



A-428-840
Sunset Review
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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Enforcement

SUBJECT: Final Results Issues and Decision Memorandum for the Full
Sunset Review of the Antidumping Duty (AD) Order on
Lightweight Thermal Paper from Germany

Summary

We have analyzed the comments of the interested parties in the full sunset review of the AD order on lightweight thermal paper (LWTP) from Germany and recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. The issues addressed in the final results are:

Issues:

1. Methodology for Determining the Likelihood of the Continuation/Recurrence of Dumping
2. Likelihood of Continuation/Recurrence of Dumping
3. Magnitude of the Margin Likely to Prevail

Scope of the Order

The scope of the order includes certain lightweight thermal paper, which is thermal paper with a basis weight of 70 grams per square meter (g/m^2) (with a tolerance of $\pm 4.0 \text{ g/m}^2$) or less; irrespective of dimensions;¹ with or without a base coat² on one or both sides; with thermal active coating(s)³ on one or both sides that is a mixture of the dye and the developer that react

¹ LWTP is typically produced in jumbo rolls that are slit to the specifications of the converting equipment and then converted into finished slit rolls. Both jumbo and converted rolls (as well as LWTP in any other form, presentation, or dimension) are covered by the scope of the order.

² A base coat, when applied, is typically made of clay and/or latex and like materials and is intended to cover the rough surface of the paper substrate and to provide insulating value.

³ A thermal active coating is typically made of sensitizer, dye, and co-reactant.



and form an image when heat is applied; with or without a top coat;⁴ and without an adhesive backing. Certain LWTP is typically (but not exclusively) used in point-of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts. The merchandise subject to this order may be classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 3703.10.60, 4811.59.20, 4811.90.8000, 4811.90.8030, 4811.90.8040, 4811.90.8050, 4811.90.9000, 4811.90.9030, 4811.90.9035, 4811.90.9050, 4811.90.9080, 4811.90.9090, 4820.10.20, and 4823.40.00.⁵ Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Background

On November 24, 2008, the Department published in the Federal Register the antidumping duty order on LWTP from Germany.⁶ Since the issuance of the AD Order, the Department completed three administrative reviews⁷ involving one respondent, Papierfabrik August Koehler AG (Koehler).⁸ The Department is currently conducting a fourth administrative review and published the preliminary results on December 26, 2013.⁹ The Department also initiated administrative reviews in each of the above-referenced review periods for the other known producers of the subject merchandise, Mitsubishi HiTec Paper Flensburg GmbH and Mitsubishi HiTec Paper Bielefeld GmbH (collectively, “Mitsubishi”),¹⁰ but each of these reviews was subsequently rescinded.¹¹

⁴ A top coat, when applied, is typically made of polyvinyl acetone, polyvinyl alcohol, and/or like materials and is intended to provide environmental protection, an improved surface for press printing, and/or wear protection for the thermal print head.

⁵ HTSUS subheading 4811.90.8000 was a classification used for LWTP until January 1, 2007. Effective that date, subheading 4811.90.8000 was replaced with 4811.90.8020 (for gift wrap, a non-subject product) and 4811.90.8040 (for “other” including LWTP). HTSUS subheading 4811.90.9000 was a classification for LWTP until July 1, 2005. Effective that date, subheading 4811.90.9000 was replaced with 4811.90.9010 (for tissue paper, a non-subject product) and 4811.90.9090 (for “other,” including LWTP).

⁶ See Antidumping Duty Orders: Lightweight Thermal Paper From Germany and the People’s Republic of China, 73 FR 70959 (November 24, 2008) (AD Order).

⁷ See Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Administrative Review, 76 FR 22078, 22079 (April 20, 2011) (AR1 Final); Lightweight Thermal Paper From Germany: Notice of Final Results of the 2009-2010 Antidumping Duty Administrative Review, 77 FR 21082 (April 9, 2012); Lightweight Thermal Paper From Germany: Notice of Amended Final Results of the 2009-2010 Antidumping Duty Administrative Review, 77 FR 28851, 28852 (May 16, 2012) (AR2 Amended Final), and Lightweight Thermal Paper From Germany: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 23220, 23221 (April 18, 2013) (AR3 Final).

⁸ In November 2012, the respondent changed its name to Papierfabrik August Koehler SE. On December 26, 2013, the Department preliminarily determined that Papierfabrik August Koehler SE is the successor-in-interest to Papierfabrik August Koehler AG. See Lightweight Thermal Paper from Germany: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 78335 (December 26, 2013) (AR4 Prelim), and accompanying Decision Memorandum. For purposes of this memorandum, we refer to this respondent entity as “Koehler.”

⁹ See AR4 Prelim, 78 FR 78335.

¹⁰ Mitsubishi HiTec Paper Europe GmbH has filed a Notice of Appearance and Administrative Protection Order in this sunset review.

¹¹ See Lightweight Thermal Paper from Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review, 75 FR 11135 (March 10, 2010); Lightweight Thermal Paper from Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review, 76 FR 20951 (April 14, 2011); and Lightweight Thermal Paper From

On February 10, 2014, the Department of Commerce (the Department) published in the Federal Register the preliminary results of the full sunset review of the AD order on LWTP from Germany.¹² We preliminarily found that dumping was likely to continue or recur at the weighted-average margin of 6.50 percent for Koehler, and for all other companies.¹³ We invited parties to comment on the preliminary results. We received case briefs from Appvion, Inc. (Appvion),¹⁴ the domestic interested party in this review (Appvion Brief), and Koehler on April 1, 2014 (Koehler Brief), and rebuttal comments from Appvion and Koehler on April 11, 2014 (Appvion Rebuttal and Koehler Rebuttal, respectively). On April 14, 2014, Appvion withdrew its March 12, 2014, request for a public hearing. As no other interested party requested a hearing, no hearing was held.

Discussion of the Issues

Comment 1: Methodology for Determining the Likelihood of the Continuation/Recurrence of Dumping

Koehler claims that the Department improperly and unlawfully based its likelihood of continued dumping determination on the methodology outlined in the Sunset Policy Bulletin,¹⁵ rather than the statute at section 752(c)(1) of the Tariff Act of 1930, as amended (the Act).¹⁶ According to Koehler, instead of considering both dumping margins and import volumes as the statute directs, the Department considered either dumping margins or import volumes, as set forth in the Sunset Policy Bulletin. This sunset methodology, Koehler continues, permits a “likelihood” finding even when the Department has analyzed only dumping margins or only import volumes. Thus, Koehler contends that the Department acted beyond its authority in making its findings based on consideration of only one of those factors.

In addition, Koehler argues that the methodology in the Sunset Policy Bulletin is flawed because it creates an arbitrary de minimis threshold beyond which any dumping margin will establish the likelihood that dumping will continue in the event of revocation of an AD Order. Koehler explains that the Sunset Policy Bulletin states that the Department will normally find likelihood where “dumping continued at any level above de minimis after the issuance of the order,” while the SAA allows that “declining (or no) dumping margins accompanied by steady or increasing imports” may be indicative that dumping is less likely to continue or recur if the order were revoked.¹⁷ Koehler claims that, in this manner, the Department applies its sunset methodology

Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review, 77 FR 22560 (April 16, 2012).

¹² See Lightweight Thermal Paper From Germany: Preliminary Results of the First Full Sunset Review of the Antidumping Duty Order, 79 FR 7644 (February 10, 2014) (Preliminary Results), and accompanying Issues and Decision Memorandum (Preliminary Decision Memorandum).

¹³ The 6.50 percent rate was the rate calculated for Koehler, the only respondent in Lightweight Thermal Paper from Germany: Notice of Final Determination of Sales at Less Than Fair Value, 73 FR 57326 (October 2, 2008) (LTFV Final).

¹⁴ Appvion was formerly known as Appleton Papers Inc., which was the petitioner in the underlying less-than-fair-value (LTFV) investigation of LWTP from Germany.

¹⁵ Policies Regarding the Conduct of Five-Year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin 98.3, 63 FR 18871, 18872 (April 16, 1998) (Sunset Policy Bulletin).

¹⁶ See Koehler Brief at pages 3-10.

¹⁷ Statement of Administrative Action, H.R. Doc. 103-316, vol. 1 (1994) (SAA), at page 889.

so that any finding of dumping above de minimis during an administrative review period results in an automatic “likelihood” finding in the sunset review, contrary to Congressional intent under the statute.

Furthermore, Koehler claims that the Sunset Policy Bulletin established a “rule” as defined under the Administrative Procedure Act (APA), and therefore the Department was required to follow notice and comment rulemaking procedures in adopting this rule, which it failed to do.¹⁸ According to Koehler, while the Department issued a Federal Register notice proposing policies regarding the conduct of sunset reviews, and solicited comments on the proposed policies,¹⁹ the Department did not publish a final rule, respond to comments, or explain the Department’s rationale for its actions. As a result, Koehler asserts that the Department’s reliance on the Sunset Policy Bulletin is unlawful, particularly with respect to its application in the Preliminary Results.

Appvion responds that the Department properly and reasonably applied the statute in making its likelihood determination in the Preliminary Results.²⁰ According to Appvion, while the statute sets forth the two factors that the Department “shall consider” in determining the likelihood of the recurrence of dumping,²¹ *i.e.*, dumping margins and import volumes, the statute does not specify when an affirmative or negative determination is justified based on the two factors. That is, Appvion explains, the statute instructs the Department to “consider” import volume trends, but the statute does not mandate that the import volume factor outweighs continued dumping margins. Similarly, Appvion continues, the statute does not prescribe that the cessation of dumping margins outweighs significant declines in import volumes. Appvion asserts that the statute does not preclude the Department from finding that, depending upon the circumstances, only one of the two factors, by itself, may be determinative for purposes of a likelihood determination.

Appvion asserts that nothing in the Sunset Policy Bulletin is inconsistent with the plain language of the statute, and in fact, the Sunset Policy Bulletin simply restates the authoritative interpretation of the statute as provided in the SAA and synthesizes this guidance into a coherent policy statement. For instance, although the Sunset Policy Bulletin adopts the use of “or” when discussing the bases for an affirmative likelihood determination, but uses “and” when discussing the bases for a negative likelihood determination, this interpretation is based on the statute and the SAA. Appvion argues that Commerce should not abandon its longstanding and established interpretation in favor of Koehler’s proposed interpretation, which would convert the statutory requirement that the Department “shall consider” dumping margins and import volumes into a substantive standard that would permit an affirmative likelihood determination if, and only if, both (1) dumping continued after issuance of the order, and (2) import volumes declined significantly or ceased after issuance of the order.

At the same time, Appvion emphasizes that it is the statute and the SAA that constitute the direct authority for the legal standard applied in this case, not the Sunset Policy Bulletin, as Koehler suggests. In this regard, Appvion argues that Koehler’s abstract challenge to the Sunset Policy

¹⁸ See generally 5 USC 551 et seq.

¹⁹ See Sunset Policy Bulletin, 63 FR at 18871.

²⁰ See Appvion Rebuttal at pages 2-11.

²¹ See section 752(c)(1) of the Act.

Bulletin de minimis threshold is off-point because the Department relies on the statute and the SAA, not the Sunset Policy Bulletin, as its direct legal authority, and is irrelevant because both Koehler and Mitsubishi had margins well-above the de minimis threshold.

Appvion also rejects Koehler's depiction of the Sunset Policy Bulletin as a "rule," which was unlawfully established pursuant to the APA. According to Appvion, the Sunset Policy Bulletin is non-binding guidance, not a legislative rule. Appvion points to language in the Sunset Policy Bulletin that it provides "guidance regarding the conduct of sunset reviews," under which the Department will evaluate information supporting revocation of antidumping orders on "a case-by-case basis," leaving the Department "free to exercise discretion" in its review of individual orders.²² Appvion continues that, in the Preliminary Results, contrary to Koehler's claim, the Department relied on the statute and the SAA as its principal legal authorities, while citing the Sunset Policy Bulletin only as a secondary resource to explain the Department's analysis under the Act. Because the Sunset Policy Bulletin clarifies some "issues not explicitly addressed" by the Act²³ and preserves the Department's discretion in individual cases, Appvion asserts that the Sunset Policy Bulletin is thus plainly a guidance document and not a binding regulation. Appvion concludes that the Sunset Policy Bulletin clearly does not violate the APA, and that the Department's interpretation of the statute in this case, and more generally in the Sunset Policy Bulletin, is reasonable and will withstand judicial scrutiny.

Department's Position:

We disagree with Koehler that the Department improperly relied on the Sunset Policy Bulletin in determining that revocation of the AD Order is likely to lead to continuation or recurrence of dumping. In the Preliminary Decision Memorandum, we outlined the legal framework for our analysis, emphasizing the statutory basis for our analysis under section 752(c) of the Act, as well as the authoritative guidance of the SAA.²⁴ The Sunset Policy Bulletin describes the Department's practice in applying the statute, and our reference to the Sunset Policy Bulletin did not rise to the level of legal authority portrayed by Koehler. As we discuss below in our response to Comment 2, the Department clearly considered both the dumping margins and import volumes as required under the statute and further supported by the SAA, which, as Appvion notes, is "an authoritative expression" of the Act.²⁵ Specifically, in the Preliminary Results, we considered both the weighted-average dumping margins determined in the investigation and subsequent reviews, and the volume of imports of the subject merchandise for the period before and after the issuance of the AD Order, pursuant to section 752(c)(1)(A) and (B) of the Act. Our analysis showed that dumping continued at levels above de minimis after the issuance of the AD Order, and imports of the subject merchandise declined during a portion of the sunset review period in conjunction with the continued existence of dumping margins.²⁶

²² See Sunset Policy Bulletin 63 FR at 18872 and 18874.

²³ See id. at 18872.

²⁴ See Preliminary Decision Memorandum at pages 4-5 and 8-9.

²⁵ See Uruguay Round Agreements Act, P.L. 103-465, Title I, Subtitle A, 102(d), 108 Stat. 4815, 4819 (1994) (codified at 19 U.S.C. § 3512(d)) ("The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

²⁶ See Preliminary Decision Memorandum at pages 8-9.

In any event, we agree with Appvion that the Sunset Policy Bulletin itself does not conflict with the statute, but is a restatement of the statute and the guidance found in the SAA. In particular, and as explained below, we agree with Appvion that the Sunset Policy Bulletin cannot be deemed to establish a de minimis threshold beyond which any dumping margin will be sufficient for the Department to make an affirmative likelihood determination. Koehler’s argument in this regard is also based on the false proposition that the Sunset Policy Bulletin was the principal legal authority in the Preliminary Results. As discussed above, the Department’s analysis precisely tracked section 752(c) of the Act, which instructs the Department to consider:

- (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and
- (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.²⁷

In the Preliminary Results, the Department stated that:

{s}ince the imposition of the AD Order in 2008, the Department found that dumping continued at levels above de minimis in each completed administrative review. This fact alone has been found sufficient to determine that revocation of an AD order would lead to continuation or recurrence of dumping.²⁸

To support that conclusion, we cited to the SAA at page 890 (not the Sunset Policy Bulletin), which reads:

The Administration believes that existence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. (Emphasis added.)

However, in this review the Department did not rely on the existence of above de minimis margins alone. Thus, Koehler’s argument in this respect is not relevant to the Department’s analysis in this case.²⁹

Finally, we disagree with Koehler that the Department has elevated the Sunset Policy Bulletin to

²⁷ See section 752(c)(1) of the Act.

²⁸ See Preliminary Decision Memorandum at page 8.

²⁹ We would note that, under the statute, even the absence of a margin does not require a negative likelihood determination: “Treatment of zero or de minimis margins. A dumping margin described in {section 752(c)(1)(A) of the Act} that is zero or de minimis shall not by itself require the administering authority to determine that revocation of an antidumping duty order or termination of a suspended investigation would not be likely to lead to continuation or recurrence of sales at less than fair value.” See section 752(c)(4)(A) of the Act. The SAA reiterates this statutory provision: “Under new section 752(c)(4), the existence of zero or de minimis dumping margins at any time while the order was in effect shall not in itself require Commerce to determine that there is no likelihood of continuation or recurrence of dumping. Exporters may have ceased dumping because of the existence of an order or suspension agreement. Therefore, the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order or agreement.” See SAA at 890.

the status of a “rule” and violated the APA in adopting it. As discussed above, the Department does not rely on the Sunset Policy Bulletin as its legal authority in making sunset review determinations. We agree with Appvion that the Department has lawfully followed the statute and the SAA in this sunset review, citing to the Sunset Policy Bulletin for a description of the Department’s practice. Thus, Koehler’s arguments regarding our reliance on the Sunset Policy Bulletin over the statute and APA-related issues are moot. In any event, we agree with Appvion that the Sunset Policy Bulletin does not have the force of a “rule” under the APA, as it is generally relied upon for guidance on analytical or methodological issues not specifically addressed in the statute.³⁰

Comment 2: Likelihood of Continuation/Recurrence of Dumping

Koehler reiterates the arguments presented in its substantive response³¹ that revocation of the AD Order is not likely to lead to continuation or recurrence of dumping.³² Specifically, Koehler contends that it has imported LWTP in the United States in volumes equal to, or in excess of, its pre-AD Order import volumes.³³ At the same time, Koehler contends, its margins have declined since the issuance of the AD Order, which included the 6.50 percent margin calculated in the LTFV investigation.³⁴ Koehler asserts that the 3.77 percent margin calculated in the AR1 Final and the 4.33 percent margin calculated in the AR2 Amended Final, as well as the zero margin calculated in the AR4 Prelim, demonstrate that its margins have declined since the AD Order and that it is able to export without resorting to dumping.

Koehler dismisses both the 75.36 percent adverse facts available (AFA) margin applied to it in the AR3 Final, and the subsequent decline in imports after the AR3 Final publication, as an anomaly not representative of Koehler’s actual rate or commercial reality and, thus, not predictive of its future behavior. Moreover, Koehler contends that the Department must disregard the AR3 Final AFA margin because the statute expressly mandates that the Department shall only consider “weighted average dumping margins”³⁵ in its likelihood determination, while the 75.36 percent AFA margin was based on the highest margin alleged in the LTFV investigation petition³⁶ and thus not a “weighted average dumping margin.” Furthermore, Koehler notes that on appeal the Court of International Trade (CIT) “set aside as unlawful” the Department’s AR1 Final margin, and Koehler similarly expects to win its appeal of the AR2 Amended Final margin and the AR3 Final AFA margin. Koehler asserts that a successful appeal in all cases will show that its margins should have been zero or, in the case of the AR3 Final, about 5 percent.³⁷ In addition, Koehler notes its zero margin in the AR4 Prelim and asserts that it similarly expects to receive a zero margin in the upcoming fifth administrative review; thus,

³⁰ See Sunset Policy Bulletin 63 FR at 18872 and 18874; see also 5 USC 553 (stating that the APA’s notice-and-comment procedures do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

³¹ See Koehler’s November 18, 2013, substantive response (Koehler Substantive Response).

³² See Koehler Brief at pages 10-16.

³³ See Koehler Substantive Response at pages 5-6, and Koehler Brief at page 12.

³⁴ See LTFV Final.

³⁵ See section 752(c)(1)(A) of the Act.

³⁶ See AR3 Final and accompanying Issues and Decision Memorandum at Comment 2.

³⁷ See Koehler Substantive Response at pages 5-6, and Koehler Brief at pages 11-12.

Koehler claims, it has met the statutory test that margins have declined since the imposition of the AD Order.

According to Koehler, its history of declining and zero dumping margins coupled with stable or increasing exports to the United States, meet the SAA scenario in which “declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.”³⁸ Koehler argues that the Department improperly focused on the “period of declining import volumes, accompanied by the continued existence of dumping margins, {as an indication} that dumping would be likely to continue or recur if the AD Order were revoked.”³⁹ Koehler stresses that the Department should disregard the AR3 Final Results for the reasons stated above, as well as the assumption that Mitsubishi, whose exports the Department has never reviewed and may account for a only a small fraction of U.S. imports,⁴⁰ engaged in dumping since the issuance of the AD Order. Instead, Koehler argues that the Department should consider Koehler’s data before and after the AR3 Final as more probative of Koehler’s commercial behavior. Under that analysis, Koehler concludes, revocation of the AD Order is not likely to result in continuation or recurrence of dumping and, therefore, the Department should revoke the AD Order.

Appvion argues that the record and the statute support the Department’s Preliminary Results finding that revocation of the AD Order would likely result in the continuation of dumping in the United States.⁴¹ Appvion notes that Koehler’s margins have increased throughout the life of the order, from 3.77 percent in the AR1 Final, to 4.33 percent in the AR2 Amended Final, to 75.36 percent in the AR3 Final. Although Koehler refers to its legal appeals in those administrative reviews and its zero margin in the AR4 Prelim in order to claim lower margins, Appvion points out that the administrative review final results must be “presumed valid and accurate, notwithstanding pending challenges, until there is a final and conclusive court decision holding otherwise,”⁴² and that the Department does not rely on preliminary rates in conducting its sunset review analysis.⁴³ Appvion also argues that, even if Koehler’s AR4 margin is found to be zero, the “continued dumping” prong of the Department’s sunset analysis is still satisfied given the positive margins in the first three reviews. Therefore, according to Appvion, the record demonstrates that Koehler continued to dump with the AD Order in place and an affirmative finding of likelihood is warranted under the SAA.⁴⁴

Appvion contends that Koehler is wrong that an AFA margin may not be considered for

³⁸ See SAA at 889-890.

³⁹ See Preliminary Decision Memorandum at page 9.

⁴⁰ See Koehler Substantive Response at page 9, and Koehler Brief at page 15, footnote 47.

⁴¹ See Appvion Brief at pages 11-19.

⁴² See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order, 72 FR 35220 (June 27, 2007) (CRCS from the Netherlands), and accompanying Issues and Decision Memorandum at Comment 1; cited at page 12 of the Appvion Rebuttal.

⁴³ See Grain-Oriented Electrical Steel from Italy: Final Results of Full Sunset Review of Countervailing Duty Order, 65 FR 65295 (November 1, 2000) (GOES from Italy), and accompanying Issues and Decision Memorandum at Comment 3; cited at pages 13-14 of the Appvion Rebuttal.

⁴⁴ See SAA at 889-890.

purposes of a likelihood determination. Appvion asserts that the plain language of the AFA provision in sections 776(a) and (b) of the Act permit the Department to rely on the facts available, including information from the LTFV petition, to reach any applicable determination dealing with antidumping and countervailing duties under the Act. Thus, Appvion continues, the fact that the AFA margin from the AR3 Final was not calculated as a weighted-average margin from Koehler's sales files does not mean that the 75.36 percent rate was not Koehler's "weighted average dumping margin" for consideration in a sunset review. Citing Carbon Steel Flat Products Prelim, Appvion points out that Department's longstanding practice in sunset reviews is to treat margins based on AFA as examples of "continued dumping," which weighs in favor of an affirmative finding of likelihood.⁴⁵

With respect to Koehler's position that the Department should "place little weight" on Mitsubishi's imports of LWTP for purposes of the sunset review determination, Appvion responds that Koehler glosses over the fact that the Department makes its likelihood determination on an order-wide basis.⁴⁶ Although the Department has not reviewed Mitsubishi's entries of LWTP, Appvion notes that, nevertheless, Mitsubishi made entries since the imposition of the AD Order and the Department assessed duties on Mitsubishi's entries. Therefore, Appvion asserts that the Department must consider Mitsubishi's imports in making a likelihood determination.

Finally, Appvion takes issue with Koehler's contention that Koehler's import volume decline after the imposition of the AFA-based 75.36 percent cash deposit rate should be disregarded as anomalous commercial behavior. Appvion refers to the SAA, which states that the cessation of imports "is highly probative of the likelihood of continuation or recurrence of dumping," and "it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to reenter the U.S. market, they would have to resume dumping."⁴⁷ Appvion also notes the Department's statement in the Preliminary Decision Memorandum that the Department considers the entirety of the sunset review period, including the period in which Koehler's 75.36 percent margin applied, in making its likelihood determination.⁴⁸ Accordingly, Appvion concludes that there is no basis for the Department to exclude this segment of Koehler's import history. Indeed, Appvion argues that Koehler's behavior over the course of the order has demonstrated that it will take any necessary measures, including dumping and engaging in fraud,⁴⁹ to maintain its U.S. market share.

Department's Position:

The Department affirms both its reasoning and its finding in the Preliminary Results that

⁴⁵ See Corrosion-Resistant Carbon Steel Flat Products From Germany and the Republic of Korea: Preliminary Results of Full Sunset Reviews, 77 FR 44213 (July 27, 2012) (Carbon Steel Flat Products Prelim), and accompanying Issues and Decision Memorandum at Comment 1 ("We agree with the domestic interested parties that a rate based entirely on AFA may serve as a basis for finding likelihood..."); unchanged in Corrosion-Resistant Carbon Steel Flat Products From Germany and the Republic of Korea: Final Results of Full Sunset Reviews, 77 FR 72827 (December 6, 2012).

⁴⁶ See Preliminary Decision Memorandum at page 9.

⁴⁷ See SAA at 890.

⁴⁸ See Preliminary Decision Memorandum at page 9.

⁴⁹ See AR3 Final.

revocation of the AD Order would likely result in the continuation or recurrence of dumping in the United States. In the Preliminary Results, we considered both the weighted-average dumping margins determined in the investigation and subsequent reviews, and the volume of imports of the subject merchandise for the period before and after the issuance of the AD Order, pursuant to section 752(c)(1)(A) and (B) of the Act. Our analysis showed that dumping continued at levels above de minimis after the issuance of the AD Order, and imports of the subject merchandise declined during a portion of the sunset review period in conjunction with the continued existence of dumping margins.⁵⁰ This analysis is unchanged in the final results.

As an initial matter, although the statute directs the Department to “consider” dumping margins and import volumes, the statute does not mandate that one factor outweigh the other.⁵¹ Thus, the Department properly relies on the SAA for guidance in reaching its determination as to whether revocation of the order would be likely to lead to a continuation or recurrence of dumping. In particular, the SAA provides that existence of dumping margins after the order “is highly probative of the likelihood of continuation or recurrence of dumping,” and “declining import volumes accompanied by the continued existence of dumping margins after the issuance of the order may provide a strong indication that, absent an order, dumping would be likely to continue.”⁵² The SAA also provides that declining (or no) dumping margins accompanied by steady or increasing imports may indicate that dumping is less likely to continue or recur if the order were revoked.⁵³ In the instant case, although we recognize that there were declining margins in the first two administrative reviews and increasing imports, there was also an increase in the margin for, and a substantial decrease in, the level of imports following the third review. Therefore, consistent with the statute and SAA, we continue to find that this period of declining import volumes, accompanied by the continued existence of dumping margins after imposition of the order, indicates that dumping would be likely to continue or recur if the AD Order were revoked.

In addition, we stress that the determination of likelihood is made on an order-wide basis, not a company-specific basis as Koehler suggests. The SAA specifically states that both the Department and the ITC “will make their sunset determinations on an order-wide, rather than a company-specific, basis.”⁵⁴ There is no statutory, regulatory, or precedential basis for the Department to exclude Mitsubishi’s imports from our sunset review analysis and consider only Koehler’s imports. In any event, the record shows that Mitsubishi has made imports since the imposition of the AD Order.⁵⁵ These imports were subject to the 6.50 percent “all others” rate

⁵⁰ See Preliminary Decision Memorandum at pages 8-9.

⁵¹ See NMB Sing. Ltd v. United States, 557 F.3d 1316, 1320 (Fed. Cir. 2009) (NMB) (“In deciding whether lifting an anti-dumping order would be likely to lead to continued or resumed dumping, Commerce is required by statute to consider previous estimates of dumping margins and the volume of imports pre- and post-order. 19 U.S.C. § 1675a(c)(1). The statute does not explain how this comparison is to indicate to Commerce whether an anti-dumping order should be lifted, but ... {the SAA} is, by statute, an ‘authoritative expression’ of the interpretation of that act....”)

⁵² SAA at 889-90.

⁵³ Id.

⁵⁴ See SAA at 879.

⁵⁵ See Appvion’s November, 18, 2013, substantive response (Appvion Substantive Response) at pages 6-8, and Koehler Substantive Response at page 9. While neither submission provided specific import volume data for Mitsubishi since the imposition of the AD Order, both submissions indicate that Koehler did not account for all imports of the subject merchandise and that Mitsubishi continued to import merchandise during this period.

established in the LTFV Final.⁵⁶ Therefore, Mitsubishi continued to dump at an above de minimis rate since the imposition of the AD Order. As we noted above in our response to Comment 1, the SAA states that the existence of dumping margins after the imposition of the order is highly probative of the likelihood of continuation or recurrence of dumping.⁵⁷ Thus, the analysis of all imports (including those of Mitsubishi and Koehler) on an order-wide basis supports an affirmative likelihood finding in this case.

With respect to Koehler, in each of the completed administrative reviews conducted since the imposition of the AD Order, the Department has found dumping margins above de minimis, i.e., 3.77 percent in the AR1 Final, 4.33 percent in the AR2 Final, and 75.36 percent in the AR3 Final. Koehler attempts to revise this factual history by imputing the results of its desired outcome in pending litigation involving these administrative reviews, and by incorporating the results of the AR4 Prelim. As stated in our Preliminary Decision Memorandum, the Department does not consider speculation about the results of ongoing litigation in its sunset review determination.⁵⁸ As Appvion correctly noted, Koehler provides no legal authority or procedural example to the contrary. In addition, Appvion also correctly cited the Department's practice, as articulated in GOES from Italy, not to rely on preliminary rates for purposes of sunset review analysis.⁵⁹ Again, Koehler's submissions lack legal or procedural citation to support such analysis.

Koehler also attempts to eliminate its AR3 Final 75.36 percent margin from our likelihood analysis because this rate, which was determined based on AFA, is derived from the petition underlying the LTFV investigation, and therefore according to Koehler does not constitute a "weighted average dumping margin{ } determined in the investigation and subsequent reviews," as specified at section 752(c)(1)(A) of the Act. Koehler correctly quotes that provision of the Act. However, in stating that the Department may use an adverse inference "in reaching the applicable determination", section 776(b) of the Act contemplates that margins based on AFA may be a proxy for weighted-average dumping margins. Furthermore, as Appvion notes, the Department has relied on rates based entirely on AFA in making likelihood determinations in sunset reviews.⁶⁰ The Department articulated this statutory interpretation in the Final Modification for Reviews, stating that, with respect to sunset review determinations, "{t}he

⁵⁶ "When the Department has not conducted any administrative review with respect to imports of the subject merchandise from a producer/exporter, the Department considers the above de minimis deposit rates determined in the investigation to remain in effect for U.S. imports from that producer/exporter." See Preliminary Decision Memorandum at page 9, which also cited as a precedential example Certain Hot-Rolled Carbon Steel Flat Products from Argentina, the People's Republic of China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine; Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders, 71 FR 70506 (December 5, 2006) (Hot-Rolled Steel), and accompanying Issues and Decision Memorandum at Comments 1 and 2.

⁵⁷ See SAA at 890.

⁵⁸ See Preliminary Decision Memorandum at page 8; see also CRCS from the Netherlands at Comment 1 ("Courts have found that the Department's determinations are presumed valid and accurate, notwithstanding any pending challenges, until there is a final and conclusive court decision holding otherwise.").

⁵⁹ See GOES from Italy at Comment 3.

⁶⁰ See, e.g., Carbon Steel Flat Products Prelim, and Carbon and Certain Alloy Steel Wire Rod From Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders, 78 FR 63450 (October 24, 2013), and accompanying Issues and Decision Memorandum at Comment 1.

Department may also rely on past dumping margins that were not affected by the WTO-inconsistent methodology, such as ...dumping margins determined based on the use of adverse facts available...”⁶¹ Therefore, while section 752(c)(1) states that the Department “shall consider” the weighted-average margins, it does not limit the Department’s consideration only to those “weighted average dumping margins” that were actually calculated in the investigation or subsequent review. Additionally, as discussed below in Comment 3, the Sunset Policy Bulletin, which again, provides a description of the Department’s practice, contemplates the use of an AFA margin as the margin likely to prevail. Thus, we find no merit in Koehler’s construction of the statute as prohibiting the use of the AR3 AFA rate in this sunset determination.

Koehler further argues that the Department should depart from its statutorily-prescribed likelihood analysis, under which we consider previous dumping margins and the volume of imports pre- and post-order,⁶² and disregard both the AR3 AFA rate and the decline in imports following the imposition of this rate as an “anomaly” that does not represent Koehler’s “actual rate” of dumping nor its “commercial reality.” Under Koehler’s analytical scheme, the effects of the AFA rate are irrelevant because they are “not predictive of future behavior” with respect to the continuation or recurrence of dumping in the absence of the order.⁶³ As an initial matter, Koehler points to no authority that allows the Department to exclude certain periods of time from its sunset review. In addition, neither the statute nor the SAA directs the Department to determine a “commercial reality” relevant to a likelihood determination, nor do these authorities direct the Department to determine whether any margin or change in import volume was generated by an alleged “anomaly” and must, therefore, be disregarded. Section 752(c)(2) does permit that, “[i]f good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.” Koehler claimed in the Koehler Substantive Response that “good cause” existed to consider certain other factors,⁶⁴ but the Department found that “the additional information supplied by Koehler {in the Koehler Substantive Response} does not give the Department “good cause” to consider further information in its analysis, pursuant to section 752(c)(2) of the Act.”⁶⁵ Koehler did not pursue this matter further in the Koehler Brief and we continue to find no basis to consider “other factors” in our likelihood determination.

Comment 3: Magnitude of the Margin Likely to Prevail

In the Preliminary Decision Memo, the Department stated its intent to report to the International Trade Commission (ITC) the final determination rates from the LTFV Final, 6.50 percent for Koehler and All Others, because these rates best reflect the behavior of exporters without the discipline of an order in place. Appvion reiterates its argument presented in the Appvion Substantive Response⁶⁶ that, for Koehler, the Department instead should report to the ITC the AR3 Final margin of 75.36 percent. While Appvion acknowledges that the normal practice is to

⁶¹ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101, 8103 (February 14, 2012) (Final Modification for Reviews).

⁶² See section 751(c) of the Act; NMB, 557 F.3d at 1320.

⁶³ See Koehler Brief at pages 14-15.

⁶⁴ See Koehler Substantive Response at page 10.

⁶⁵ See Preliminary Decision Memorandum at page 12.

⁶⁶ See Appvion’s November 18, 2013, substantive response (Appvion Substantive Response).

select the margin from the LTFV investigation to report to the ITC, Appvion points to the exception to this practice outlined in the Sunset Policy Bulletin that the Department may “provide to the {ITC} a more recently calculated margin for a particular company where, for that particular company, dumping margins increased after the issuance of the order, even if the increase was as a result of the application of best information available or facts available.”⁶⁷

Appvion argues that this exception should be applied to Koehler because Koehler’s imports of LWTP increased during AR3 and, at the same time, Koehler increased dumping (based on the AR3 Final rate of 75.36 percent) in order to maintain or increase market share. According to Appvion, the analysis should be based on the exporter’s behavior during the period in which it increased dumping, not on the exporter’s subsequent behavior after the higher cash deposit rate is issued. In support of its argument, Appvion cites to SSSSC 2004, where the Department, after determining that the respondent continued dumping at increasing rates with the discipline of the order in place, concluded that “{w}e find that increasing import volumes coupled with increasing dumping margins provide sufficient cause for the Department to report to the ITC a rate other than that calculated in the amended final determination. We determine that is appropriate to report to the ITC a more recent rate for {the respondent} because the more recent rate better reflects the behavior of {the respondent}.”⁶⁸ Appvion asserts that this situation applies to Koehler and, therefore, the Department should conclude that the magnitude of the margin likely to prevail for Koehler were the AD Order revoked would be Koehler’s 75.36 percent rate from the AR3 Final.

Koehler contends that the Department properly rejected the petitioner’s argument in the Preliminary Results and should continue to do so in the final results. According to Koehler, the plain language of section 752(c)(3) excludes the use of a rate based on AFA because the rate to be reported to the ITC must be a “margin of dumping that is likely to prevail if the order is revoked.” Koehler also cites to the SAA, which states that the Department “normally will select the rate from the investigation, because that is the only calculated rate that reflects the behavior of exporters without the discipline of an order or suspension agreement in place.”⁶⁹ In contrast, Koehler asserts that the 75.36 rate advocated by Appvion as the margin likely to prevail is an AFA rate which is not tied to its sales behavior. If the Department were to provide the ITC with any “more recently calculated margin,” as contemplated in the Sunset Policy Bulletin, Koehler argues that the rate should be the zero rate published in the AR4 Prelim, which Koehler believes is a more current predictor of its behavior should the AD Order be revoked.

Department’s Position

We disagree with Appvion. As we explained in the Preliminary Decision Memorandum, normally, the Department will provide to the ITC the company-specific, weighted-average AD margin from the investigation because it is the only calculated rate that reflects the behavior of

⁶⁷ See Sunset Policy Bulletin, 63 FR at 18873.

⁶⁸ See Stainless Steel Sheet and Strip in Coils from The Republic of Korea, Taiwan and the United Kingdom; Final Results of the Expedited Five Year (“Sunset”) Reviews of Antidumping Duty Orders, 69 FR 67892, (November 22, 2004) (SSSSC 2004), and accompanying Issues and Decision Memorandum at Issue 2; cited in Appvion Brief at page 4, footnote 10.

⁶⁹ See SAA at 890.

exporters without the discipline of an order or suspension agreement in place.⁷⁰ However, the Department may provide to the ITC a more recently calculated margin for a particular company where, for that particular company, dumping margins declined or dumping was eliminated after the issuance of the order and import volumes remained steady or increased.⁷¹ Additionally, if a company chooses to increase dumping in order to increase or maintain market share, the Department may provide the ITC with a more recently calculated margin for that company.⁷² Although we note Appvion's argument that, during the AR3 review period, Koehler's dumping margin increased along with its claimed market share, we look at the entirety of the sunset review period. Here, Koehler's margins calculated in the three completed administrative reviews do not show a consistent pattern of declining margins accompanied by steady or increasing import volumes, nor has Koehler increased or maintained its market share after it received a higher dumping margin in the AR3 Final. Thus, we continue to find that, in accordance with our practice, it is appropriate to report to the ITC the rate calculated in the investigation, as this is the best representation of Koehler's behavior without the discipline of an order.

Furthermore, we find that Appvion's reliance on our determination in SSSSC 2004 to be misplaced. In that case, the Department reported a more recently calculated rate for a Korean company which was not a respondent in the LTFV investigation. The Department found that this company continued dumping at increasing rates with the discipline of the order in place. It determined that it was more appropriate to report a rate of 5.44 percent calculated for that company, rather than the "All Others" rate of 2.49 percent calculated in the LTFV investigation.⁷³ In contrast, Koehler was a respondent in the underlying LTFV investigation of the instant AD Order and the 6.50 percent margin was calculated based on Koehler's data and reflected its behavior prior to the issuance of the AD Order.

Moreover, we find no merit with respect to Koehler's contention that the Department should report the rate calculated for Koehler in the AR4 Prelim. As noted above in our response to Comment 2, the Department does not consider preliminary rates in sunset review analyses. More importantly, we have no evidence on the record to indicate that this rate reflects Koehler's behavior without the discipline of the AD Order in place.

Accordingly, we affirm the Preliminary Results that the weighted-average AD margin of 6.50 percent established in the LTFV Final represents the magnitude of the margin of dumping likely to prevail for Koehler and All Others if the AD Order were revoked. This rate was not affected by the denial of offsets in accordance with the Final Modification for Reviews because the final determination of the investigation was made after the Department ceased zeroing in its investigations. Therefore, pursuant to section 752(c)(3) of the Act, we will provide the ITC with the final determination rates from the LTFV Final because these rates best reflect the behavior of exporters without the discipline of an order in place.

⁷⁰ See Preliminary Decision Memorandum at page 10 (citing Eveready Battery Co., Inc. v. United States, 77 F. Supp. 2d 1327, 1333 (CIT 1999)); and SAA at 890.

⁷¹ See SAA at 890-891; Sunset Policy Bulletin, 63 FR at 18873.

⁷² See Preliminary Decision Memorandum at page 10 (citing SAA at 890-891); and Sunset Policy Bulletin, 63 FR at 18873.

⁷³ See SSSSC 2004 at Issue 2.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review in the Federal Register.



Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

28 MAY 2014

Date