Section 771(35) of the Act (19 U.S.C. § 1677(35)), is supported by decades of judicial precedent. The second argument is that the Executive Branch has implemented an

adverse report adopted by the World Trade Organization ("WTO") Dispute Settlement Body in a limited manner and Commerce has done so in a reasonable manner. The third point is that Commerce's interpretations of Section 771(35) of the Act are reasonable because they account for inherent differences in the calculation methodologies applied in average-to-average comparisons in investigations and average-to-transaction comparisons in administrative reviews. We analyze each of these arguments in turn.

a. Judicial Precedents

Were it not for changes in Commerce's methodology in conducting antidumping investigations, the Panel's obligation to follow the precedents of the CAFC would have meant that Ivaco's challenge to the use of zeroing in administrative reviews would have been automatically unsuccessful. The CAFC had, in cases dating back to 2004, held that Commerce was justified in applying zeroing methodology to both administrative reviews (*Timken Co. v. United States*, 354 F. 3d 1334 (Fed. Cir. 2004)) and initial investigations (*Corus Staal BV v. Dep't of Commerce*, 395 F. 3d 1343 (Fed. Cir. 2005)). This methodology amounted to a reasonable interpretation of the relevant statutory provision: 19 U.S.C. §1677(35). However, in 2006, the United States, in response to an adverse WTO dispute settlement report in *US-Zeroing (EC)*, WT/DS294/AB/R (April 18, 2006), after following the procedures mandated by Congress in Section 123 of the Uruguay Round Agreements Act ("URAA")[2], announced through Commerce that, henceforth, Commerce would no longer use zeroing methodology in any investigation using average-to-average comparisons. *Antidumping Duty Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006)

[2] 19 U.S.C. § 3533 (Pub. L. 103-465, 108 Stat. 4809, enacted Dec. 8, 1994).

("*Section 123 Determination*"). Subsequently, the CAFC upheld the application of the new methodology in investigations. *U.S. Steel Corporation v. United States*, 621 F. 3d 1351 (Fed. Cir. 2010).

Nonetheless, Commerce continued (until administrative reviews whose preliminary results were issued after April 16, 2012, *see infra* at n.3) to deploy zeroing methodology in administrative reviews, reviews which generally involved average-to-transaction comparisons.[3] This generated claims before both the CIT and the Federal Circuit that this amounted to an inconsistent reading or application of the relevant statutory provision. Until March 2011, that argument did not succeed, including at least one case where the CAFC was confronted by an administrative review in which the final determination post-dated the change in methodology for initial investigations. *See SKF USA Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011). In that case, the Court explained, "Even after Commerce changed its policy with respect to original investigations, we have held that Commerce's application of zeroing to administrative reviews is not inconsistent with the statute." *Id.* at 1375.

Less than three months later, however, in *Dongbu* the CAFC revisited this issue. *Dongbu*, 635 F.3d at 1363. In so doing, the Court stated that it had never before "addressed the reasonableness of Commerce's interpretation of 19 U.S.C. § 1677(35), with respect to administrative reviews now that Commerce is no longer using a consistent interpretation.

[3] This changed as of April 16, 2012 for administrative reviews the preliminary results of which were issued after that date. This change also was the culmination of the process mandated by the URAA as to how the United States would respond to adverse WTO dispute resolution reports and this change was the response to later WTO cases finding against the United States' zeroing methodology in administrative reviews. At the same time, moreover, Commerce provided for the use of average-to-average comparisons in administrative reviews. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 FR 8,101 (February 14, 2012).

Accordingly, we are not bound by the prior cases...." *Id.* at 1371. The Court then stated that Commerce's final determination in the administrative review did not contain any justification for the apparent inconsistency. *Id.* at 1372.

Further, only in the course of oral argument did Commerce provide the explanation that the inconsistency was reasonable because the change for investigations was in response to an adverse WTO dispute settlement report. The Court opined that such explanation "standing alone does not provide sufficient justification for the inconsistent statutory interpretations." *Id.* The Court then remanded the matter for further proceedings and, more specifically, for Commerce to "justify using opposite interpretations of 19 U.S.C. § 1677(35) in investigations and in administrative reviews." *Id.* at 1373.

Subsequently, in *JTEKT*, there was a remand on the same terms as in *Dongbu*. In remanding, the CAFC rejected Commerce's explanation of the apparent inconsistency. *Id.* at 1384. It was not enough to simply assert that investigations and administrative reviews had "different purposes," and that the former involved the making of average-to-average comparisons while the latter generally deployed average-to-transaction comparisons. Nor, in the view of the Court, was the matter clarified by the following statement:

> The purpose of the dumping-margin calculation also varies significantly between antidumping investigations and reviews. In antidumping investigations, the primary function of the dumping margin is to determine whether an antidumping duty order will be imposed on the subject imports. In administrative reviews, in contrast, the dumping margin is the basis for the assessment of antidumping duties on entries of subject merchandise to the antidumping order.

Id. These explanations did not address the "relevant question."

In terms of the CAFC case law that is binding on this Panel, *Timken*, *supra*, holding that the use of zeroing in administrative reviews was a permissible or reasonable interpretation of the

relevant statutory provision, and *Corus Staal*, *supra*, reaching the same conclusion with respect to investigations, have never been overruled. However, the remands in both *Dongbu* and *JTEKT* were based on the Court's determination that it might no longer be safe to rely on that previous authority once the use of zeroing had been abandoned in the instance of initial investigations but retained for administrative reviews. The abandonment of zeroing in initial investigations raised a possible issue of inconsistency in the retention of zeroing in administrative reviews, and, therefore, in continuing to rely on the existing precedents upholding zeroing as reasonable in the context of administrative reviews, Commerce was obliged to provide a reasonable explanation for so doing. Thereafter, following the lead of the CAFC, the CIT has issued remands in similar cases. *See, e.g., Grobest & I-Mei Industrial (Vietnam) Co., Ltd. v. United States*, 815 F. Supp. 2d. 1342 (CIT 2012) (*Grobest I).*

Confronted by a similar lack of explanation for the possible inconsistency, this Panel applied *Dongbu* and *JTEKT* and remanded the proceedings to Commerce for "a thorough explanation, keyed to the 'otherwise contrary to law' [*Chevron*] standard of review." [4] *Panel Decision*, at 50. Commerce, in its *Determination on Remand*, Ivaco, in its *Comments*, and Commerce, in its *Response*, raised various issues respecting the interaction of the Federal Circuit's precedents with the species of argument or justification that should be legally relevant in the response to the remand. Without reciting in detail the various arguments of the parties, the Panel, in assessing the reasonableness of the explanation provided in the *Determination on Remand*, and by reference to the orders made in and reasons for judgment in both *Dongbu* and *JTEKT*, proceeds on the following premises:

[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

1. The pre-*Dongbu* and *JTEKT* precedents, while establishing that zeroing or not zeroing in initial investigations and administrative reviews are individually reasonable interpretations of the relevant statutory provision, cannot in themselves provide a justification for zeroing in administrative reviews but no longer zeroing in investigations. While they have never been overruled, the precedents do not address that precise question.

2. To simply assert without elaboration that the abandonment of zeroing in the case of initial investigations was a response to an adverse WTO dispute settlement report is not a stand-alone or sufficient justification for failing to also abandon zeroing in administrative reviews. In order to rely on this justification as being sufficient, either independently or in combination with other reasons, Commerce has to explain why the domestic response to the WTO dispute settlement report in the case of initial investigations did not reasonably, as a matter of discretion, require a similar change in the instance of administrative reviews.

3. Bald statements without justification to the effect that the inconsistency is explained by the different purposes of initial investigations and administrative reviews or by the fact that initial investigations use average-to-average comparisons and administrative reviews generally use average-to-transaction comparisons are no more than assertions; they are not explanations.

For these purposes, the Panel has also taken account of the fact that, while the CAFC has yet to decide an appeal from a CIT decision evaluating the reasonableness of Commerce's response to a *Dongbu*-style remand, the CIT, in at least two cases, *Union Steel v. United States*, 823 F. Supp. 2d 1346 (CIT 2012)[5] and *Grobest & I-Mei Industrial (Vietnam) Co., Ltd. v. United States*, Slip Op. 2012-100 (CIT July 31, 2012), has accepted Commerce's explanation of the retention of zeroing in administrative reviews. This Panel's decision on the explanation that Commerce provided in the *Determination on Remand* is informed by the reasons of the CIT in both those cases.

[5] The Plaintiff-Appellants in *Union Steel* filed a Notice of Appeal of the judgment on March 6, 2012. *Union Steel v. United States*, CAFC Court No. 2012-1248.

As noted above, the Panel does not find Commerce's first argument, based strictly on pre-*Dongbu* precedents, to be sufficient to justify affirmance of the challenged administrative review results. The Panel has reached a different conclusion, however, with respect to Commerce's second and third arguments.

b. U. S. Law and International Obligations

In its *Determination on Remand*, Commerce responds, *inter alia*, to Ivaco's argument that its zeroing methodology is inconsistent with the United States' international obligations, as interpreted by World Trade Organization ("WTO") Panel and Appellate Body reports ("Panel and AB reports") under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* of the WTO Agreement, Marrakesh Agreement Establishing the World Trade Organization, Annex 2. *Determination on Remand,* at 2. This section of the Panel's decision reviewing Commerce's *Determination on Remand* addresses the issue of whether it was reasonable for Commerce to continue to apply zeroing in reviews when it had abandoned zeroing in investigations in order to comply with U.S. obligations under the WTO Agreements as implemented into United States law and in accordance with the procedures governing such compliance under the United States implementing legislation. Sections 123 and 129 of the URAA. 19 U.S.C. §§ 3533 and 3538. *See* n.2, *supra.*

Commerce has consistently interpreted 19 U.S.C. § 1677(35) as allowing zeroing in both antidumping duty investigations and administrative reviews. This practice was affirmed by the Federal Circuit as a reasonable interpretation of an ambiguous statute and thereby permitted in investigations and administrative reviews. *Corus Staal*, 395 F.3d at 1347-49; *Timken*, 354 F. 3d at 1345.

In December 2006, following an adverse WTO dispute settlement report in *US - Zeroing (EC*) (WT/DS294) that found zeroing in investigations to be contrary to the provisions of the WTO Antidumping Agreement, Commerce issued its *Section 123 Determination*, *supra*, announcing that it would no longer use zeroing in investigations when making average to average calculations. *Id.* However, the *Section 123 Determination* specifically declared that the offsetting methodology it would begin to apply to new investigations would not extend to other types of antidumping proceedings, including administrative reviews. *Id.* Thus, Commerce continued to apply zeroing in administrative reviews.

This change in the methodology of calculation of whether dumping is or may be occurring in investigations resulted from the Executive Branch's decision to comply with the report of the Appellate Body in *US - Zeroing (EC)* by following the procedures set out in Section 123. These include notice, comment, consultations with congressional committees, and explanation. In its *Determination on Remand*, Commerce states, "The Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the *Uruguay Round Agreements Act* for such changes in practice." *Determination on Remand*, at 8.

Ivaco challenges the continued use of zeroing by Commerce in administrative reviews, but not in investigations, as unreasonable due to its "inconsistency." This differential treatment was authorized by Congress and the procedures Congress prescribed in Section 123 were followed. Commerce changed its methodology of calculation in investigations after being instructed to do so by the U.S. Trade Representative. It is thus inaccurate for Ivaco to say that new legislation would be needed to implement WTO reports if U.S. law precluded WTO confirming action. *Comments*, at 18. That might be the case in another situation but it is not the

case here. The provisions of Section 123 and Section 129 were available for Commerce to make changes to its zeroing practice once the Executive Branch had determined to conform the administrative body's antidumping procedures to an adverse Panel and AB report. Indeed, that is what occurred in December 2006. *Section 123 Determination, supra.*

Ivaco relies on *Dongbu* as requiring that the "inconsistent" approach taken by Commerce needs explanation on grounds other than as a consequence of the implementation of a directive, pursuant to statute, from the political branch. Specifically, Ivaco relies on the following statement by the *Dongbu* Court, "In other words, the government's decision to implement an adverse WTO report standing alone does not provide sufficient justification for the inconsistent statutory interpretations." *Dongbu*, at 1372.

However, neither party noted that in *Dongbu* the Federal Circuit also said:

> The government argues, without explanation, that Congress contemplated that inconsistent interpretations might occur through the process of complying with adverse WTO decisions. We are not persuaded that Congress's intent is so clear.

Id. This language suggests that the provisions of the URAA and its Statement of Administrative Action ("SAA") were not properly explained to the Court and that, if they had been, the Court might have been persuaded that Congress did intend to allow "inconsistent interpretations" if the Section 123 procedure were to be followed. Unlike in *Dongbu*, in this remand Commerce has explained and provided justification for the perceived inconsistency. Thus the Panel has received an explanation that the *Dongbu* Court apparently wanted but did not receive.

The compliance (at that time, in 2006) with the adverse report in *US - Zeroing (EC)* pursuant to Section 123 in the case of investigations means that zeroing is no longer used in average-to-average comparisons in investigations. *See, Section 123 Determination, supra*. This directive from the political branches regarding investigations did not extend to administrative

reviews. *Section 123 Determination,* 71 Fed. Reg. at 77,723. The application of zeroing in administrative reviews therefore continued to represent a reasonable interpretation of what has long been accepted by all parties (as well as the courts) to be an ambiguous statutory provision. There is no requirement in United States law that Commerce change what have been held by the courts to be reasonable interpretations of statutes other than as required by the political authorities under the provisions of the legislation enacted by Congress prescribing how the United States should react to adverse Panel and AB decisions (Sections 123 and 129).

In the *Panel Decision*, this Panel concluded that the statement of the U.S. Supreme Court in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), did not form a basis to remand Commerce's continuation of zeroing in antidumping administrative reviews. *Panel Decision*, at 34. We based this view on the detailed provisions of the URAA concerning the relationship between Panel and AB reports and U.S. law. We reasoned that, until the political branches have determined that the United States should comply with such rulings (in accordance with sections 123 and 129), the WTO reports do not provide a basis for concluding that an otherwise lawful interpretation of a provision of the Act should not be upheld. Thus, this Panel has already explained that *Charming Betsy* does not constitute a basis for remanding for explanation Commerce's practice of zeroing in administrative reviews.

In its *Determination on Remand*, Commerce notes that *Charming Betsy* does not require Commerce to modify its long-standing interpretation of the Act in cases when the Executive Branch has not ordered it to do otherwise. *Determination on Remand,* at 11. Commerce, however, seems to suggest that where such a directive has occurred, Commerce's implementation of such a directive amounts to compliance with *Charming Betsy*. *Id.* at 11, n.4. This is incorrect. There is no scope for *Charming Betsy* to apply where Congress has clearly

stated the limited situations where international obligations of the United States will result in changes to U.S. domestic law. It is also incorrect for Ivaco to say that Commerce is "[hiding] behind *Charming Betsy* to defend ignoring the recommendations of the WTO Appellate Body in those situations where it thinks it does not have to do so…." *Comments*, at 18. Congress has clearly established an exhaustive framework for the implementation of such "recommendations."

Charming Betsy is not relevant here since Congress has already established a clearly delineated procedure to implement Panel and AB reports. As we explained, this procedure does not impose obligations on Commerce to interpret a statute in a particular way other than pursuant to the procedures set out in the URAA and the SAA. This is not a case where, in order to be reasonable, an interpretation of a statute needs to comply with the international obligations of the United States. The URAA and the SAA establish the sole basis for adverse WTO Panel and AB reports to impact Commerce's interpretation of U.S. trade law. Those procedures have been followed in this case. Those procedures have led to the abandonment of zeroing in investigations. In the period under review herein, those procedures did not culminate in a change in the methodology applied to administrative reviews. As a result, the continued use of zeroing in the antidumping administrative review we are concerned with here is both reasonable and consistent with the procedures established by Congress to implement adverse WTO Panel and AB rulings.

c. Methodological Differences

As noted above, the CAFC had, over a period of years, ruled that Commerce was justified in using the zeroing methodology both in administrative reviews, *Timken, supra,* and in original investigations, *Corus Staal, supra*. The CAFC held that this methodology rested on a reasonable interpretation of 19 U.S.C. §1677(35).

The dispute before us exists because Commerce, as part of the Executive Branch's deployment of the URAA Section 123 mechanism, ceased zeroing in original investigations in 2006 but continued for several more years, until 2012, to zero in administrative reviews, including the one before this Panel. Legal challenges based on Commerce's inconsistent behavior (as between investigations and reviews) during this period initially failed at the CAFC, *SKF USA Inc.*, *supra,* but subsequently gave rise to *Dongbu* and *JTEKT*.

One way to capture the fundamental question raised in (and by) *Dongbu* and *JTEKT* is whether Commerce was entitled to adjust its practice, in response to a welter of adverse WTO decisions, in a staged fashion or was instead legally obligated to cease zeroing in *all* contexts the moment it ceased zeroing in *any* context. On that question, the CAFC has not yet pronounced. But the CAFC did remand for further agency explanation. This Panel accordingly did the same, remanding to Commerce, as previously stated, for "a thorough explanation, keyed to the 'otherwise contrary to law' standard of review." *Panel Decision,* at 50.

As noted above, the Panel accepts that pre-*Dongbu* precedents, such as *Timken*, holding that zeroing in administrative reviews rests on a permissible interpretation of 19 U.S.C. §1677(35), cannot alone provide a basis for upholding Commerce's redetermination here. The Panel also accepts that Commerce's redetermination cannot be upheld on the basis of bald, conclusory statements about the different purposes of original investigations and administrative reviews. The record now before us is not limited to pre-*Dongbu* precedents or cursory explanations.

The *Dongbu* court used the label "inconsistent statutory interpretations" to describe the situation before it, at one point even referring to "opposite interpretations of 19 U.S.C.

§ 1677(35) in investigations and in administrative reviews." *Dongbu*, 635 F.3d at 1373. This characterization was founded on what the CAFC itself recognized was an incomplete explanation by Commerce, and in fact the bottom line of both *Dongbu* and *JTEKT* was a remand for further explanation. *Id.; see also JTEKT, supra.* Having closely reviewed (1) the CAFC's opinions, (2) Commerce's subsequent (court-ordered) explanation in other cases, (3) the opinions of the CIT judges who have approved that explanation, (4) the explanation prepared by Commerce specifically for this panel review, and (5) the submissions by the parties to this appeal commenting on Commerce's explanation, we do not see evidence of inconsistent interpretations of 19 U.S.C. §1677(35). Rather, Commerce appears to us to be interpreting the statute consistently – as allowing both zeroing and offsetting. Under Commerce's consistent interpretation, 19 U.S.C. §1677(35) mandates neither practice and forbids neither practice. Instead, it creates a zone of discretion in which an expert agency can select – subject to the reasonableness standard – methodologies that are appropriate to the various contexts that arise.

As explained by Commerce, and as the Panel now understands, zeroing and offsetting are not interpretations but *methodologies*. (More specifically, the average-to-transaction-zeroing approach, and the average-to-average-offsetting approach, are methodologies.) Traditionally in U.S. law, Commerce's methodologies are (and must be) sustained in appellate review so long as they rest on a permissible interpretation of the statute being administered. *See, Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). Here, both methodologies – zeroing and offsetting – have been definitively held, by the CAFC, to rest on a permissible interpretation of 19 U.S.C. §1677(35). In *Dongbu*, the CAFC introduced an additional caveat – that an agency simultaneously using different methodologies in different contexts must provide a coherent explanation of the reasons why. *Dongbu*, 635 F.3d at

1372-73 ("[i]n the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce's action is arbitrary…").

We agree with the CIT judges who have examined Commerce's explanation and held it to be satisfactory. *See Union Steel supra* at 9; *Grobest I, supra* at 8. In particular, Commerce's more detailed explanation of why the difference in *contexts* justifies a difference in *methodologies* is coherent and persuasive:

> Commerce stated that when using an average-to-average comparison methodology, it … calculates "the average export price or constructed export price and normal value for each averaging group," "averages together all prices, high and low, for directly comparable merchandise," and compares the average export price or constructed export price for the averaging group with the average normal value for the comparable merchandise." *Determination on Remand* at 12. This process results in Commerce calculating a comparison result for each averaging group. In doing so, Commerce averages together high and low export prices within an averaging group, allowing those export prices above normal value to offset those export prices below normal value. *Id*. Commerce then aggregates the results of the comparison for each averaging group. Inherently, an average-to-average comparison is not concerned with measuring the extent to which individual export prices are below normal value, but rather the extent to which export prices *on average* are above or below normal value. Accordingly, this comparison methodology permits individual transaction prices that are below normal value (i.e., dumped) to be masked by other above normal value prices within the same averaging group.
>
> It is entirely consistent and reasonable that when aggregating the results of the comparison for each averaging group Commerce follows a similar methodology. At the aggregation stage, negative averaging group comparison results offset positive averaging group comparison results. In this manner, the weighted average dumping margin is calculated in a manner that permits an averaging group that is found to be priced below normal value on average to be masked by another averaging group that is found to be priced above normal value. By permitting offsets in the aggregation stage, Commerce determines "on average" the aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which

the comparison results being aggregated were determined.

In contrast, when Commerce uses the average-to-transaction comparison methodology, as it did in this review, Commerce compares the export price or constructed export price for a particular export transaction with an average normal value for the comparable sales of foreign like product. *Id*. at 13. Therefore, Commerce calculates a comparison result for specific export transactions, which establishes the amount, if any, by which a respondent sells a specific export transaction at a price that is less than its normal value. *Id*. Unlike under the average-to-average comparison methodology that Commerce uses in investigations, under the average-to-transaction comparison methodology Commerce does not average the prices of export transactions before comparing the export price or constructed export price to normal value. Instead, Commerce uses the price of a single export transaction in its comparison. Inherently, an average-to-transaction comparison is concerned with measuring the extent to which individual export prices are below normal value. Unlike the average-to-average comparison method, this comparison methodology does not inherently permit individual non-dumped export prices to mask the amounts of dumping found in connection with other transactions.

Commerce then aggregates the transaction-specific comparison results. When aggregating the results of the comparison for each export transaction pursuant to the average-to-transaction comparison methodology, it is reasonable for Commerce to follow a similar methodology, and aggregate the transaction-specific amounts of dumping. To the extent normal value does not exceed the export price or constructed export price of a particular export sale, there is no dumping margin calculated for that sale and thus no amount of dumping to include when Commerce aggregates the amounts of dumping from each of the transaction-specific comparisons.

Therefore, Commerce's decision whether to use zeroing reflects the important differences between the results derived using distinct comparison methodologies. … Commerce is interpreting subparagraph (A) and (B) [of 19 U.S.C. § 1677(35)] such that the aggregation of comparison results performed pursuant to (B) takes into account, and is consistent with, the comparison method used to produce those comparison results pursuant to subparagraph (A).

Response, at 11-16 (emphasis in original).

Commerce has also provided an expanded and coherent explanation of why different methodologies are appropriate in investigations and reviews. In investigations, Commerce applies an average-to-average comparison methodology to examine "overall pricing behavior on average." This approach makes sense when Commerce is evaluating pricing behavior in the absence of an order and is, as Commerce notes, supported by 19 U.S.C. §1677f-1(d)(1)(A)(i). See *Determination on Remand*, at 13-14.

By contrast, once an antidumping order is in place, Commerce when conducting an administrative review uses (or did use as of 2008) an average-to-transaction comparison methodology to evaluate pricing behavior with respect to individual export transactions. That is what occurred in the administrative review before this Panel, and statutory provisions specifically addressing administrative reviews support this approach. 19 U.S.C. §1677f-1(d)(2); *see also Determination on Remand*, at 13-15.

In sum, Commerce has satisfactorily explained why it made sense to apply – and why the statute afforded it the discretion to apply – an average-to-transaction-with-zeroing methodology in administrative reviews even after it had adopted an average-to-average-with-offsets methodology for original investigations. The Panel has therefore found that two of the three components of the expanded explanation Commerce has now provided are sufficient to justify affirmance of the challenged administrative review results. Commerce has adequately explained why the URAA provisions governing implementation of adverse WTO reports allowed zeroing in average-to-transaction administrative review calculations to continue even after zeroing in average-to-average investigation calculations had ceased. And Commerce has cogently explained why simultaneously using different methodologies in different contexts was reasonable. We note that either of these conclusions, by itself, would justify affirmance.

Ivaco may be correct in predicting that a future CAFC decision will say what *Dongbu* and *JTEKT* did not – namely, that general administrative law principles obligated Commerce to cease zeroing in all contexts the moment it ceased zeroing in any context. We can only apply U.S. law as we find it today. Having done so, we conclude that Commerce has met the explanatory burden imposed on it by all relevant precedents including *Dongbu* and *JTEKT*.

ORDER

Upon consideration by the Panel and in light of the foregoing, the Department of Commerce's *Final Results of Redetermination Pursuant to Remand* are affirmed.

So ORDERED.

Issue Date: October 25, 2012

Signed in the original by:

Lisa Koteen Gerchick
Lisa Koteen Gerchick, Chair

Cynthia C. Lichtenstein
Cynthia C. Lichtenstein, Panelist

John R. Magnus
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David J. Mullan
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Robert K. Paterson
Robert K. Paterson, Panelist