

**UNITED STATES – LAWS, REGULATIONS AND
METHODOLOGY FOR CALCULATING
DUMPING MARGINS (“ZEROING”)**

**RECOURSE TO ARTICLE 21.5 OF THE DSU
BY THE EUROPEAN COMMUNITIES**

WT/DS294

**COMMENTS ON THE LETTER OF THE EUROPEAN COMMUNITIES
DATED JUNE 11, 2008 OF
THE UNITED STATES OF AMERICA**

June 13, 2008

1. On June 11, 2008, the EC provided comments on representations made by the United States concerning U.S. customs law, and in particular an administrative remedy under U.S. law called customs protests. The United States has concluded that the EC's comments on U.S. municipal law in this regard are inaccurate. The United States, therefore, provides the following clarifications to ensure that the Panel has a correct understanding of U.S. municipal law.

2. The EC contends that the United States has misunderstood its own domestic law by asserting that the scope of a customs protest is limited to decisions made by CBP.¹ The EC contention, however, is directly contradicted by both the U.S. statute that authorizes customs protests, and CBP's regulations implementing that statute.

3. The statute clearly provides that customs protests are limited to decisions and actions made by CBP. Specifically, the statute provides that an importer may protest:

any clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, *decisions of the Customs Service . . .*²

Thus, decisions by the U.S. Department of Commerce to assess antidumping duties – including decisions as to the amount of antidumping duties to be assessed – do not fall within the category of decisions or actions that may be protested under this statute.³

4. The EC argues that its position is supported by 19 C.F.R. 174.11, the regulation that the United States submitted in its comments to the EC's answers to the panel's questions.⁴ However, the EC quotes section 174.11 selectively. When read in its entirety, it is clear that the regulation provides that an importer may only protest decisions by CBP:

The following *decisions of the port director*, including the legality of all orders and findings entering into the same, may be protested under the provisions of section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514):

- (a) The appraised value of merchandise;
- (b) The classification and rate and amount of duties chargeable;

¹ EC letter to the Panel dated June 11, 2008, p. 2.

² 19 U.S.C. 1514(a) (emphasis added) (Exhibit US-39).

³ *Mitsubishi Electronics America v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (holding that antidumping decisions are not decisions by Customs and may not be protested) (Exhibit US-42). In this regard, the original panel stated, "One aspect of [municipal law being a matter of fact for an international tribunal] is the need for an international tribunal to take account of decisions of domestic courts on the meaning of municipal law." Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R, para. 7.53. The panel cited the writings of Ian Brownlie that "Interpretation of their own laws by national courts is binding on an international tribunal". *Id.* at para. 7.53, n. 157 (citing Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 5th Ed. (1998) p. 40).

⁴ EC letter to the Panel dated June 11, 2008, p. 2.

- (c) All charges or exactions of whatever character including the accrual of interest within the jurisdiction of the Secretary of the Treasury;
- (d) The exclusion of merchandise from entry or delivery under any provision of the Customs laws;
- (e) The liquidation or reliquidation of an entry, or any modification thereof;
- (f) The refusal to pay a claim for drawback; and
- (g) The refusal to reliquidate an entry under section 520(c), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)).⁵

A port director is a CBP official. Thus, the regulations fully support the United States' assertions that only decisions made by CBP may be protested.

5. Moreover, each of the protestable events cited by the EC to argue that the scope of a protest is broader than what the United States asserts are all decisions made by CBP, not Commerce.⁶ Therefore, the regulation cited by the EC, when read in its entirety as opposed to selectively, fully supports the U.S. explanation that decisions concerning whether to assess antidumping duties and the amount of those antidumping duties are made by Commerce, and therefore are not capable of being addressed in a customs protest.

6. Finally, the EC argues that the recent case of *Corus Staal BV v. United States*⁷ demonstrates that the scope of a customs protest is not limited to decisions made by CBP.⁸ *Corus Staal*, however, did not involve a challenge to a denial of a customs protest. Rather, *Corus Staal* concerned a challenge to Commerce's liquidation instructions to CBP. The legal basis for the court's jurisdiction in *Corus Staal* is different from that of a custom protest.⁹ The Court of International Trade's holding in this case, therefore, has nothing to do with what may be challenged in a customs protest.

⁵ 19 C.F.R. 174.11 (Exhibit US-40).

⁶ EC letter to the Panel dated June 11, 2008, p. 2.

⁷ 515 F.Supp.2d 1337 (Ct. Int'l Trade 2007).

⁸ EC letter to the Panel dated June 11, 2008, pp. 2-3.

⁹ Without getting into the intricacies of the statutory provisions conferring jurisdiction on the U.S. Court of International Trade, suffice it to say that in *Corus Staal* the court based its jurisdiction on 28 U.S.C. 1581(i). If the case had involved a challenge to the denial of a customs protest, jurisdiction would have been based on 28 U.S.C. 1581(a).