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Contents

Trade Briefs

- Major Development Concerning Targeted Dumping Analysis in U.S. AD Cases

Dumping Watch

- Amended Final Results in AD Review of Japanese Ball Bearings
- Final Results of Review and Revocation of Order Regarding High and Ultra-High Voltage Ceramic Station Post Insulators from Japan
- Developments in AD Investigations into Chinese and Korean Circular Welded Carbon Quality Steel Line Pipe

The Week Ahead

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Trade Briefs

Major Development Concerning Targeted Dumping Analysis in U.S. AD Cases

Last week, there was a major development concerning the use of targeted dumping analysis in U.S. antidumping cases that may dramatically reduce the predictability of targeted dumping outcomes. Businesses that rely on exporting to the U.S. may be faced with new uncertainties in trying to navigate U.S. trade law.

The Commerce Department (DOC) issued a notice announcing its decision to withdraw its existing regulations on "targeted dumping." DOC's existing regulations permit the DOC to determine the existence of targeted dumping in original investigations "through the use of ... standard and appropriate statistical techniques." The DOC notice states that the Department is taking this action—withdrawing this regulation—because it prefers to adopt a case-by-case approach to determining whether targeted dumping existed, rather than following the standards set forth in its regulations.

The DOC also stated that it had determined that the "good cause" existed to waive the statutory requirement, set forth in the Administrative Procedures Act, to provide prior notice and opportunity for public comment before changing existing regulations. Without much discussion, the DOC claimed in its notice that such requirement was "impracticable and contrary the public interest." Accordingly, the DOC's notice actually is effective immediately for all new AD investigations that are initiated after the *Federal Register* publication date. The DOC is allowing parties to submit comments on this rule, however.

This DOC action is significant and is likely to be adverse to exporter and importer interests. As a result of pressure from domestic interested parties, the DOC has agreed not to provide any guidance, or even have any standards for, determining an important aspect of the antidumping calculation in original investigations. Rather, the DOC will simply make the decision whether to apply a "targeted dumping" analysis on a case-by case basis. We also believe that DOC's action is contrary to well-established legal principles concerning how an agency changes its promulgated regulations.

Brief Background and History of DOC's Approach to Targeted Dumping

It has only been in the past year or so that targeted dumping has become a "hot" issue in the antidumping area. The interest in targeted dumping stems from the DOC's implementation of the WTO rulings prohibiting the use of "zeroing" in the AD margin calculation.

Over the past several years the WTO ruled in several cases that DOC's practice of zeroing was in violation of the United States WTO obligations. Under normal circumstances, DOC calculates dumping margins in original investigations by comparing weighted-average export prices to average normal values, or, in rare cases, by comparing transaction-specific export prices to transaction-specific normal values. Until the implementation of the WTO zeroing decisions, DOC effectively inflated dumping margins by not offsetting the margins calculated on dumped sales with the negative margins calculated

on non-dumped sales (i.e., all negative margins were set to zero prior to being factored into the overall weighted-average-to-weighted-average dumping calculation).

Once DOC eliminated the practice of zeroing from its preferred calculation methodology in original investigations to comply with the WTO rulings, many lower dumping margins were obtained on some orders and some orders were actually revoked. Investigations initiated after the DOC abandoned its practice of zeroing resulted in lower dumping duties than would previously have been the case. Facing the prospect of reduced dumping margins in new investigations without zeroing, domestic petitioners pressed DOC to employ "targeted" dumping as a means to inflate dumping margins in the absence of zeroing. Their claim was that exporters could "target" individual US customers or regions by selling at low prices to those "targets," and "financing" this targeted dumping by higher prices to other US customers. In the domestic petitioners' view, an average-to-average would allow exporters to get away with such targeted dumping because the export prices sold above normal value would "offset" the dumped sales to the targeted customers when the export prices were averaged together.

Petitioners brought pressure to bear on the DOC by making targeted dumping allegations in many AD cases initiated in 2007 and 2008. Faced with increasing cases having targeted dumping allegations, and admitting that it had very little experience in this area, the DOC decided that it needed to develop an established methodology for determining whether targeted dumping existed. Toward this end, in October 2007 the DOC published a request seeking comments on how the DOC should develop "a standard test for general application in analyzing a targeted dumping allegation." In response, DOC received 19 responses from both petitioner and respondent interested parties.

In April 2008, in the context of an ongoing antidumping investigation, *Certain Steel Nails from China*, the DOC announced that it had developed a new methodology for analyzing a targeted dumping allegation, and stated that it intended to adopt and apply this new targeted dumping methodology in all future investigations.

The new targeted dumping methodology was designed to implement the DOC's existing regulations on targeted dumping, which required that DOC determine the existence of targeted dumping "through the use of . . . standard and appropriate statistical techniques." Although the DOC did not go as far as many had suggested in employing *bona fide* statistical analysis, the DOC's new targeted dumping methodology did employ an established statistical methodology for determining the existence of targeted dumping.

Since April 2008, DOC has applied its new methodology in 6 cases (that is, those cases in which the petitioner made a targeted dumping allegation) for which a final determination has been rendered. In each one of these cases, there was at least one mandatory respondent that the DOC found did not engage in targeted dumping after applying the new targeted dumping methodology.

Domestic petitioners have made clear to the DOC that they do not like the DOC's new targeted dumping methodology. Domestic petitioners have claimed that the DOC's targeted dumping methodology does not do an adequate job of unmasking "true" targeted dumping.

DOC's New Notice

The DOC has now essentially responded to the criticism from petitioners by withdrawing its targeted dumping regulation (as well as the new targeted dumping methodology). This can be seen from the "justification" set forth in DOC's notice:

The Department promulgated [its targeted dumping regulation] on May 19, 1997. At that time, the Department had never performed a targeted dumping analysis. Therefore, the provisions were promulgated without the benefit of any departmental experience on the issue of targeted dumping. . . . This situation has caused the Department to question whether, in the absence of any practical experiences, **it established an appropriate balance of interests in the provisions.**

The highlighted part of the quoted language above suggests that the DOC now believes that the targeted dumping methodology, which it established pursuant to the DOC's targeted dumping regulation, is not generating the results that domestic petitioners want. Therefore, it appears that the DOC decided to withdraw both the methodology and the underlying regulation.

There is a general consensus in Washington that the Department's action is part of a crass political move to give sweeping benefits to domestic petitioners. Essentially, by the time this DOC action is fully implemented the responsible senior DOC officials will be long gone, and the new DOC officials can say that it was done by the old administration. It may be that the existing DOC senior officials wanted to give the new Obama administration a "clean slate" on which to develop a methodology to ameliorate the loss of zeroing by employing targeted dumping.

The difficulty for exporters and importers is that now there is no longer any standard for determining targeted dumping. Rather, by adopting a case-by-case approach, the DOC is free to employ one methodology in one case, and then a different methodology in another case. This makes it virtually impossible for exporter and importers to predict the outcome of an AD case, or to engage in price monitoring behavior to prevent an AD order from being implemented in advance of a case being filed. In short, the new case-by-case rule has removed whatever measure of predictability that had previously existed in antidumping proceedings, particularly in those where targeted dumping is alleged.

Dumping Watch

Amended Final Results in AD Review of Japanese Ball Bearings

On December 9, the Department of Commerce (DOC) gave notice of amended final results in the administrative review of the antidumping (AD) duty order on ball bearings from Japan. The DOC calculated weighted-average dumping margins on ball bearings from Japan to be 10.31% to 12.58%. Within fifteen days of this notice, the DOC will instruct the Customs and Border Protection (CBP) to assess AD duties on all appropriate entries.

Final Results of Review and Revocation of Order Regarding High and Ultra-High Voltage Ceramic Station Post Insulators from Japan

On December 12, the Department of Commerce (DOC) gave notice that it was revoking the AD duty order on high and ultra-high voltage ceramic station post insulators from Japan. In the course of a five-year sunset review, domestic petitioners did not participate. Therefore, the DOC has decided to revoke the AD duty order on this product effective December 30, 2008.

Developments in AD Investigations into Chinese and Korean Circular Welded Carbon Quality Steel Line Pipe

On December 12, the Department of Commerce (DOC) gave notice that it was issuing a new scheduling date for the AD duty investigation into circular welded carbon quality steel line pipe from China. Also, the DOC gave notice that it was formally terminating the AD investigation into the same type of pipe from Korea. The DOC had originally scheduled the AD investigation into this kind of Chinese line pipe alongside the countervailing duty investigation of the same pipe from China for purposes of efficiency. However, the DOC has postponed the final AD duty determination, and a supplemental brief addressing this determination is now due on March 31, 2009. The DOC has also formally terminated the AD investigation into this kind of line pipe from Korea. Unlike their Chinese counterparts, Korean respondents were planning a substantial defense. Therefore, petitioners requested that the Korean investigation be terminated in order to avoid the Koreans' participation in the International Trade Commission's (ITC) final injury proceeding.

Federal Register Notices

International Trade Administration

[RIN 0625-AA82] Steel Import Monitoring and Analysis System 73 FR 75624-75625, December 12, 2008.

[A-475-818] Certain Pasta from Italy: Notice of Extension of Final Results of Antidumping Duty Changed Circumstances Review 73 FR 75671-75672, December 12, 2008.

[C-533-825] Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review 73 FR 75672-75673, December 12, 2008.

[C-423-809] Stainless Steel Plate in Coils from Belgium: Final Results of Countervailing Duty Administrative Review 73 FR 75673-75675, December 12, 2008.

[A-588-862] High and Ultra-High Voltage Ceramic Station Post Insulators from Japan: Final Results of Sunset Review and Revocation of Order Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty *73 FR 75675-75676*, December 12, 2008.

Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty *73 FR 75676-75677*, December 12, 2008.

[A-791-821] Antidumping Duty Order: Uncovered Innerspring Units From South Africa *73 FR 75390-75391*, December 11, 2008.

[A-552-803] Antidumping Duty Order: Uncovered Innerspring Units From the Socialist Republic of Vietnam *73 FR 75391-75392*, December 11, 2008.

[A-570-848] Continuation of Antidumping Duty Order on Freshwater Crawfish Tail Meat from the People's Republic of China *73 FR 75392-75393*, December 11, 2008.

[A-570-863] Honey From the People's Republic of China: Notice of Court Decision Not in Harmony with Final Results of Administrative Review *73 FR 75393*, December 11, 2008.

[A-405-803] Purified Carboxymethylcellulose From Finland; Final Results of Antidumping Duty Administrative Review *73 FR 75397-75398*, December 11, 2008.

[A-401-808] Purified Carboxymethylcellulose From Sweden: Final Results of Antidumping Duty Administrative Review *73 FR 75395-75396*, December 11, 2008.

[A-421-811] Purified Carboxymethylcellulose From the Netherlands: Final Results of Antidumping Duty Administrative Review *73 FR 75393-75395*, December 11, 2008.

[A-423-808] Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review *73 FR 75398-75400*, December 11, 2008.

[A-475-818] Certain Pasta From Italy: Notice of Final Results of the Eleventh Administrative Review and Partial Rescission of Review *73 FR 75400-75402*, December 11, 2008.

[RIN 0625-AA79] Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations *73 FR 74930-74932*, December 10, 2008.

[A-428-801] Ball Bearings and Parts Thereof from Germany: Final Results of Antidumping Duty Changed-Circumstances Review *73 FR 75078*, December 10, 2008.

[A-552-801] Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension of Time Limit for the Final Results of the Expedited Sunset Review of the Antidumping Duty Order *73 FR 75078-75079*, December 10, 2008.

[A-549-817] Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Correction to Notice of Extension of Time Limit for Final Results of Changed Circumstances Review *73 FR 75079*, December 10, 2008.

[A-351-828] Certain Hot-Rolled, Flat-Rolled Carbon Quality Steel Products from Brazil: Final Rescission of Antidumping Duty Administrative Review *73 FR 75079-75081*, December 10, 2008.

[A-570-506] Porcelain-on-Steel Cooking Ware from the People's Republic of China: Final Results of Antidumping Duty Administrative Review *73 FR 75081-75082*, December 10, 2008.

[A-570-851] Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review *73 FR 75083-75084*, December 10, 2008.

Applications for Duty-Free Entry of Scientific Instruments *73 FR 74703*, December 9, 2008.

[A-588-804] Notice of Amended Final Results of Antidumping Duty Administrative Reviews: Ball Bearings and Parts Thereof from Japan *73 FR 74703-74704*, December 9, 2008.

[A-583-831] Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review *73 FR 74704-74707*, December 9, 2008.

[A-570-848] Crawfish Tail Meat from the People's Republic of China: Amended Final Results of the Administrative Review Pursuant to Final Court Decision *FR 73 74457-74458*, December 8, 2008.

Exporters' Textile Advisory Committee *73 FR 74458*, December 8, 2008.

[A-549-813] Canned Pineapple Fruit From Thailand: Final Results of Antidumping Duty Administrative Review *73 FR 74458-74459* December 8, 2008.

[A-337-806] Individually Quick Frozen Red Raspberries from Chile: Final Results of Antidumping Duty Administrative Review *73 FR 74459-74460*, December 8, 2008.

[A-821-808] Certain Cut-to-Length Carbon Steel Plate from Russia: Final Results of Expedited Sunset Review of the Suspension Agreement *73 FR 74461-74462*, December 8, 2008.

[A-570-831] Fresh Garlic from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative and New Shipper Reviews and Intent to Rescind, In Part, the Antidumping Duty Administrative and New Shipper Reviews *73 FR 74462-74469*, December 8, 2008.

International Trade Commission

[Investigation No. 337-TA-615] In the Matter of Certain Ground Fault Circuit Interrupters and Products Containing Same; Notice of Commission Determination To Review in Part a Final Determination on Violation of Section 337; Schedule for Briefing on the Issues on Review and on Remedy, Public Interest, and Bonding; Denial of Motion for Leave To File a Reply *73 FR 75768-75770*, December 12, 2008.

[Investigation No. 731-TA-1150 (Final)] Circular Welded Carbon Quality Steel Line Pipe From Korea *73 FR 75770*, December 12, 2008.

[Investigations Nos. 701-TA-455 and 731-TA-1149 (Final)] Circular Welded Carbon Quality Steel Line Pipe From China *73 FR 75770*, December 12, 2008.

[Investigation No. 332-288] Ethyl Alcohol for Fuel Use: Determination of the Base Quantity of Imports *73 FR 75770-75771*, December 12, 2008.

[Inv. No. 337-TA-661] In the Matter of Certain Semiconductor Chips Having Synchronous Dynamic Random Access Memory Controllers and Products Containing Same: Notice of Investigation *73 FR 75131-75132*, December 10, 2008.

[Investigation Nos. 731-TA-1141-1142 (Final)] Uncovered Innerspring Units From South Africa and Vietnam 73 FR 75132, December 10, 2008.

The Week Ahead

- The ITC has no meetings, hearings, or votes scheduled for the week of December 15-19.