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Administrative Review
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DATE: April 13, 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: Lightweight Thermal Paper from Germany
(Period of Review: November 20, 2008, through October 31, 2009)

SUBJECT: Issues and Decision Memorandum for the Final Results of the First
Administrative Review of the Antidumping Duty Order on
Lightweight Thermal Paper from Germany

Summary

We have analyzed the case brief submitted by petitioner, Appleton Papers, Inc. and the rebuttal brief submitted by respondent, Papierfabrik August Koehler AG (“Koehler”). As a result of our analysis, we have made changes from the Preliminary Results¹ in the margin calculations. We recommend that you approve the positions described in the Discussion of Interested Party Comments, infra. Outlined below is the complete list of the issues in this review for which we have received comments from petitioner and Koehler.

I. Background

On December 14, 2010, the Department of Commerce (“the Department”) published in the Federal Register the Preliminary Results of this administrative review. See Preliminary Results. This review covers one manufacturer/exporter of the subject merchandise: Koehler.

¹ See Lightweight Thermal Paper From Germany: Notice of Preliminary Results of Antidumping Duty Administrative Review, 75 FR 77831 (December 14, 2010) (“Preliminary Results”); see also Lightweight Thermal Paper from Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review, 75 FR 11135 (March 10, 2010).

II. List of Comments

Comment 1: Whether Koehler's Sales of the KT 48 F20 Product in Germany Constituted a Fictitious Market

Comment 2: Whether Koehler's Home Market Sales of the KT 48 F20 Product Were Outside the Ordinary Course of Trade

Comment 3: Whether the Department Should Disallow Certain Post-Sale Price Adjustments Reported in the REBATE1H Field

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III. Discussion of Interested Party Comments

Comment 1: Whether Koehler's Sales of the KT 48 F20 Product in Germany Constituted a Fictitious Market

Petitioner argues that the Department should reconsider its preliminary findings that the general price trend for the products at issue is consistent over time and that Koehler's pricing of sales of certain products in Germany does not result in a fictitious market, given the new evidence submitted in Koehler's November 15, 2010, supplemental questionnaire response. Petitioner asserts that Koehler sold KT 48 F20 subject merchandise in the United States and a comparatively small number of sales of the identical product in Germany at prices that are substantially lower than those for its mainstream KT 55 F20 product. Therefore, petitioner argues that Koehler is attempting to avoid dumping in the United States without lowering its overall average home market prices by selling small amounts of the matching product at artificially low prices. According to petitioner, this is the very behavior that the "fictitious market" provision of the statute was intended to prevent. Petitioner states that the statute provides that "no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account in determining normal value. See section 773(a)(2) of the Tariff Act of 1930, as amended ("the Act").

Citing to Porcelain-on-Steel Cooking Ware from Mexico, petitioner states that the Department looks to whether there have been price movements that tend to "reduce the amount by which normal value exceeds the U.S. price of the merchandise," such as where "prices of home market merchandise identical to the U.S. merchandise have decreased while prices of the home market merchandise not sold in the United States have increased."² Petitioner claims that Koehler acknowledges that, during the period of review ("POR"), KT 48 F20 was sold at a lower net price in the home market than KT 55 F20, primarily as the result of a large product-specific

² See Final Results of Antidumping Duty Administrative Review: Porcelain-on-Steel Cooking Ware from Mexico, 58 FR 32095, 32096 (June 8, 1993) ("Porcelain-on-Steel Cooking Ware from Mexico").

monthly rebate (the “monatsbonus”) that was applied only to the KT 48 F20 product.³ Nevertheless, petitioner states that Koehler argues that the pricing pattern during the POR was fully consistent with its pricing pattern during the period of investigation (“POI”).⁴ However, petitioner argues that although Koehler reported the monatsbonus rebate for home market sales of KT 48 F20 during the POI, the rebate program itself was created in 2008, after the POI, and applied retroactively to sales of KT 48 F20 during the POI in order to eliminate dumping margins. Petitioner contends that this is evident from the information supplied by Koehler in its November 15, 2010, supplemental response as well as other information from the investigation.

Petitioner claims Koehler has stated that, although there is no formal written agreement regarding the monatsbonus, it is documented on the customers’ price lists. Petitioner asserts that a review of the price lists demonstrates that the customers were unaware of any monatsbonus rebates until sometime in 2008. Therefore, petitioner argues that: (1) the monatsbonus rebate program was not instituted until 2008; (2) the rebates were applied retroactively; and (3) the program was entirely unknown to the customer at the time it made its purchasing decisions. Petitioner further argues that there is no commercial explanation why Koehler would retroactively grant rebates. Petitioner contends that it was only through the much later application of the retroactive rebate, after the petition was filed, and after Koehler became aware that KT 48 F20 would be a critical matching product, that Koehler was able to give the false appearance that KT 48 F20 was sold at a lower price than KT 55 F20 during the POI. Moreover, petitioner contends that Koehler concealed the existence of the separate monatsbonus monthly rebate program from the Department during the investigation by reporting a single “REBATEH” that included quarterly rebates.⁵ Further, petitioner argues that the timing of these retroactive rebates, coupled with Koehler’s litigation strategy during the investigation and the lack of any commercial explanation, demonstrates that the monatsbonus program was instituted as a response to the antidumping duty investigation.

Petitioner asserts that Koehler sold KT 48 F20 for a lower net price than KT 55 F20 during the review period when the company knew that they would be the matching sales.⁶ Thus, petitioner argues this evidences “different movements in prices” that establishes a fictitious market. Petitioner argues that there is no commercial explanation for these different price movements, other than Koehler’s incentive to minimize its exposure to potentially large dumping duties. Further, petitioner argues that this case stands in contrast to Tubeless Steel Disc Wheels from Brazil, where the lost revenues suffered by the respondent from lowering home market prices on the matching product exceeded any potential antidumping duty savings, thereby demonstrating “no commercial incentive” to establish a fictitious market.⁷ Therefore, petitioner argues that the Department should disregard all home market sales of the KT 48 F20 product in the dumping calculations.

³ See Koehler’s Sections A–C Supplemental Questionnaire Response, dated April 15, 2010, at pages 11-17.

⁴ Id. at pages 6 and 11. See also Koehler’s Sections A–C Supplemental Questionnaire Response, dated November 15, 2010, at page 2 and Exhibit 3.

⁵ See Petitioner’s Factual Information Submission (“PFIS”), dated April 19, 2010, at Exhibit 2. See also Koehler’s Section B Questionnaire Response, dated January 30, 2008, at B-21 (from the investigation).

⁶ See Koehler’s Sections A–C Supplemental Questionnaire Response dated April 15, 2010, at page 11.

⁷ See Tubeless Steel Disc Wheels From Brazil; Final Results of Antidumping Duty Administrative Review, 56 FR 14083,14085 (April 5, 1991), and accompanying Issues and Decision Memorandum at Comment 3.

Koehler argues that petitioner misinterprets the law and attempts to divert the Department by suggesting that Koehler must raise its U.S. prices as the only valid means of complying with the dumping law. Koehler asserts that it has not altered its behavior with respect to its U.S. or home market sales of KT 48 F20 since the imposition of the antidumping duty order. Moreover, Koehler contends that it has not dumped U.S. sales of KT 48 F20 during the POI or the POR, but rather, Koehler has eliminated its overall dumping margin by ceasing its U.S. sales of KT 55 F20, the product that led to the overall finding of a dumping margin during the POI. Koehler contends that there is nothing in the U.S. law that prohibits, or even discourages, a respondent from eliminating or reducing dumping margins by lowering its home market prices, as long as the home market prices are above the cost of production. See Tapered Roller Bearings;⁸ see also Furfuryl Alcohol.⁹

Koehler states that the “fictitious markets” provision of the statute provides a narrow limitation on the steps that a respondent can take to eliminate its dumping margin. See section 773(a)(2) of the Act. Koehler remarks that the Department has explained in Furfuryl Alcohol that the Department’s general practice in determining whether a fictitious market exists is to require evidence that the decrease in the price of home market sales of the foreign like product was accompanied by an increase in the price of sales of different forms of the foreign like product. See Electrolytic Manganese.¹⁰ Further, Koehler argues that its pricing pattern does not fit the narrow fictitious market exception, and therefore does not preclude Koehler from eliminating dumping margins by eliminating KT 55 F20 sales for which the Department found dumping margins in the original investigation.

Koehler contends that applying the law to the facts, petitioners might have had a case to exclude Koehler’s home market sales of KT 48 F20 product if it could have shown all of the following: (1) Koehler sold KT 48 F20 at dumped prices in the POI; (2) between the POI and the instant administrative review, Koehler decreased its home market prices for KT 48 F20 and made up for it by increasing its home market prices for KT 55 F20; (3) Koehler sold only KT 48 F20 in the U.S. market during the POR; and (4) the simultaneous decrease in matching KT 48 F20 prices and increase in non-matching KT 55 F20 prices had the net effect of reducing Koehler’s dumping margin with respect to KT 48 F20. Koehler further contends that petitioner is not only unable to demonstrate that all of these elements are true, petitioner also cannot demonstrate that any of these elements are true, except that Koehler sold only KT 48 F20 product in the United States during the POR.

⁸ See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part, 62 FR 11825, 11831 (March 13, 1997) (“Tapered Roller Bearings”).

⁹ See Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol From the Republic of South Africa, 62 FR 61,084, 61,085 (November 14, 1997) (“Furfuryl Alcohol”).

¹⁰ See Electrolytic Manganese Dioxide from Japan: Final Results of Antidumping Duty Administrative Review, 58 FR 28551, 28555 (May 14, 1993) (“Electrolytic Manganese”).

Koehler argues that it did not eliminate its weighted-average dumping margin by decreasing the home market price of KT 48 F20 while increasing the home market price of KT 55 F20. On the contrary, Koehler contends that it eliminated its weighted-average dumping margin by eliminating its U.S. sales of KT 55 F20, which the Department found to have been dumped in the original investigation, and focused instead on selling only the non-dumped KT 48 product in the U.S. market. Koehler cites to Cyanuric Acid where Koehler claims the Department found “no fictitious market created based, in part, on the fact that both the granular and powdered forms of these products exhibited downward price trends for the periods reviewed.”¹¹ Koehler concludes that the fact that it sells predominantly one type of product in the home market and another type of product in the U.S. market does not make its home market a fictitious market.

Regarding the timing and the motivation of the monatsbonus rebate program, Koehler refutes petitioner’s allegations that (1) Koehler concealed the existence of the monatsbonus from the Department in the original investigation; (2) the monatsbonus did not exist prior to the POI, as evidenced by new information submitted in Koehler’s November 15, 2010, supplemental questionnaire at Exhibit 3; (3) the monatsbonus was applied retroactively to sales that occurred during the POI; and (4) that the monatsbonus rebate program was created as part of Koehler’s legal strategy. Koehler argues that the fictitious market provision does not apply in the instant case because Koehler never dumped KT 48 F20 in the original investigation or during the POR, and any downward price movement in Koehler’s home market prices of KT 48 F20 is matched by a similar downward price movement in its home market prices of KT 55 F20, not a “different price movement.” Therefore, Koehler argues that there is no basis for petitioner’s fictitious market allegation.

Department’s Position:

Pursuant to section 773(a)(2) of the Act, no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account in determining normal value. The occurrence of different movements in the prices at which different forms of the foreign like product are sold (or, in the absence of sales, offered for sale) in the exporting country after the issuance of an antidumping duty order may be considered by the administering authority as evidence of the establishment of a fictitious market for the foreign like product if the movement in such prices appears to reduce the amount by which the normal value exceeds the export price (or the constructed export price) of the subject merchandise.

As stated in the Preliminary Results, the Department will examine not only whether there are price movements, but also whether there are commercial or market factors that explain these price movements. In Cement from Mexico, the Department stated that “the existence of a fictitious market is not necessarily established merely on the basis of price movements without regard to the reasons that may have caused those price movements. The presence of commercial factors other than the existence of an antidumping duty order is relevant in determining whether a fictitious market exists.”¹²

¹¹ See Final Results of Antidumping Duty Administrative Review: Cyanuric Acid and Its Chlorinated Derivates from Japan, 55 FR 1690 (January 18, 1990) (“Cyanuric Acid”).

¹² See Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 58 FR 25803, 25804 (April 28, 1993) (“Cement from Mexico”).

We find petitioner's contention that because Koehler retroactively applied the monatsbonus rebate to its home market sales of KT 48 F20 during the POI, Koehler gave the false appearance that KT 48 F20 was sold in the home market at a lower price than KT 55 F20 during the POI, to be unsubstantiated by record evidence. Petitioner's assumption is based on the attribution of a certain percentage of the monthly rebate to home market sales of KT 48 F20 during the POI. However, because Koehler did not provide separate monthly and quarterly rebates during the POI, the arbitrary percentage assigned by petitioner is invalid for determining whether the net price of KT 48 F20 was higher or lower than KT 55 F20 products during the POI. Thus, a valid comparison of the effects of the monatsbonus rebate on price movements between the POI and POR for the KT 48 F20 and KT 55 F20 products cannot be made. Further, we continue to find that the general price trend for the KT 48 F20 and KT 55 F20 products is consistent over time. Therefore, we do not find that the "different movements in prices," establishes a fictitious market. Due to the proprietary nature of this issue, see the Department's Memorandum to the File titled, "Calculation Memorandum for the Final Results – Koehler," dated April 13, 2011, on file in the Central Records Unit ("CRU"), room 7046.

In these final results, we find that there were no comments received that warrant the Department changing its position with respect to petitioner's fictitious market allegation. Therefore, the Department continues to find that there are not different movements in prices at which different forms of the foreign like product are sold in Germany sufficient to establish a fictitious market.

Comment 2: Whether Koehler's Home Market Sales of the KT 48 F20 Product Were Outside the Ordinary Course of Trade

Petitioner argues that Koehler's home market sales of KT 48 F20 product should be disregarded as "outside the ordinary course of trade" within the meaning of section 771(15) of the Act and section 773(a)(1)(B)(i) of the Act. Petitioner states that in accordance with 19 CFR 351.102(b)(35), the Department considers sales to be outside the ordinary course of trade when, "based on an evaluation of all of the circumstances particular to the sales in question," they "have characteristics that are extraordinary for the market in question. Petitioner argues that in the instant case, there is no exhaustive list of such characteristics. Further, petitioner argues that for numerous reasons Koehler's sales of KT 48 F20 product "are not representative of the home market" and should be disregarded.

Petitioner asserts that the facts of the instant case are analogous to those presented in CEMEX¹³ and Mantex.¹⁴ Petitioner claims that the Federal Circuit upheld Commerce's determination that CEMEX's sales in Mexico of the matching Type II and V products were a small percentage of total home market sales and constituted a "niche market" in Mexico.

Petitioner states that the Court found that the sales "were of a promotional nature," and the home market customers who purchased those types also purchased established Type I cement. Petitioner also states that the Court noted that CEMEX's "profit margin on these types was significantly lower than its profits on other cement types," and found that "the disparity in profit

¹³ See CEMEX, S.A. v. United States, 133 F.3d 897, 900 - 902 (Fed. Cir. 1998) ("CEMEX")

¹⁴ See Mantex, Inc. v. United States, 17 CIT 1385, 1404, 841 F. Supp. 1290, 1306 (CIT 1993) ("Mantex").

margins is indicative of sales that were not in the ordinary course of trade.” Petitioner asserts that in successive reviews of Cement from Mexico, the Department continued to find CEMEX’s home market sales of Types II and V sales as outside the ordinary course of trade. Moreover, petitioner asserts that although Type II and V cements had been produced for a number of years, the Department repeatedly found that home market sales of those products continued to exhibit a promotional quality that is not evidenced in CEMEX’s ordinary sales of Type I cement.

Similarly, petitioner states that the Court of International Trade (“CIT”) upheld Commerce’s finding that sales made under similar circumstances were outside the ordinary course of trade in Mantex. In Mantex, TISCO, a respondent, sold pipe made to American (“ASTM”) standards in the U.S. market, and primarily sold pipe made to Indian (“IS”) standards in the home market, but also sold small amounts of ASTM product in the home market. Petitioner also states that the CIT upheld Commerce’s decision to disregard home market sales of the matching product, citing “marginal demand” and “low sales volume” for ASTM pipe in India, the fact that “only two of TISCO’s many distributors in India” purchased ASTM grade pipe, and the “low profits received from home market sales of ASTM relative to IS sales.”

Likewise, petitioner contends that Koehler’s sales in Germany of the matching KT 48 F20 product mirror CEMEX’s sales of Type II and Type V cements in Mexico and TISCO’s sales of ASTM pipe in India. Petitioner claims that Koehler has acknowledged that KT 55 F20 is still the established product in Europe. In contrast, petitioner argues that KT 48 F20: (1) is a newer product; (2) has lower demand relative to the KT 55 F20 product; (3) is less profitable than sales of Koehler’s other products; (4) is a promotional product based on initial product brochure in November 2009; (5) is small and has an unrepresentative customer base; (6) has an unusual rebate program; and (7) pricing has no legitimate commercial explanation. Petitioner argues that for these reasons, the Department should exclude all home market sales of the KT 48 F20 product as being outside the ordinary course of trade. Petitioner suggests that it would be distortive to match the entire universe of U.S. sales solely to the small and unrepresentative set of home market sales of KT 48 F20.

Koehler refutes petitioner’s arguments, stating that its sales of KT 48 F20 are not outside the “ordinary course of trade.” Koehler argues that its home market sales of KT 48 F20 were: (1) not below cost; (2) prime merchandise without any unusual product specifications; (3) not sold pursuant to unusual terms of sale; (4) not made to affiliated parties; and (5) not priced aberrationally. On the other hand, Koehler argues that its home market sales of KT 48 F20 bear all of the indicia of sales within the ordinary course of trade because Koehler has sold KT 48 F20 since February 2007, prior to the POI, in commercial quantities in arm’s length transactions.

Koehler argues that petitioner cites to cases with fact patterns that do not resemble the instant case. Koehler claims that in Mantex, the Court noted that Commerce’s reasons supporting its decision to find TISCO’s home market sales of ASTM merchandise outside the ordinary course of trade “demonstrate such sales lacked the volume and frequency that would permit Commerce to make a ‘satisfactory’ determination of foreign market value” Commerce also found that TISCO’s ASTM home market sales were “too sparse for a meaningful comparison.” Koehler also claims that in CEMEX, the Court noted that “these sales represent a miniscule percentage of CEMEX’s total sales of cement ...” and that they were “sold to a niche market.”

In contrast to these cases, Koehler argues that sales of KT 48 F20 are made in normal commercial quantities. It argues that the overall volume percentage of sales is significant and that the product is not sold in a niche market, but rather that this product is sold to the same customers and used in the same applications as the predominant home market product, KT 55 F20. Koehler asserts that while demand is lower for KT 48 F20 than for KT 55 F20, it is higher than demand for the other six products sold in the home market. Further, Koehler asserts that it made home market sales of KT 48 F20 in significant quantities, well above the 5 percent “significance” threshold the Department uses regarding other aspects of the antidumping law (e.g., home market viability, reporting of home market downstream sales). See Corrosion-Resistant Carbon Steel.¹⁵ Thus, Koehler argues that home market sales of KT 48 F20 cannot be described with the same key terms of “miniscule” and “sparse” used in Mantex and CEMEX. With respect to the low profitability of KT 48 F20 alleged by petitioner, Koehler argues that petitioner’s conclusion is based on a one-sided statistical presentation. Specifically, Koehler contends that petitioner has aggregated the profits of all products other than KT 55 F20 and KT 48 F20 into “others.” However, Koehler asserts that if all products are broken out individually, the picture changes considerably. Moreover, Koehler argues that it is not unusual for manufacturers to have different profit levels for different products.

Koehler argues that petitioner misinterprets Koehler’s use of the word “promotional.” Koehler explains that the phrase “promoting the KT 48 F20 product” is meant to be synonymous with marketing. In contrast, in CEMEX, the “promotional nature” of the sales of types II and V cement was evidenced by the fact that the customers who bought this merchandise were “more likely to purchase CEMEX’s other cement products.” See CEMEX, 133 F.3d at 901. Koehler argues that there is no indication in the record in the instant case that Koehler sold the KT 48 F20 in the hope that its customers would then buy other LWTP products.

Koehler argues that petitioner’s citation to Mantex in support of its argument that the limited nature of the customer group “favors a finding of sales made out of the ordinary course of trade,” is without merit because there is no reference in that opinion to a “customer group.” Koehler notes that the petitioner cites to Cement from Mexico as standing for the proposition that a group of customers found to be “small and unrepresentative” weighs toward a finding of sales outside the ordinary course of trade. However, Koehler argues that it is unclear from this citation what the Department deems small and unrepresentative. In any event, Koehler argues that the “customer group” who purchased KT 48 F20 is not “small and unrepresentative.”

Koehler refutes petitioner’s arguments that the sales of KT 48 F20 were made outside the ordinary course of trade because: (1) there was a new rebate associated with them, (2) there is no legitimate commercial explanation for pricing, and (3) the product is new and not mainstream. Koehler contends that the monthly rebates were not new, and were a normal part of its business prior to the POI. Koehler contends that petitioner continues to ignore basic micro-economics in its assertion that lower demand should not result in lower prices. Koehler also contends that petitioner wrongly cites to CEMEX regarding whether a product is “new,” because CEMEX did not discuss the “newness” of the product, and the only support for the concept of a product being

¹⁵ See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Antidumping Duty Administrative Review, 65 FR 8935, 8940 (February 23, 2000) (“Corrosion-Resistant Carbon Steel”).

“not mainstream” is Commerce’s recognition that the products at issue were “specialty” products sold in a “niche” market. See CEMEX, 133 F.3d at 901. Koehler argues that while KT 48 F20 is a newer product than KT 55 F20, the Department was aware that the KT 48 F20 product was sold during the POI. Furthermore, Koehler argues that the Department is also aware that the KT 48 F20 is a mainstream product, and there are no end-use differences between the KT 48 F20 and KT 55 F20 products. Therefore, Koehler argues that the facts of this case support a finding that Koehler’s sales of KT 48 F20 were made within the ordinary course of trade.

Department’s Position:

Section 771(15) of the Act defines the term “ordinary course of trade” as “the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.” The Statement of Administrative Action (“SAA”) which accompanied the passage of the Uruguay Round Agreements Act of 1995 (“URAA”) further clarifies this portion of the statute, when it states: “Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market.” See SAA at page 834. See also 19 CFR 351.102(b)(35).

As stated in the Preliminary Results, we examined the terms of sale and the sales trends of the products in question, and found that Koehler reported sales of KT 48 F20 to a number of customers in both the POI and the POR.¹⁶ We also evaluated all of the circumstances particular to the sales in question and did not find that such sales have characteristics that are extraordinary for the market in question. Thus, based on our examination of the record, we find that there is no evidence to demonstrate that Koehler’s sales of KT 48 F20 are based on transactions involving off-quality merchandise, merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm’s length price.

In these final results, we continue to find that Koehler’s sales of KT 48 F20 are not outside the ordinary course of trade because (1) the like product was sold in commercial quantities; (2) the merchandise was not produced according to unusual product specifications; (3) the merchandise was not sold at aberrational prices; and (4) the merchandise was not sold pursuant to unusual terms of sale. In addition, we did not receive any comments that warrant the Department reaching a different conclusion from that stated in the Preliminary Results. Therefore, the Department determines that Koehler’s sales of KT 48 F20 are not outside the ordinary course of trade.

Comment 3: Whether the Department Should Disallow Certain Post-Sale Price Adjustments Reported in the REBATE1H Field

Koehler reported that it issues rebates in the home market on a monthly, quarterly, and yearly basis and separately reported the rebates in the data fields, REBATE1H, REBATE2H, and

¹⁶ See Koehler’s Questionnaire Response, dated March 16, 2010, letter, at page 1.

REBATE3H, respectively.¹⁷ Although the Department preliminarily accepted Koehler's reporting of its rebates for purposes of the Preliminary Results, the petitioner argues that Koehler's monthly rebate ("monatsbonus") should be disallowed by the Department for these final results. Petitioner explains its basis for this argument by distinguishing Koehler's reported rebate programs, discusses why Koehler's monatsbonus program is not a bona fide rebate program, and cites the Department's practice and precedent with respect to post-sale price adjustments.

Petitioner asserts that Koehler never disclosed the existence of the monatsbonus program during the original investigation. Petitioner states that the antidumping questionnaire issued to Koehler during the investigation required Koehler separately to describe each rebate program and to "create a separate field for reporting each rebate program."¹⁸ Petitioner states that Koehler failed to separately identify its rebate programs in separate fields during the investigation, and instead, Koehler reported a single rebate field ("REBATEH") for its home market sales. Petitioner states that throughout the investigation (and in its original section B response in this review), Koehler's description of its rebates was restricted to a description of the "quartalsbonus" program and made no reference to the "monatsbonus" program during the investigation. The first time that Koehler described its monthly "monatsbonus" rebate program, and separately reported the amount of that rebate, was in its supplemental questionnaire response filed in this review on April 15, 2010. Petitioner argues that the fact that Koehler disclosed the existence of the quartalsbonus during the investigation, but never disclosed the monatsbonus, reveals an intention to conceal the latter program from the Department's scrutiny.

Petitioner states that the monatsbonus is unique because it is offered exclusively for sales of the matching product and the changes in the monatsbonus are applied retroactively to sales. Petitioners argue that the monatsbonus is subject to no written agreement and has arisen only recently in response to the antidumping case. Petitioner also states that the monatsbonus is Koehler's only rebate program applied on a monthly basis, matching the monthly interval period of the Department's antidumping calculations. In contrast, Petitioner states that the quarterly rebate ("quartalsbonus") applies to sales of all products invoiced during the relevant quarter, is long-standing, and based upon a written agreement originally governing sales dating back to 2002/2003.¹⁹ Petitioner contends that the quartalsbonus, unlike the retroactive monatsbonus, is not a "post-sale" price adjustment because the customer knows that it will receive the specific rebate at the time of sale. Therefore, petitioner argues that the customer can reasonably rely on the quartalsbonus at the time that it makes its purchasing decisions. Petitioner asserts that, although the amount of the monatsbonus appears on price lists issued to a certain customer at the beginning of each month, Koehler revises the rate of the monatsbonus after the end of the month. Petitioner argues that the e-mail correspondence provided by Koehler demonstrates that Koehler

¹⁷ See Koehler's Supplemental Sales Questionnaire Response, dated April 15, 2010, at page 15.

¹⁸ See Petitioner's Factual Information Submission (April 19, 2010) at Exhibit 2, pages B-21-22 (Koehler's Section B Response, dated January 30, 2008, from the investigation); see also First Review Antidumping Questionnaire dated December 23, 2009, at page B-23.

¹⁹ See Koehler's Sections A-C Supplemental Questionnaire Response, dated April 15, 2010, at page 18; see also Koehler's Sections A-C Supplemental Questionnaire Response, dated November 15, 2010, at Exhibit S-12.

did not notify the customer of this rebate percentage until after the relevant sales for the month already had been made.²⁰

Petitioner references Koehler's assertion that its rebates, as documented on its customer-specific price lists, "are always agreed to prior to sale."²¹ However, petitioner claims that, more recently, Koehler has acknowledged that the monatsbonus is revised long after the date of the original price list, and that "it is a relatively frequent occurrence that sales of subject merchandise are made in the home market prior to the establishment of a precise rebate percentage."²² Petitioner asserts that, unlike other rebates, the monatsbonus is determined on a post facto basis without regard to any metrics or formulas known to the customer at the time of sale, but rather, is set, without negotiation, solely according to Koehler's discretion.²³ Petitioner addresses Koehler's suggestion that the rebate was intended to incentivize a certain customer's purchases of the KT 48 F20 product, stating that this makes sense only if the customer had been aware of the rebate terms before it made its purchasing decisions. Petitioner argues that the monatsbonus is a post-sale price adjustment which represents a gift to the customers, and it cannot incentivize sales that already have been made.

Petitioner contends that Koehler is incorrect in its assertion that "there is no Department requirement that the exact (or even approximate) amount of a rebate be known prior to sale in order for the Department to allow a price adjustment."²⁴ The petitioner states that the antidumping questionnaire issued to Koehler states plainly that "when the seller establishes the terms and conditions under which the rebate will be granted at or before the time of sale, the Department reduces the gross selling price by the amount of the rebate."²⁵ Further, the petitioner argues that the amount of the refund to which a customer will be entitled is clearly a "term" of the rebate program, and it must therefore be established at or before the time of sale. Petitioner asserts that the Department's practice has been to disallow rebates where the respondent cannot demonstrate that the customer was aware of the terms and conditions of the rebate at or before the time of sale.²⁶ Citing Plate from Canada, petitioner states that "{t}he purpose of requiring respondents to prove that the buyer was aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of the sale is to protect against manipulation of the dumping margins by a respondent."²⁷ The petitioner argues that the record in this case conclusively shows that a certain customer²⁸ was unaware, at the time of purchase, (1) whether or not it would be entitled to a monatsbonus and (2) the amount of the monatsbonus. As a result, petitioner argues that the Department should disallow the monthly rebate.

²⁰ See Koehler's Sections A-C Supplemental Questionnaire Response, dated April 15, 2010, at Exhibit 14, at page 28.

²¹ Id.

²² See Koehler's Sections A-C Supplemental Questionnaire Response, dated November 15, 2010, at page 6.

²³ See Koehler's Sections A-C Supplemental Questionnaire Response, dated April 15, 2010, at Exhibit 14.

²⁴ Id. at pages 6-7.

²⁵ See the Department's Antidumping Duty Questionnaire issued December 23, 2009, at page I-12.

²⁶ See Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Steel Plate from Canada, 61 FR 13815, 13822-23 (March 28, 1996) (final results) ("Plate from Canada").

²⁷ Id. at 13823.

²⁸ The customer name is considered business proprietary information ("BPI"); see the Final Sales Calculation Memorandum for additional details.

Petitioner argues that the monatsbonus is similar to the price adjustments which the Department rejected in Canned Pineapple.²⁹ Specifically, petitioner states that the Department's practice is that "exporters or producers should not be allowed to eliminate dumping margins by providing price adjustments after the fact."³⁰ Drawing a comparison to the instant review, petitioner states that where, "a price adjustment made after the fact lowers a respondent's dumping margin, the Department will closely examine the circumstances surrounding the adjustment to determine whether it was a bona fide adjustment made in the ordinary course of business."³¹ Petitioner states that in Canned Pineapple, the Department disallowed post-sale price adjustments where (1) the adjustments had a significant impact on the dumping margin, (2) the respondent had no commercial explanation for the price adjustments that was supported by record evidence, and (3) the adjustments appeared to be "unique" because there was no record evidence of their being offered to other customers or in other markets. Petitioner claims that the burden rests with Koehler to establish its entitlement to this adjustment by proving that (1) its customers were aware of the terms and conditions of the monatsbonus at the time of sale, and (2) the monatsbonus was established in the ordinary course of business solely for "legitimate commercial purposes." Petitioner argues that Koehler has failed to provide any such evidence.

Petitioner rebuts Koehler's assertion that the monatsbonus should be considered a long-standing program because it applied to sales that were made "seven months before the antidumping duty petition was filed," and thus should be considered a normal business practice rather than some attempt to manipulate its dumping margin.³² Petitioner claims that recent information submitted in Koehler's November 15, 2010, supplemental response demonstrates that Koehler instituted the monatsbonus as a response to the antidumping case, after the petition was filed in September 2007, and only later made the decision to apply monthly rebate amounts to sales of KT 48 F20 retroactively. Petitioner states that the first mention of any monatsbonus for KT 48 F20 in Koehler's correspondence with a certain customer was not until well over a year after Koehler supposedly began granting the rebate, and a certain period after the petition had been filed. Petitioner notes that certain business proprietary information regarding the 2007 price lists and communications between Koehler and a certain customer demonstrate that (1) the monatsbonus program was not instituted until 2008, (2) the rebates were applied retroactively, a year or more after the fact, to sales during 2007, and (3) the monatsbonus program was entirely unknown to the customer at the time it made its purchasing decisions.

In the Preliminary Results, the Department discussed certain differences between the post-sale adjustments which were rejected in Canned Pineapple and those which the Department preliminary accepted in the instant review. Specifically, petitioner argues that, in the Preliminary Results, the Department conflates the post-sale price adjustment at issue (*i.e.*, the monatsbonus) with entirely unrelated (and legitimate) rebate programs. Petitioner states that the Department's reliance on the 2002/03 rebate documentation as a distinguishing factor from Canned Pineapple is misplaced because it incorrectly combines the quartalsbonus (which is long-standing and was

²⁹ See Canned Pineapple Fruit from Thailand, 71 FR 70948 (December 7, 2006), and accompanying Issues and Decision Memorandum at Comment 1 ("Canned Pineapple"); see also 19 C.F.R. § 351.401(b)(1).

³⁰ Id.

³¹ Id.

³² See Koehler's Sections A-C Supplemental Questionnaire Response, dated November 15, 2010, at Exhibit 3 and page 2; see also Koehler's Sections A-C Supplemental Questionnaire Response, dated April 15, 2010, at page 6.

originally set according to written agreements) and the monatsbonus (which was not). Petitioner argues that the significant point is that Koehler, like the respondent in Canned Pineapple, targeted its post-sale price adjustments to a limited set of sales that would tend to eliminate its dumping margin. Petitioner states that, in the instant review, Koehler targeted its post-sale price adjustments exclusively to matching sales, all of which are also used in the dumping calculations.

Koehler rebuts petitioner's assertion that it tried to conceal the monatsbonus from the Department. Koehler states, that in the original investigation, it indicated that it "had a number of customer-specific rebates in place with its customers."³³ Koehler stated that its rebates could be paid out "either on a monthly or quarterly basis," and indicated that the quarterly rebate ("Quartalsbonus") was just one of the types of rebates that it offered.³⁴ Koehler states that, although it combined all of its rebates into one data field during the investigation because "rebate terms were all agreed to on a percentage of gross unit price basis," the sample documents it submitted in its Section A response showed not only a Quartalsbonus, but also a Monatsbonus.³⁵ Koehler asserts that the Department reviewed the Monatsbonus during its verification of Koehler in the original investigation.³⁶

Koehler contends that the monatsbonus existed prior to the filing of the antidumping petition. Specifically, Koehler states that, in Koehler's Section A response in the original investigation, Koehler provided the Department with a price list, dated March 20, 2007, for a home market customer that included an explicit reference to "Monatsbonus 2007."³⁷ In addition, Koehler asserts that the verification exhibits from the original investigation show a price list dated October 18, 2006 that also references the monatsbonus.³⁸ Koehler asserts that this demonstrates that Koehler offered the monatsbonus on home market sales of KT 48 F20 even prior to the first sale of KT 48 F20 in the home market.

Koehler rebuts petitioner's claim that Koehler "retroactively" granted a monthly rebate for KT 48 F20 to a certain customer. Koehler states that it granted rebates to a certain customer dating back as early as February 2007. Koehler rebuts petitioner's "new" evidence in which petitioner claims that the monatsbonus for one customer, "was not even conceived of until sometime in 2008 – when Koehler was preparing its questionnaire responses during the original investigation."³⁹ Koehler argues that petitioner's allegation is false and claims that this information does not support such an allegation because it is an incidental price list included as an attachment to Koehler's November 15, 2010, response. Koehler states that this information is not new to this review or the original investigation.

³³ See PFIS, at Exhibit 2 (containing Koehler's Section B Questionnaire Response, dated January 30, 2008, at B-22).

³⁴ Id.

³⁵ See PFIS Exhibit 1 (Koehler's Section A Questionnaire Response, at Exhibits A-10, A-12).

³⁶ See PFIS, Exhibit 10 (Sales Verification Exhibit 16(f)).

³⁷ See PFIS Exhibit 1, at Exhibit A-12.

³⁸ See PFIS Exhibit 10 (Sales Verification Exhibit 16(a)).

³⁹ See petitioner's Case Brief, at 8-9 (citing a price list to a certain customer of Koehler); Id. at 10 (citing e-mail correspondence referring to same price list which refers to a certain percentage Quartalsbonus but does not refer to additional percentage Monatsbonus).

Koehler refutes petitioner's "new" evidence, by explaining its sales process with respect to rebates. Specifically, Koehler states that rebates (whether monthly, quarterly, or annual) usually, but not always, appear on the customer-specific price list. See Koehler's April 15, 2010 questionnaire response (which indicates that "in most cases {they} appear on the customer-specific list"). Koehler states that these rebates are often negotiated over the telephone, and sometimes the rebate is applied before the price list is updated. In addition, Koehler states that the e-mail correspondence that petitioner cites included a reference to specific order confirmation numbers. Koehler asserts that it is likely that this price list was attached to that particular e-mail because the only relevant information for the purpose of the correspondence was the quarterly rebate percentage, which applies to all products on the price list, and which applied throughout 2007.⁴⁰ Koehler claims that the order numbers in question likely did not pertain to KT 48 F20 sales.

Further, Koehler explains that it has not submitted record evidence of rebates in 2007 because the Department has not asked it to do so. Specifically, in its supplemental questionnaire issued to Koehler, the Department requested that Koehler provide all e-mails which support the monthly, quarterly, and/or annual rebate percentages granted by Koehler to a certain customer during 2008 and 2009.⁴¹ Koehler responded by providing the e-mail correspondence between Koehler and the certain customer for the period in 2008 that was not already provided in Exhibit S-14.

Koehler argues that Petitioner is incorrect in its assertion that the Department's practice has been to disallow rebates where the respondent cannot demonstrate that the customer was aware of the terms and conditions of the rebate at or before the time of sale. Koehler states that this is not the Department's standard. Koehler cites Hot-Rolled Steel from India⁴² and states that the Department has established a standard for treating a price adjustment as a rebate where there is 1) sufficient evidence on the record of its rebate program; 2) customers had prior knowledge of the rebate program; and 3) the program was in existence before the sales were made. Koehler argues that Plate from Canada is irrelevant because the review was conducted under the old law and the old regulations. Koehler argues that petitioner's assertion that "the Department's practice has been to disallow rebates where the respondent cannot demonstrate that the customer was aware of the terms and conditions of the rebate at or before the time of sale" is outdated and does not reflect the Department's current practice under the current law.

Koehler states that its rebates on sales of KT 48 F20 have been granted since the initial sales of the product in the home market in February 2007. Koehler references its supplemental response and indicates that, based on its correspondence with its customer, it is clear that the customer is well aware of the rebate program (being its beneficiary), and that only the precise rebate percentage for the month was to be determined.⁴³ Koehler rebuts the petitioner's assertion that the Monatsbonus is offered exclusively for sales of the matching KT 48 F20 product and is not available for any non-matching product. Koehler notes that in its response, the data

⁴⁰ See Koehler's Section A-C Supplemental Questionnaire Response, dated November 15, 2010, at Exhibit 3.

⁴¹ See Department's November 3, 2010, Supplemental Questionnaire, Question 3(f), at 3.

⁴² See Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 31961 (June 5, 2008), and accompanying Issues and Decision Memorandum at Comment 27.

⁴³ See Koehler's Section A-C Supplemental Questionnaire Response, dated April 15, 2010, at Exhibit S-14, at page 8.

demonstrates that a certain customer received a monatsbonus for other products sold by Koehler as well.

Koehler clarifies its reporting by stating that its rebates are normally, but not always, agreed to prior to sale. Koehler rebuts petitioner's assertion that the "{m}onatsbonus is determined on a post facto basis without regard to any metrics or formulas known to the customer at the time of sale, but rather is set, without negotiation, solely according to Koehler's discretion and whim."⁴⁴ Koehler states that its rebates are negotiated and determined based on Koehler's sales negotiations with its respective customer. Further, Koehler asserts that the negotiations take place either in person or via telephone between the sales manager and/or agent and the customer, and therefore, there is generally no documentation other than the price lists (which in essence represent the "finalization" of the negotiations).⁴⁵

Department's Position:

In the Preliminary Results, we accepted the claimed post-sale price adjustment reported in the field, REBATE1H, of Koehler's home market sales database. The Department's preliminary analysis relied on certain written documentation provided by Koehler as a general basis for support of its aggregate rebates. We have further examined the data on the record of this review and have considered the parties' comments. Based upon further review, we find that the 2002/03 written rebate documentation does not specifically apply to the monatsbonus, Koehler failed to demonstrate that its customer was aware of the terms and conditions of the monatsbonus prior to the sales, and the monatsbonus is unique because it differs significantly from Koehler's other rebates. Accordingly, the record does not demonstrate that the monatsbonus is a legitimate rebate that should be treated as a price adjustment for this review.

The Department's standard for determining the legitimacy of a price adjustment is codified in the regulations, outlined in the Department's antidumping duty questionnaire, and reflected in the Department's prior practice. Specifically, the regulations state that a "(p)rice adjustment means any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser's net outlay." See 19 C.F.R. § 351.102(b)(38). "In calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary will use a price that is net of any price adjustment, as defined in § 351.102(b), that is reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)." See 19 C.F.R. § 351.401(c). While the Department's regulations allow for post-sale price adjustments that are reasonably attributable to the subject merchandise, the Preamble to the regulations indicates that exporters or producers should not be allowed "to eliminate dumping margins by providing price adjustments 'after the fact.'"⁴⁶

As stated in the Department's initial questionnaire issued to Koehler, "{w}hen the seller establishes the terms and conditions under which the rebate will be granted at or before the time

⁴⁴ See Petitioners' Case Brief, at 24.

⁴⁵ See Koehler's Section A-C Supplemental Questionnaire Response, dated April 15, 2010, at Exhibit S-14, at page 8.

⁴⁶ See Antidumping Duties; Countervailing Duties: Final Rule, 62 FR 27296, 27344 (May 19, 1997).

of sale, the Department reduces the gross selling price by the amount of the rebate. (Section 351.102(b) of the regulations.)”⁴⁷ The initial questionnaire issued to Koehler in the investigation and the instant review also outlines the specific reporting requirements for rebates, as follows: “(REBATEH): Description: Report the unit value of each rebate given to the customer. Create a separate field for reporting each rebate program. Rebates should be reported with the sales to which they apply. Narrative: Explain your policy and practice for granting rebates. Describe the terms and conditions of each rebate program and when the terms and conditions are established in the sales process. If rebates vary by customer category (field 6.0) or channel of distribution (field 7.0), provide an explanation of the rebates given to each. For rebates that have not yet been paid, describe how you computed the amount to be rebated. Include your worksheets as an attachment to the response. Where available, provide sample documentation, including sample agreements, for each type of rebate.”⁴⁸

The Department’s case precedent follows the relevant regulations and identifies the conditions which must be met for the Department to accept a post-sale price adjustment. In the case of Stainless Steel Sheet and Strip in Coils from Mexico, the Department stated “{i}t is our general policy to allow rebates only when the terms of sale are predetermined in order to protect against manipulation of the dumping margins by a respondent once it learns that certain sales will be subject to review.”⁴⁹ As stated in Canned Pineapple, “where a price adjustment made after the fact lowers a respondent’s dumping margin, the Department will closely examine the circumstances surrounding the adjustment to determine whether it was a legitimate adjustment that was made in the ordinary course of business.”⁵⁰ In that case, the Department rejected the post-sale adjustments because the respondent did not provide sufficient documentation to support such adjustments, and the circumstances of the post-sale adjustments were inconsistent with commercial realities. In Hot-Rolled Steel from India, the Department accepted the rebates in question, stating, “Essar provided sufficient evidence on the record of its rebate program, Essar’s customers had prior knowledge of Essar’s rebate program, and the program was in existence before the sales were made.”⁵¹ Further, in the review of Welded Pipe and Tube From Korea,⁵² the Department indicated that during the underlying investigation, the respondent claimed two types of rebates: a regular rebate which was based on its customers’ purchases, and a special rebate to help distributors in the home market compete. The Department allowed the regular rebate but disallowed the additional special rebate because it reflected a change made after the initiation of

⁴⁷ See Antidumping Duty Questionnaire, dated December 23, 2009, at I-12.

⁴⁸ See Section B of the initial questionnaire (field REBATEH).

⁴⁹ See Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review, 69 FR 6259 (February 10, 2004), and accompanying Issues and Decision Memorandum at Comment 1.

⁵⁰ See Canned Pineapple, and accompanying Issues and Decision Memorandum at Comment 1; see also Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews, 61 FR 13815, 13823 (March 28, 1996) (noting, with respect to price adjustments by way of rebates, that the “purpose of requiring respondent to prove that the buyer was aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of sale is to protect against manipulation of the dumping margins by a respondent once it learns that certain sales will be subject to review”).

⁵¹ Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 31961 (June 5, 2008), and accompanying Issues and Decision Memorandum at Comment 27.

⁵² See Final Results of Antidumping Duty Administrative Review: Certain Circular Welded Carbon Steel Pipes and Tubes From Korea 52 FR 33460 (September 3, 1987), and accompanying Issues and Decision Memorandum at Comment 3.

the antidumping investigation, and the respondent did not demonstrate that it was normal in the trade. Subsequently, in the aforementioned review, the respondent made no claim for the additional rebate, and the Department only allowed the regular rebate.

The interested parties in this review provided comments and arguments which pertain to the relevant standard for the Department's treatment of price adjustments, the history of Koehler's monthly rebates, the consistency of the monthly rebates with commercial considerations, and the deficiencies in Koehler's reporting of its rebates during the investigation and in the instant review. These comments are addressed below.

Petitioner alleged that Koehler did not institute the monatsbonus until after the antidumping duty ("AD") petition was filed in September 2007. Petitioner also asserts that there is new evidence based on a price list that was provided as an attachment to Koehler's November 15, 2010, response which demonstrates that the monatsbonus was not conceived until sometime in 2008, when Koehler was preparing its questionnaire responses during the original antidumping investigation. Petitioner argues that this new evidence shows that Koehler retroactively applied the rebate to certain sales in order to eliminate dumping margins on the KT 48 F20 sales during the original investigation.

Although the price list referenced by petitioner underscores Koehler's reporting anomalies, we disagree with petitioner's assertion that a monthly bonus was not referenced until after September 2007. Koehler's Section A response in the original investigation identified a price list, dated March 20, 2007, for a home market customer that included a reference to "Monatsbonus: 2007."⁵³ Nonetheless, the fact that the term, "monatsbonus" was used by Koehler prior to the initiation of the investigation does not mean that this rebate is a legitimate price adjustment. This monatsbonus was not explained by Koehler or examined by the Department during the investigation. In addition, the payment of a monatsbonus to the respective customer during the investigation does not, in itself, establish that this particular rebate is a legitimate price adjustment.

In conducting its analysis of the legitimacy of this particular rebate, the Department has considered the information from the complete record of this review. We have examined further the underlying written documentation from 2002/03 and do not find that the terms described therein specifically support Koehler's monthly rebates.⁵⁴ Furthermore, due to the frequency and significance of the changes to the monthly rebates,⁵⁵ which are retroactively applied, we find that Koehler has not provided sufficient support for the Department to accept this price adjustment. In contrast to its reporting of a single rebate field in the investigation,⁵⁶ Koehler broke out its

⁵³ See Koehler's Rebuttal Brief at 12; see also PFIS at Exhibit A-12.

⁵⁴ This discussion involves business proprietary information; therefore, see the Department's memorandum titled "Calculation Memorandum for the Final Results – Koehler," dated April 13, 2011, on file in the CRU, room 7046 HCHB.

⁵⁵ *Id.*

⁵⁶ The Department notes that the original questionnaire issued to Koehler in the investigation requests the following information with respect to rebates (REBATEH):

Description: "Report the unit value of each rebate given to the customer. Create a separate field for reporting each rebate program. Rebates should be reported with the sales to which they apply. **Narrative:** Explain your policy and practice for granting rebates. Describe the terms and conditions of each rebate program and when the terms and conditions are established in the sales process. If rebates vary by customer category (field 6.0) or channel of

rebates into three separate fields in this review. The fact that Koehler unilaterally identified separate fields for this particular review stands in contrast to the information presented during the investigation and calls into question the consistency of Koehler's reporting of its rebate information.

Koehler also states that Department reviewed the monatsbonus during its verification of Koehler in the original investigation. The Department agrees that it collected certain rebate documentation which contained a notation of the German term, "monatsbonus," during the verification in the original investigation. However, the Department disagrees that it examined and verified this particular rebate program independent of the aggregate rebate calculations for the field (REBATEH). Koehler did not provide details regarding its various rebate programs within the context of the original investigation, as requested by the Department's questionnaire. In addition, the German term, "monatsbonus" was not explained in any detail or translated by Koehler during the investigation. In contrast to the instant review, the term "monatsbonus" was not identified by Koehler as a separate rebate program during the investigation that is paid on a different time interval than its other rebates. Furthermore, we did not address issues regarding rebates in the investigation because the specific distribution of Koehler's sales in the United States vis-à-vis the German home market was not as pronounced as in this review. In summary, the issue of monthly-specific rebates was not examined during the investigation. Therefore, the Department cannot rely on the verification findings from the investigation as the basis to determine whether the monatsbonus is a legitimate rebate that should be treated as a price adjustment in this review.

Koehler asserts that the Department has not added any "other regulatory refinements," regarding price adjustments, as referenced in the Preamble.⁵⁷ Therefore, Koehler states that the sole substantive regulatory requirement for a price adjustment (including a rebate) is that it be "reasonably attributable to the subject merchandise or the foreign like product." Koehler cites Hot-Rolled Steel from India and states that the Department has established a standard for treating a price adjustment as a rebate where 1) there is sufficient evidence on the record of its rebate program; 2) customers had prior knowledge of the rebate program; and 3) the program was in existence before the sales were made. In citing this standard, Koehler rebuts petitioner's reliance on Plate from Canada, stating that it is irrelevant because it was conducted under the old law and the old regulations.⁵⁸

The Department disagrees that Plate from Canada is irrelevant simply because it was conducted under the prior law and regulations. Instead, we find that Plate from Canada is a relevant precedent because it summarizes the intent behind our practice regarding rebates, stating "{t}he purpose of requiring respondents to prove that the buyer was aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of the sale is to protect against manipulation of the dumping margins by a respondent once it learns that certain sales will be subject to review." Id. at 13823. At the same time, the Department agrees with Koehler that the

distribution (field 7), provide an explanation of the rebates given to each. For rebates that have not yet been paid, describe how you computed the amount to be rebated. Include your worksheets as an attachment to the response. Where available, provide sample documentation, including sample agreements, for each type of rebate."

⁵⁷ See Preamble at 27344.

⁵⁸ See Koehler's Rebuttal Brief, at page 29, footnote 5.

aforementioned three criteria in Hot-Rolled Steel from India are relevant in determining whether to treat a price adjustment as a rebate. Also, the Department agrees that Koehler satisfied these criteria with respect to its quarterly (quartalsbonus) and annual rebate programs. However, based upon further examination of the record and consideration of the parties' comments, we find that Koehler has not sufficiently demonstrated that the monatsbonus meets the aforementioned criteria. In fact, the monatsbonus program at issue in this review is similar to the claimed post-sale price adjustments that the Department disallowed in Canned Pineapple.

First, Koehler has not provided sufficient evidence on the record of its monthly rebate program. It is evident that Koehler has some history of granting certain rebates over periods longer than a month, pursuant to the 2002/03 written documentation provided.⁵⁹ However, Koehler has not provided documentation specifically describing the monatsbonus and the terms and conditions of the monatsbonus (as opposed to longer-term rebates), as reported in this review. Koehler states that "while there were initially written agreements with customers when Koehler established its recent rebate programs (e.g., such as in 2002 or 2003), the rebate practices had become routine enough by the POR that the parties did not bother with formalized written rebate agreements. Rather, the rebate percentage (e.g., "Quartalbonus" per the documents provided in Exhibit B-4) is simply specified on the relevant customer-specific price lists."⁶⁰ Koehler also reports that its negotiations regarding rebates may take place in person or via telephone.⁶¹ Further, Koehler indicates that "Koehler personnel save substantive email communications with Koehler's customers."⁶² The Department examined such e-mail communications and identified a number of instances which demonstrate that the monatsbonus percentage was modified retroactively to apply to prior consumption, as specifically acknowledged by Koehler in its rebuttal brief at pages 35-36.⁶³

Second, Koehler has not demonstrated that its customers had prior knowledge of the rebate program. The Department issued three sales supplemental questionnaires to Koehler in this review and requested that Koehler provide additional information regarding its rebate programs.⁶⁴ In its response, Koehler stated, "Koehler is not in a position to determine how frequently the customer may not be aware of the precise amount of the rebate prior to a particular sale, because such a determination would require an enormous amount of work to determine, for each customer and over an extended time period, when a rebate percentage was determined and how many sales were made prior to vs. after that date. Nonetheless, Koehler believes that it is a relatively frequent occurrence that sales of subject merchandise are made in the home market

⁵⁹ See Koehler's Section A-C Supplemental Questionnaire Response, dated April 15, 2010, at Exhibit S-13.

⁶⁰ See Koehler's Section B Questionnaire Response, dated February 16, 2010, at B-22.

⁶¹ Id. at page 17.

⁶² See Koehler's Section A-C Supplemental Questionnaire Response, dated November 15, 2010, at page 7.

⁶³ See also Id. at Exhibit S-14.

⁶⁴ In the Department's November 3, 2010 supplemental questionnaire at question 3(e), the Department included the following question, "{o}n page 15 of Koehler's Section A-C questionnaire response, dated April 15, 2010, Koehler states '...Koehler notes that normally, there are no terms or conditions that must be met in order to qualify for the rebate: as noted above, the rebates are always agreed to prior to sale...' Also, on page 5 of Koehler's June 17, 2010, letter, Koehler provides correspondence with a customer and states that 'only the precise rebate percentage of the month was to be determined.' Please clarify these statements and explain how often customers do not know the precise rebate percentage until after the sale has occurred. Provide specific examples as they pertain to Koehler's customers."

prior to the establishment of a precise rebate percentage.”⁶⁵ The monthly rebate data reported on the record shows that there are significant adjustments to the rebate percentages which were retroactively applied by Koehler without sufficient documentation to support a finding that the customer was aware of such changes when the sales commenced.⁶⁶ Furthermore, we find that, in certain instances, neither an “approximate” nor a “precise” rebate percentage was known to Koehler’s customer prior to the time that it made the home market sales in question, as discussed below.

Koehler has not provided evidence to support its claim that its customers were aware of the terms and conditions required to qualify for the monatsbonus amount which was ultimately applied by Koehler. In its brief, Koehler speculates about its customer’s knowledge of the terms and conditions of a rebate stating, “[g]iven that negotiations take place orally, it is much more likely that the customer in fact was aware of the exact amount of the rebate for the relevant period prior to the actual correspondence.”⁶⁷ As the Department stated in Canned Pineapple, it is the respondent’s burden to justify its entitlement to a price adjustment, like the “monatsbonus,” that tends to lower the respondent’s dumping margin. Koehler bears the burden, therefore, to establish its entitlement to this adjustment by demonstrating that (1) its customers were aware of the terms and conditions of the monatsbonus at the time of sale, and (2) the monatsbonus was established in the ordinary course of business solely for “legitimate commercial purposes.” Koehler cannot alleviate its reporting burden simply by stating that the Department’s request requires a large amount of work or rely on mere speculation regarding a customer’s knowledge of the rebate in question. The Department’s practice is that “exporters or producers should not be allowed to eliminate dumping margins by providing price adjustments after the fact.”⁶⁸ Because Koehler is unable to demonstrate that the customer is aware of the final monthly rebate amount applied and is also unable to support the monatsbonus through any formal written agreement which outlines the terms and conditions which apply to the customers, the Department finds that Koehler has not sufficiently demonstrated that its customers had prior knowledge of the monatsbonus rebate program.⁶⁹

Third, Koehler has not provided sufficient evidence on the record to demonstrate that the monthly rebate program was in existence before the sales were made. As stated above, Koehler has acknowledged that its customer(s) may not be aware of the precise amount of the rebate prior to a particular sale. The amount of the refund to which a customer will be entitled represents a “term” of the rebate program, and the Department’s questionnaire states that it must be established at or before the time of sale. As stated in Plate from Canada, the Department’s practice has been to disallow rebates where the respondent cannot demonstrate that the customer was aware of the terms and conditions of the rebate at or before the time of sale. Because the amount of the rebate is a term of the rebate program and Koehler has not demonstrated that the customer was aware of the terms and conditions of the rebate at or before the time of sale, we find that Koehler’s monthly rebates do not constitute a legitimate rebate program that was in place before the corresponding sales were made.

⁶⁵ See Koehler’s Supplemental Questionnaire Response, dated November 15, 2010, at page 6.

⁶⁶ See Koehler’s Section A-C Supplemental Questionnaire Response, dated April 15, 2010, at Exhibit S-14.

⁶⁷ See Koehler’s Rebuttal Brief at page 34, footnote 7.

⁶⁸ See Canned Pineapple at Comment 1; see also Preamble at 27344.

⁶⁹ See Plate from Canada; Canned Pineapple; see also Antidumping Manual (January 22, 1998) at Chapter 8, page 9.

Petitioner asserts that the monatsbonus is offered exclusively for sales of the matching KT 48 F20 product and is not available for any non-matching product. Koehler rebuts that petitioner's allegation is false and argues that a certain customer received a monatsbonus for certain non-matching products. However, Koehler's listing of rebates for this particular customer indicates that the monthly rebates for such non-matching products relate to certain months prior to the instant POR.⁷⁰ Therefore, the Department finds that the application of the monthly rebates only to home market sales of the matching product supports petitioner's allegation that Koehler's monatsbonus is unique.

Petitioner argues that the monatsbonus differs from the quartalsbonus because the "Quartalsbonus, unlike the retroactive Monatsbonus, is not a 'post-sale' price adjustment because the customer knows that it will receive the {certain percentage} rebate at the time of sale."⁷¹ Koehler rebuts this allegation stating that the monatsbonus and the quartalsbonus can both change on a post-facto basis. Koehler provides certain business proprietary information to support such changes to the quartalsbonus. However, the Department's review of the data show that there are significant changes in monthly rebate percentages and marked differences between the monthly and quarterly rebates reported in the instant review. Furthermore, the written rebate documentation for 2002/03 provided by Koehler is not relevant to the monatsbonus; instead, it pertains to rebates that are based on a longer periods of time (e.g., quarterly and annual periods).

The Department has considered the information on the record and finds that, although Koehler referenced a relatively minor change that occurred with respect to the quartalsbonus over a quarterly period, the degree of such a change was relatively insignificant compared to those reported by Koehler for the monatsbonus over a monthly period. The price list documentation identified by Koehler supports such changes in the quartalsbonus program.⁷² Further, in contrast to the monatsbonus, the quartalsbonus percentage applied has been stable and there is no evidence that it is retroactively applied on a routine basis. Therefore, we find that a customer can reasonably rely on the fact that it will receive the specific quartalsbonus percentage rebate at the time that it makes its respective purchases. However, because the record does not indicate that Koehler's customers were aware of the monatsbonus rebate terms and conditions when the sale commenced, and because of the significant volatility associated with the percentage changes of the monatsbonus program, we find a clear distinction between the monatsbonus and the quartalsbonus program. Accordingly, we conclude that the monatsbonus is not a legitimate rebate that should be treated as a price adjustment for this review.

Comment 4: Whether the Department Should Reallocate Monthly Rebates (REBATE1H) on a Customer-Specific Basis

Petitioner argues that, even if the Department determines not to reject amounts reported in the REBATE1H field as post-sale price adjustments, it should, at the very least, reallocate those rebate amounts to sales of all thermal paper to a certain customer, rather than solely to sales of the KT 48 F20 product. Petitioner states that such a reallocation is appropriate because Koehler

⁷⁰ See Koehler's November 15, 2011, supplemental questionnaire response, at Exhibits 3 and 4 (BPI Version).

⁷¹ See petitioner's case brief, at page 30.

⁷² See Koehler's rebuttal brief at page 36.

has not demonstrated that the amount of the rebate is linked directly and exclusively to purchases of the KT 48 F20 product. Petitioner claims that, because Koehler determined the amount of the monatsbonus after the relevant sales already had taken place, a certain customer of Koehler did not necessarily make its purchasing decisions regarding KT 48 F20 with any settled expectations or reliance upon receiving a specific rebate on those purchases. Moreover, because of the post facto nature of the price adjustment, nothing constrained Koehler from adjusting the rebate percentage at the end of the month based upon other factors, such as the certain customer's purchases of all thermal products (rather than solely purchases of KT 48 F20), and then arbitrarily (for dumping purposes) allocating those rebates exclusively to sales of KT 48 F20.

Petitioner states that, if the purpose of Koehler's monatsbonus had been to promote and incentivize purchases of KT 48 F20, one would expect that the rebate percentage would increase as a certain customer's purchase volumes increased. Petitioner asserts that there is an inverse relationship between the monthly rebate percentage and purchase quantities of KT 48 F20. This shows that, at the time Koehler determined the amount of monatsbonus to confer upon a certain customer at the end of the month, after the sales already had been completed, the amount of KT 48 F20 purchases was not the only consideration. Rather, it appears that Koehler considered other factors, determined a total monatsbonus based upon sales of all thermal products, and then simply assigned the rebate (after the fact) as a percentage of purchases of KT 48 F20. Petitioner argues that Koehler was under no commitment, at the time of sale, to provide any specific monatsbonus rebate based upon a certain customer's purchases of KT 48 F20. For these reasons, petitioner asserts that the rebate is more appropriately allocated across all sales to a certain customer, rather than solely to sales of the KT 48 F20 product.

Koehler rebuts petitioner's argument, stating that Koehler has, in fact, demonstrated that the amount of the rebate is linked directly and exclusively to purchases of the KT 48 F20 product. Koehler argues that the price lists on the record of this review for a certain home market customer all clearly indicate that the monthly rebate applies to "KT 48 F20."⁷³ Further, Koehler asserts that it would be distortive for the Department to disallow the monthly rebates to a certain customer. Finally, Koehler asserts that the rebates were provided to Koehler's customers on a product-specific basis and, therefore, should be ascribed to those products by the Department.

Department's Position:

The Department has determined that Koehler's monthly rebates should be disallowed as a price adjustment for these final results. Therefore, it is unnecessary to address the issue of allocation of Koehler's monthly rebates.

IV. 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 results and the final weighted-average dumping margin in the Federal Register.

⁷³ See Koehler's Section A-C Supplemental Questionnaire Response, dated April 15, 2010, at Exhibit S-12.

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

(date)