ARTICLE 1904 BINATIONAL PANEL REVIEW

Pursuant to the

NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of: LIGHT-WALLED RECTANGULAR PIPE AND TUBE FROM MEXICO Final Results of the 2008-2009 Antidumping Duty Administrative Review	Secretariat File No.: USA-MEX-2011-1904-02

FINAL DECISION

I. Introduction

In response to the Panel's Interim Decision and Order of December 5, 2012 (Interim Order), the Department of Commerce's Import Administration (DOC) issued its Final Results of Redetermination Pursuant to Remand on March 4, 2013 (Remand Results). In its Remand Results, DOC continued in its prior decision to zero out negative dumping margins in this administrative review, despite having abandoned that practice in certain original investigations, and provided a detailed explanation for doing so, as directed by the Panel. Complainant

Maquilacero filed its Comments on the Remand Results on May 1, 2013 (Maquilacero Comments), and DOC, after the Panel granted its consent motion for an extension of time, filed its Response on June 17, 2013 (DOC Response).

II. Does the Federal Circuit's April 2013 Decision in Union Steel v. United States Resolve the Inconsistent Zeroing Issue

A. Holding In Union Steel

In its Interim Order, the Panel noted that "the Federal Circuit in Dongbu held that Commerce had not supplied a reasonable interpretation why U.S. antidumping law supports the inconsistent application of zeroing to administrative reviews, but not to investigations." Interim Order at 36, citing Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363, 1371 (2011). Following the direction of the Federal Circuit in Dongbu and a similar decision issued three months thereafter in JTEKT Corp. and Koyo Corp. v. United States, 642 F.3d 1378 (2011), the Panel issued the remand order to which DOC now responds.

Subsequent to the Panel's Interim Order and the DOC's Remand Results, the Federal Circuit had occasion to address further the issue raised in Dongbu and JTEKT, that is, whether DOC had provided an explanation of its application of zeroing to antidumping administrative reviews, but not to antidumping investigations, sufficient to satisfy the reasonable explanation

standard of the second step of *Chevron*: "If Congress has not spoken directly on the issue, we must determine whether the agency responsible for filling a gap in the statute has rendered an interpretation that is based on a permissible construction of the statute." Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

Sub nomine Union Steel v. United States, Dongbu and Union Steel appealed the decision of U.S. Court of International Trade Judge Jane Restani that, in light of the further explanation provided by DOC in response to the Federal Circuit's 2011 remand in Dongbu, DOC's zeroing practices are a reasonable interpretation of the statute. Union Steel and Dongbu Steel v. United States, 823 F.2d 1346, 1360 (Ct. In'tl Trade 2012).

In its Remand Results in Union Steel, as here, DOC offered three reasons for its decision to abandon its practice of zeroing out negative dumping margins in original investigations, but not in administrative reviews:

> First [Commerce] has, with one limited exception, maintained a long-standing, judicially-affirmed interpretation of [19 U.S.C. § 1677(35)] pursuant to which [Commerce] does not consider export price to be a dumped price where normal value is less than export price. Pursuant to this interpretation, [Commerce] includes no (or zero) amount of dumping, rather than a negative amount of dumping, in calculating the aggregate weighted-average dumping margin where normal value is less than export price. Second, the limited exception to this interpretation

> was not adopted as an arbitrary departure from established practice, but was adopted, instead, in response to a specific international obligation the Executive Branch determined to implement pursuant to the procedures established by the [URAA] for such changes in practice with full notice, comment and explanation thereof. Third, [Commerce's] interpretation reasonably resolves the ambiguity in [19 U.S.C. § 1677(35)] in a way that accounts for the inherent differences between the result of an average-to-average comparison on the one hand and the result of an average-to-transaction comparison on the other.

Union Steel v. United States, 713 F.3d 1101, 1106 (Fed. Cir. 2013); Remand Results at 7-8.

The Court examined the reasons provided by DOC, noting as to its first that "Commerce's reasonable interpretation of the statute is not foreclosed by this court's prior decisions." Union Steel at 1107. As to DOC's second reason, while the Court noted its concern in Dongbu that "the government's decision to implement an adverse WTO report standing alone does not provide sufficient justification for the inconsistent statutory interpretations, Dongbu, 635 F.3d at 1372, the Court continued:

> Nevertheless, it is within Commerce's discretion to adopt reasonable practices to meet international obligations. Union Steel, 823 F.Supp.2d at 1357-58.10. Certainly, this information is relevant when considered in conjunction with the other explanations offered by Commerce.

Union Steel at 1109-10.

The Court proceeded to find with regard to DOC's third reason that continued zeroing in administrative reviews "ensures

the amount of antidumping duties assessed better reflect the results of each average-to-transaction comparison. Commerce's differing interpretation is reasonable because the comparison methodologies compute dumping margins in different ways and are used for different reasons." Union Steel at 1109 (citation omitted).[1]

Complainant attempts to reargue before the Panel the question before the Federal Circuit in Union Steel. *See* Maquilacero Comments at 6-14. This attempt is misplaced. The decision in Union Steel addresses these arguments in the context of the same DOC explanation before the Panel, which is bound by decisions of the Federal Circuit.[2]

B. Do the Factual Differences in *Union Steel* Disqualify the Federal Circuit's Decision as *Stare Decisis* for the Panel

Complainant contends that the Federal Circuit's decision in Union Steel is distinguishable on its facts and, therefore, not binding on this Panel. Maquilacero explains that DOC applied its zeroing methodology to the respondents in Union Steel both in the original investigation that led to issuance of the

[1] The Court had begun its examination by stating that "Because the Court of International Trade properly found that Commerce's interpretation of its governing statute is in accordance with law, we affirm." Union Steel at 1103.

[2] NAFTA art. 1904(3): "The Panel shall apply . . . the general legal principles that a court of the importing Party otherwise would apply . . ." General legal principles include the concept of *stare decisis* and the only "court of the importing party" that has jurisdiction over AD/CVD reviews in the United States is the U.S. Court of International Trade, which of course is bound by decisions of the Federal Circuit. *See also Certain Durum Wheat and Hard Red Spring Wheat from Canada: Final Affirmative Countervailing Duty Determinations, at 17 n.45, USA-CDA-2003-1904-05 (Mar. 10, 2005), available at* http://registry.nafta-sec-alena.org/cmdocuments/9dab4f7d-4da9-498a-8994-785402675eb9.pdf. Therefore, pursuant to NAFTA art. 1904(3), this Panel is likewise bound by decisions of the Federal Circuit under the principle of *stare decisis*.

antidumping order and in subsequent administrative reviews, including the 16th administrative review that was before the Circuit Court. In contrast, complainant notes that in December 2006 DOC rejected zeroing in investigations,[3] with the result that DOC did not apply zeroing to the investigation initiated on July 17, 2007,[4] in this case. Maquilacero Comments at 5, note 3, and 15-16.

DOC does not contest that it applied zeroing both to the original investigation and to the 16th administrative review in the case before the Federal Circuit in Union Steel. Instead, DOC responds that "Maquilacero provides no explanation for why the controlling decision of the Federal Circuit in *Union Steel* is not relevant, or might not be reasonable with reference to the facts in this case." DOC argues that "the substance of the appellate court's ruling [in Union Steel] is directly applicable to the facts and question before this Panel, and that all of the arguments before this Panel were considered and rejected by the Federal Circuit in Union Steel." DOC Response at 5.

[3] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin during an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dep't Commerce Dec. 27, 2006).
[4] ITA Fact Sheet, Commerce Initiates Antidumping (AD) and Countervailing Duty (CVD) Investigations on Light-Walled Rectangular Pipe and Tube from the People's Republic of China (AD/CVD), Korea (AD), Mexico (AD), and Turkey (AD), *available at* http://ia.ita.doc.gov/download/factsheets/factsheet-rect-pipe-init-071807.pdf.

DOC issued the antidumping duty order in the case before the Federal Circuit in Union Steel in August 1993,[5] 13 years before DOC abandoned the practice of zeroing in original investigations.[6] In contrast, DOC initiated the investigation in the present case after implementing its changed practice. DOC did not thus zero out negative dumping margins in the investigation in the present case,[7] although DOC continued to apply its zeroing practice to administrative reviews until 2012, including to the 2008-2009 administrative review before the Panel.[8]

Whether this factual distinction should remove Union Steel from the scope of *stare decisis* that governs the Panel turns on whether "the facts of the two cases are sufficiently similar (apposite) that the first serves as precedent for the second," which in turn asks "what policies supported the rule of the

[5] *Antidumping Duty Order on Certain Certain Cold-Rolled Carbon Steel Flat Products and Certain Corrosion Resistant Carbon Steel Flat Products from Korea*, 58 Fed. Red. 44159 (Dep't Commerce Aug. 19, 1993).
[6] DOC's 2009 Antidumping Manual notes that "Effective February 22, 2007, in calculating the weighted-average dumping margin in investigations using the average-to-average price comparison methodology, the Department provides offsets for non-dumped comparisons. That is, the Department allows the results of averaging groups for which the weighted-average EP or CEP exceeds the NV to offset the results of averaging groups for which the weighted-average EP or CEP is less than the weighted-average NV. The Department's practice in investigations did not allow for such offsets prior to February 22, 2007." Ch. 7, at 25.
[7] DOC's Decision Memorandum confirms that it did not apply zeroing to the investigation in this case. Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Light-Walled Rectangular Pipe and Tube from Mexico (2006-2007), Jun. 13, 2008, 73 ITADOC 35649, at Comment 3.
[8] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 Fed. Reg. 8101 (Dep't Commerce Feb. 14, 2012).

first case and the extent to which those policies are implicated in the facts of the second."[9]

The Parties in Union Steel did not treat as relevant the fact that the challenge before the Circuit was to the legal rationale for DOC's change in practice, as represented in the 2006 FR Notice, rather than to an actual difference in practice in the case before it. The operative language in the brief of the United States is generic and non-specific to the case at hand:

> At issue is Commerce's interpretation of 19 U.S.C. § 1677(35), under which Commerce applies the "zeroing" methodology in connection with average-to-transaction comparisons in administrative reviews, but does not apply zeroing in connection with average-to-average comparisons in antidumping duty investigations. Union Steel v. United States, 823 F. Supp. 2d 1346 (Ct. Int'l Trade 2012), JA1-29.

Brief of Defendant-Appellee United States, 2012 WL 5248067 (C.A.Fed.), at 2 (Oct. 15, 2012).

The brief of the Korean steel producers is to similar effect.[10] The reply brief of Union Steel and Dongbu is even comfortable using third parties ("an investigation," "an

[9] GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 573 (LexisNexis 2009). *See also* Rocky River v. State Emp. Relations Bd., 43 Ohio St.3d 1, 5, 539 N.E.2d 103 (1989), citing 20 Am. Jur. 2d Courts § 129.

[10] Union Steel and Dongbu Steel state only that "Plaintiffs-Appellants appeal the decision of the CIT affirming Commerce's remand determination wherein Commerce has again adopted a statutory interpretation of 19 U.S.C. § 1677(35) as providing for the "zeroing" of negative dumping margins in antidumping duty administrative reviews but not in antidumping duty investigations." Brief of Plaintiffs-Appellants Union Steel and Dongbu Steel, 2012 WL 2338852 (C.A.Fed.), at 3 (Jun. 11, 2012).

exporter") rather than describing their own experiences in the case.[11]

The Court does not even note in passing the fact that DOC was not inconsistent in its use of zeroing in the case before it. Judge Wallach begins with a general proposition:

> In the decision now on appeal, the United States Court of International Trade affirmed the Department of Commerce's ("Commerce") use of zeroing to determine antidumping duties in administrative reviews, *even though Commerce no longer uses zeroing in investigations* establishing antidumping orders. This court has twice considered whether such divergent practices constitute a reasonable construction of Commerce's governing statute, both times remanding for Commerce to provide an explanation. In the case now on appeal, Commerce has provided such an explanation."

Union Steel v. United States, 713 F.3d 1101, 1102 (Fed. Cir. 2013) (emphasis supplied).

In referring to DOC's 2006 Federal Register notice that changed its practice in original investigations, the Court notes the February 2007 beginning date of the change without reference to the fact that DOC conducted the investigation in the case before it in 1993.[12] The Court continues throughout its opinion to use the general language with which it began the decision:

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[11] "The arguments made in the United States' brief do nothing to rehabilitate the Remand Results. The United States first argues that the A-A [average-to-average] comparison method used in *an investigation* focuses on the "overall pricing behavior" of *an exporter* whereas the A-T [average-to-transaction] method used in reviews focuses on an exporter's pricing behavior on specific, individual sales. See U.S. Br. at 18-19." Reply Brief of Defendant-Appellee United States, 2012 WL 6043063 (C.A.Fed.), at 3 (Nov. 26, 2012) (emphasis supplied).

[12] "The WTO found Commerce's practice inconsistent with the United States' international obligations, and Commerce determined that it would cease using zeroing methodology in new and pending investigations," citing to the 2006 FR Notice. Union Steel v. United States, 713 F.3d 1101, 1105 (Fed. Cir. 2013)

"The question here, as in *Dongbu* and *JTEKT*, is whether it is reasonable for Commerce to use zeroing in administrative reviews even though it no longer uses zeroing in investigations."[13] The Court is explicit, however, when referring to DOC's continued use of zeroing in administrative reviews: "In contrast, when Commerce uses the average-to-transaction comparison method, *as it did in this administrative review.*"[14]

The reasoning of the Court in analyzing whether the new DOC explanation satisfied the second prong of Chevron appears to have been entirely unaffected by the factual distinction noted here by complainant. The Union Steel Court's analysis focused only on the factual differences between investigations and reviews relied upon by DOC. For example, the Court begins its discussion of one of DOC's premises for abandoning zeroing in investigations with the following statement: "Commerce justifies using zeroing in administrative reviews but not in investigations in part based on the different comparison methodologies used in each." Union Steel at 1108. Neither did the Court make note of the 1993 investigation in the case before it in examining DOC's other explanation: "Commerce also explained the methodology for investigations was changed in

[13] Union Steel v. United States, 713 F.3d 1101, 1107 (Fed. Cir. 2013). Later the Court observes that "Commerce explained in its Remand Results that average-to-average comparison methodology *typically used in investigations* is useful for examining an exporter's or manufacturer's overall pricing behavior." Union Steel v. United States, 713 F.3d 1101, 1108 (Fed. Cir. 2013) (emphasis supplied).

[14] Union Steel v. United States, 713 F.3d 1101, 1108 (Fed. Cir. 2013) (emphasis supplied).

response to an adverse WTO decision through a section 123 proceeding." Union Steel at 1109.

In sum, as DOC argued in its filing before the Panel, "the substance of the appellate court's ruling [in Union Steel] is directly applicable to the facts and question before this Panel, and . . . all of the arguments before this Panel were considered and rejected by the Federal Circuit in Union Steel." DOC Response at 5. The Panel finds that the policies supporting the holding in Union Steel are equally implicated by the facts of the case before the Panel[15] and, therefore, that Union Steel stands as *stare decisis* for the Panel.[16]

C. Finality of the Decision

At the time Maquilacero filed its Comments on the Remand Results on May 1, 2013, the Federal Circuit had not issued its mandate in Union Steel making that decision final and conclusive following the 45 days from entry of judgment within which parties may seek rehearing. Maquilacero Comments at 5, citing Fed. R. App. P. 40(a)(1).

[15] SHREVE & RAVEN-HANSEN, *supra* note 7.

[16] Maquilacero also sees a "key factual distinction" in the fact that DOC, having in 2012 abandoned zeroing in administrative reviews, calculated Maquilacero's margin in administrative reviews following the one before the Panel without zeroing. However, complainant does not explain why this distinction is important nor, more cogently, under what authority the Panel would take account of actions not on the record of the review before it. Maquilacero Comments at 16.

On June 10, 2013, the Court issued its formal mandate under Rule 41(a). Case: 12-1248, Document: 120-4. The decision in Union Steel is thus final and conclusive.[17]

III. Adjustment for Fluctuations in Normal Value

DOC claims in its Response that "Maquilacero argues in its remand comments for the first time that Commerce should grant offsets (in other words Commerce should not use its zeroing methodology) because 'there were significant fluctuations in costs and home market prices,'" citing to Maquilacero's Comments at 17. DOC contends that this argument is barred because complainant did not exhaust its administrative remedy before the agency. DOC Response at 6-10.

Maquilacero makes the following statement in this respect:

> If the Department's rationale, as expressed in the Remand Results, is that offsets are justified in investigations because some averaging is inherent in the average-to-average methodology within the averaging groups, then offsets should also be granted in reviews if one can demonstrate that some averaging occurs also within the averaging groups in a transaction-to-average scenario. As discussed above, Maquilacero has shown that during the review period there were significant fluctuations in costs and in home market prices, affecting normal value. Thus, offsets would be warranted in calculating Maquilacero's margin in this review even under the Department's own explanation.

[17] No petition for writ of *certiorari* was filed with the U.S. Supreme Court within the 90 days following entry of judgment (July 15, 2013) pursuant to 28 U.S.C. § 2101(c).

Maquilacero Comments at 17.

DOC has misunderstood, in the Panel's view, the import of complainant's argument in this respect, which is repeated on page 12 of its Comments under a section entitled "The Department's Explanation for the Use of Different Interpretations in Different Contexts Is Not Persuasive." Maquilacero is illustrating with this example why DOC's third reason for its change in zeroing practice is "not persuasive." Complainant makes no pretense that its argument will result in an additional adjustment to normal value.

As to whether Maquilacero's example accomplishes its purpose of pointing out holes in DOC's reasoning, the Panel, as a result of the binding decision of the Federal Circuit in Union Steel, offers no view.

IV. Conclusion

In light of the Federal Circuit's decision in Union Steel, the Panel finds that Commerce's interpretation of its governing statute is in accordance with law.

Order

Therefore, upon consideration of all papers and proceedings herein to date, it is hereby **Ordered**, that the March 4, 2013, Final Results of Redetermination Pursuant to Remand of the Department of Commerce's Import Administration are **Affirmed**.

Issue Date: **AUGUST 6, 2013**

Signed in the original by:

Stephen Joseph Powell, Chairman

Stephen Joseph Powell, Chairman

Robert E. Ruggeri

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