

September 25, 2008

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping
Investigation of Lightweight Thermal Paper from Germany

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the antidumping investigation of lightweight thermal paper (LWTP) from Germany. The period of investigation (POI) covers July 1, 2006, through June 30, 2007. As a result of our analysis, we have made changes to the margin calculations, including a correction of an inadvertent programming error. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comments and rebuttal comments by parties:

I. GENERAL ISSUES

Comment 1: Ministerial Error Correction

II. TARGETED DUMPING ISSUES

Comment 2: Whether the Department's Targeted Dumping Test is Flawed and Should be Replaced with the "preponderance at two percent test" (P/2 Test)

Comment 3: Whether the Department Should Apply any Margins Calculated for Koehler Pursuant to its Targeted Dumping Test to Mitsubishi HiTec Paper and the Non-Selected Respondents

Comment 4: Whether Margins Should be Calculated Without Applying Offsets for Non-Dumped Sales

Discussion of the Issues

Comment 1: Ministerial Error Correction

The respondent, Koehler,¹ asserts that in the Preliminary Determination,² the Department of Commerce (the Department) referenced an incorrect variable name for Koehler's reported "Other U.S. Transportation Expense" (Euro/kg), which is used in the Department's macro variable definition to identify the variables that require conversion into U.S. dollars in the margin program. Specifically, the respondent claims that the Department incorrectly used a macro variable named "USOTHRU," rather than the correct spelling of "USOTHTRU," as referenced in Koehler's U.S. sales database. See page C-32 of Koehler's January 30, 2008 Section C questionnaire response. The respondent asserts that, because "USOTHRU" does not exist in the data, the Department's programs set the corresponding U.S. dollar denominated variable "USOTHTRN" to a value of zero, resulting in incorrect values in the calculated total international movement expenses used for U.S. net price calculations. Therefore, the respondent asserts that the Department should replace the incorrect field name "USOTHRU" with the correct field name "USOTHTRU," as referenced in line 1997 of the Department's margin program SAS log, reported in the Preliminary Determination.

The petitioner³ did not respond to this comment.

Department's Position:

The Department agrees with respondent. Therefore, we will correct the spelling of the macro variable to "USOTHTRU" for the final determination.

Comment 2: Whether the Department's Targeted Dumping Test is Flawed and Should be Replaced with the "P/2 Test"

The petitioner references the Department's new two-stage test which was applied in Nails PRC to identify targeted dumping.⁴ The petitioner describes the aforementioned two-stage test and refers to these stages as a "standard deviation test" and a "price gap test."

¹ Papierfabrik August Koehler AG and Koehler America, Inc. (collectively, Koehler).

² See Lightweight Thermal Paper from Germany: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 27498 (May 13, 2008) (Preliminary Determination).

³ The petitioner in this investigation is Appleton Papers, Inc.

⁴ See Preliminary Determination; see also Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) (Nails PRC), and accompanying Issues and Decision Memorandum (Nails PRC IDM); see also Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 FR 26371, 26372 (May 9, 2008).

With respect to the two-stage targeted dumping test applied in Nails PRC and the instant investigation, the petitioner alleges that the aforementioned thresholds used in the standard deviation test and price gap test are arbitrary and asserts that the Department has provided no explanation why these thresholds were selected. Furthermore, the petitioner claims that the Department's test also is invalid because it fails to identify obvious cases of targeted dumping. The petitioner states that the Department's test for targeted dumping does not identify whether prices to the targeted customer are lower than prices to non-targeted customers, claiming that the first stage of the Department's test performs an incorrect comparison. Specifically, the petitioner argues that instead of comparing the average price paid by the targeted customer to the average price paid by non-targeted customers, the Department's test compares the average price paid by the targeted customer to the average price paid by all customers, both targeted and non-targeted. The petitioner provided a hypothetical example in support of this argument and to identify what it considers an error in the Department's standard deviation test.⁵ The petitioner states that the Department's calculation results in an average price to non-targeted customers that is too low because this average includes the low prices paid by the targeted customer.

Furthermore, the petitioner asserts that the second stage "price gap" test is unnecessary. The petitioner maintains that if a test is correctly specified and finds that the targeted price differs significantly from the non-targeted prices, then that result establishes a pattern of prices that differs significantly. Therefore, the petitioner argues that the price gap comparison applied in the second stage of the Department's test provides no additional information about the occurrence of targeting, and is therefore arbitrary. In support of this argument, the petitioner provides a hypothetical example.⁶

The petitioner also argues that the Nails PRC test, unlike the P/2 test,⁷ frustrates the statutory purpose of ensuring that dumping margins are not masked through offsets. According to the petitioner, the targeted dumping provision of the statute was designed to limit the problem of masking that occurs under the average-to-average methodology whereby higher priced sales of a product would, through averaging, conceal dumping margins attributable to lower priced sales.⁸ The petitioner states that under the statute, the targeted dumping methodology is applied when there is a pattern of significant price differences that cannot be taken into account under the

⁵ See the petitioner's case brief at 3-4 for a detailed explanation of this example.

⁶ See the petitioner's case brief at 4-5 for a detailed explanation of this example.

⁷ The petitioner states that in Coated Free Sheet (CFS) from Korea, the Department found the existence of targeted dumping based upon an allegation which utilized what it refers to as the "P/2 Test" (preponderance at two percent test) to identify targeted dumping. The petitioner states that, using this test, targeted dumping will be found to exist where the weighted-average net price to an alleged targeted group is at least two percent lower than the weighted-average net price to the non-targeted group in CONNUM/MONTH combinations representing a preponderance of the targeted quantity that can be compared. See the Department's Post-Preliminary Analysis on Targeting in CFS from Korea, dated September 10, 2007. See also Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea, 72 FR 60630 (October 25, 2007), and accompanying Issues and Decision Memorandum (CFS from Korea).

⁸ See section 777A(d)(1)(B) of the Tariff Act of 1930, as amended (the Act).

average-to-average method.⁹ Further, the petitioner asserts that when the Uruguay Round Agreements Act was enacted, the disallowance of offsets for non-dumped sales was the established practice and that the average-to-average calculation method did not permit offsets, with the exception of limited instances.

The petitioner argues that, with the elimination of the disallowance of offsets for non-dumped sales in investigations,¹⁰ high-priced sales will offset dumped sales within a product control number (CONNUM)¹¹ and margins for entire CONNUMs will be permitted to offset one another, thereby masking dumping. The petitioner argues that the targeted dumping methodology was designed to address this masked dumping, but that the masking has been exacerbated greatly and the targeted dumping methodology has not accomplished its statutory intent. Further, the petitioner maintains that in order to achieve this statutory purpose, the Department must broadly construe what constitutes a “pattern of significant price differences” that can be addressed under the targeted dumping provision. The petitioner asserts that the Nails PRC test is inconsistent with the statute¹² because it fails to apply the average-to-transaction methodology even when dumping margins “clearly” are masked by offsets. Moreover, the petitioner claims that the Nails PRC test adopts a very narrow definition of the phrase “patterns of significant price differences” that would exclude most situations otherwise satisfying any common sense meaning of that phrase.

The petitioner cites to the targeted dumping test applied in CFS from Korea,¹³ wherein the Department found the existence of targeted dumping based upon an allegation utilizing what has been referred to as the P/2 Test to identify targeted dumping. The petitioner states that, under the test applied in CFS from Korea, targeted dumping will be found to exist where the weighted-average net price to an alleged targeted group is at least two percent lower than the weighted-average net price to the non-targeted group in CONNUM/MONTH combinations representing a preponderance of the targeted quantity that can be compared. The petitioner asserts that this methodology uses standard and appropriate statistical techniques that are not arbitrary because they are consistent with approaches applied in other contexts of the antidumping law.

Mitsubishi HiTec Paper Flensburg GmbH and Mitsubishi HiTec Paper Bielefeld GmbH (collectively, Mitsubishi HiTec Paper) and Mitsubishi International Corporation (MIC)¹⁴

⁹ Id.

¹⁰ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Final Modification, 71 FR 77722-77725 (December 27, 2006) (Final Modification) (the Department announced that it will begin permitting credits from non-dumped sales to offset margins for dumped sales in the average-to-average methodology).

¹¹ The term “CONNUMs” refer to the model matching hierarchy criteria used in the Department’s margin program.

¹² See section 777A(d)(1)(B)(i) of the Act.

¹³ See CFS from Korea.

¹⁴ Mitsubishi HiTec Paper and MIC were also identified by the petitioner as potential respondents in the petition submitted in this investigation. However, the Department selected Koehler as the only mandatory respondent due to

submitted comments in rebuttal. In addition, Koehler submitted comments in rebuttal. Mitsubishi HiTec Paper and MIC and Koehler state that the Department's preliminary determination to reject the P/2 test and, instead, apply the Nails PRC test was correct and assert that this finding should be affirmed by the Department in its final determination. Citing the recent determination in Steel Nails from the United Arab Emirates (UAE),¹⁵ Koehler states that the Department has already rejected the use of the "P/2" test as statistically invalid and should continue to reject its use in the instant investigation.

Citing Koehler's April 16, 2008, letter to the Department, Koehler rebuts by outlining the reasons why the petitioner's targeted dumping allegation was an inadequate basis on which to investigate targeted dumping. Specifically, Koehler argues that the petitioner failed to: 1) explain why this is an exceptional case, as required by the statute, Borden,¹⁶ and the Statement of Administrative Action (SAA); 2) explain any statistical tests that should be applied except its two percent variation from the average; 3) address market-specific conditions; 4) demonstrate that there was a pattern of price differences; 5) provide data or analysis to demonstrate that two percent is significant for any of the three allegations concerning region, purchaser, or time period; and 6) explain why differences could not be taken into account using the average-to-average analysis. Based on these deficiencies, Koehler asserts that the Department should not have conducted a targeted dumping analysis of Koehler.

Koehler rebuts the petitioner's claim that the Department's standard deviation test is applied in error by stating that the Department clearly intended to conduct the test in the manner reported. Specifically, Koehler references Comment 3 of Nails PRC IDM, in which the Department states "{w}e consider the price threshold of one standard deviation below the average market price as a reasonable indicator of a price difference...because...it is a measure of 'low' relative to the spread or dispersion of prices in the market in question..." Koehler argues that the example presented on pages 3-4 of the petitioner's case brief pre-judges sales as "targeted" because there is no way to discern what price variations may exist within the market for this hypothetical example. Koehler states that the petitioner's characterization of the Department's methodology as an error is wrong because the Department clearly stated that the methodology was intentional and relied on the standard deviation statistical tool.

Koehler also rebuts the petitioner's claim that the price gap test is unnecessary. Citing Comment 6 of Nails PRC IDM, Koehler states that the Department must be able to determine whether the price charged to the alleged target differs significantly within the meaning of section 777A(d)(B)(i) of the Act and 19 CFR 351.414(f)(1)(i). Koehler states that the standard deviation test will always identify about 32 percent of a data population that is outside one standard deviation from the average. However, this does not mean that those transactions are significantly

the Department's resource constraints. See "Respondent Selection Memorandum," dated December 4, 2007, for further details. Therefore, Mitsubishi HiTec Paper and MIC are not mandatory respondents in this investigation.

¹⁵ See Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008), and accompanying Issues and Decision Memorandum (Nails UAE IDM) at Comment 8.

¹⁶ Borden, Inc. v. United States, 4 F. Supp. 2d 1221 (CIT 1998).

outside {one standard deviation}. Koehler argues that the Department developed the “price gap” test to identify such transactions that are considered significantly outside one standard deviation from the average.

Finally, Koehler addresses the petitioner’s claim that, in applying the targeted dumping test, the Department should not limit its comparisons to identical CONNUMs. Specifically, Koehler cites to Comment 4, at pages 17-18, of Nails PRC IDM, which indicates that the statute and regulations do not require an analysis of all of the respondent’s sales for a targeted dumping determination and the use of identical matches facilitates the analysis of potentially multiple targeted dumping allegations (each of which can have multiple targets) in an antidumping duty investigation. Furthermore, Koehler argues that the petitioner has made no specific argument that the Department’s practice of limiting its comparisons to identical CONNUMs relates to the results of the Department’s analysis of Koehler.

Department’s Position:

In the Department’s Post-Preliminary Determinations in the Nails investigations, the Department explained that the first stage of the new two-stage targeted dumping test utilizes a standard deviation test, where the Department determines the share of the alleged target’s (whether purchaser, region, or time period) purchases of identical merchandise, by sales value, that were at prices more than one standard deviation below the average price of that identical merchandise to all customers. The standard deviation and the average price are calculated using a period of investigation (POI)-wide average price weighted by sales value to the alleged target, and POI-wide average prices weighted by sales value to each distinct non-targeted entity of identical merchandise. If the total sales value that met the standard deviation test exceeds 33 percent of the sales value¹⁷ to the alleged target of the identical merchandise, then the first stage of the targeted dumping test, the pattern requirement, is met.¹⁸

In the second stage of the Department’s new targeted dumping methodology, as described in the Nails Targeted Dumping Memo, the Department utilizes a price gap test, which examines all the sales of identical merchandise that meet the pattern requirement and determines the sales value for which the difference between the average price to the alleged target and the next highest average price exceeds the average price gap (weighted by sales value) observed in the non-targeted group. For these sales, the significant difference requirement is met. If the share of these sales exceeds five percent of the sales value to the alleged target of the identical merchandise, then the Department determines that targeted dumping has occurred.¹⁹

¹⁷ As stated in Nails PRC IDM at Comment 5, we have revised our targeted dumping methodology to aggregate the pattern test results on the basis of volume, rather than value, across different products (CONNUMs).

¹⁸ See Memorandum to David M. Spooner, Assistant Secretary for Import Administration, from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, RE: Antidumping Duty Investigation of Certain Steel Nails from the People’s Republic of China (PRC) and the United Arab Emirates (UAE), Subject: Post-Preliminary Determinations on Targeted Dumping, dated April 21, 2008 (Nails Targeted Dumping Memo) at page 8.

¹⁹ See Nails Targeted Dumping Memo at page 8.

To implement the statutory provisions on targeted dumping, the Department needs a definition of “pattern” because the statute requires that we identify a pattern of export prices pursuant to section 777A(d)(1)(B)(i) of the Act. For this purpose, the Department defines “pattern” as prices that distinguish the alleged target from others and, further, that the prices are “low” on CONNUMs that account for at least 33 percent of sales to the alleged target. “Low,” for a given CONNUM, is defined to be at least one standard deviation below the average market price, *i.e.*, the weighted-average market price across all customers who purchased that CONNUM in the POI.²⁰

The petitioner states that the Department’s calculation used for the standard deviation test results in an average price to non-targeted customers that is too low because this average includes the low prices paid by the targeted customer. The petitioner provided a hypothetical example²¹ which outlines a comparison of targeted and non-targeted sales to support its claim that the Department’s standard deviation test is applied in error. However, we find that the hypothetical example presented by the petitioner is distortive. The petitioner asserts that the Department’s methodology should compare the alleged target prices to the average of the other prices.

First, we disagree with the comparison methodology proposed by the petitioner because it predetermines that the sales are targeted, rather than being within the normal spread or dispersion of prices in the market in question. The Department’s targeted dumping test first examines the price variations in the market in question as the basis for considering whether the sale is targeted. This examination to consider whether a sale is targeted explains why the Department is relying on the standard deviation test rather than the P/2 test.

Second, we disagree with the petitioner’s assertion that the standard deviation test is applied in error because the test compares the average price paid by the targeted customer to the average price paid by all customers. The Department intended to conduct its analysis in this manner.²² Specifically, with respect to the standard deviation test, we consider the price threshold of one standard deviation below the average market price as a reasonable definition of “low” because (1) it is a measure of “low” relative to the spread or dispersion of prices in the market in question,²³ and (2) it strikes a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others (as may be the

²⁰ See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40480 (July 15, 2008), and accompanying Issues and Decision Memorandum (PRC Tires IDM) at Comment 23. B.

²¹ See the petitioner’s case brief at 3-4 for a detailed explanation of this example.

²² As stated in the Preliminary Determination, we conducted a targeted dumping analysis based on the test used in the Nails Targeted Dumping Memo. However, since we issued the Preliminary Determination, the Department issued Nails PRC, where it made certain revisions to the test in the Nails Targeted Dumping Memo.

²³ See Nails from UAE IDM at Comment 3, page 17; see also, PRC Tires IDM at Comment 23. B, page 72.

case under the P/2 test), and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others.²⁴

Additionally, for the reasons stated in Nails PRC IDM at Comment 5, the Department revised our targeted dumping methodology in this investigation to aggregate the pattern test results on the basis of volume, rather than value, across different products (CONNUMs).²⁵ A volume-based aggregation method is free from being skewed by potentially dumped, or targeted dumped, sales values and, therefore, provides an appropriate measure.²⁶ The Department applies the standard deviation test to determine, on a CONNUM-specific basis, which sales meet the “low price” threshold for identifying a targeted sale. Next, we must determine what level of these low-priced sales is sufficient to demonstrate a pattern of targeted dumping. While we recognize that there may be certain cases where aggregating the pattern test results on the basis of value may be more appropriate (e.g., in cases involving custom-made merchandise with large numbers of disparate parts, components and subassemblies where units of measure in these investigations cannot be reasonably converted), in this investigation we have a consistent unit of measure for aggregation on the basis of volume.²⁷

Third, we disagree with the petitioner’s assertion that the thresholds used in the standard deviation test are arbitrary. As the Department indicated in PRC Tires, “{w}e consider the requirement that the “low” prices under the standard deviation test constitute at least 33 percent of the sales volume to the alleged target to be a reasonable threshold for establishing a pattern indicative of targeted dumping under section 777A(d)(1)(B)(i) of the Act.”²⁸ In applying this test, we consider the requirement under our targeted dumping methodology that the “low” prices constitute at least 33 percent of the sales volume to the alleged target to be a reasonable threshold for establishing a pattern indicative of targeted dumping. Accordingly, we find this standard to be consistent with the pattern requirement of section 777A(d)(1)(B)(i) of the Act.

Fourth, we disagree with the petitioner’s claim that there is no statistical justification for the one standard deviation requirement and the thresholds of 33 percent for the pattern requirement and 5 percent for the significance difference requirement. Specifically, we disagree with the petitioner’s claim that 33 percent for the standard deviation test is not relevant to determining whether targeted dumping has occurred. Pursuant to section 777A(d)(1)(B)(i) of the Act, the Department must establish that there is a pattern of export prices that differ significantly in order to find that targeted dumping has occurred. Thus, the Department applies the standard deviation test to determine, on a CONNUM-specific basis, which sales meet the “low price” requirement

²⁴ See PRC Tires IDM at Comment 23. B, page 72.

²⁵ We have also applied this volume-based method to the calculation of the weighted-average prices and standard deviation elements of the pattern test, as well as the derivation of the weighted-average price gaps and the aggregation of the price gap test results.

²⁶ See PRC Tires IDM at Comment 23. B, page 72.

²⁷ Id.

²⁸ Id.

of a pattern. Next, we must determine what level of these low-priced sales is sufficient to demonstrate a pattern of targeted dumping. We consider the requirement under our targeted dumping methodology that the “low” prices constitute at least 33 percent of the sales volume to the alleged target to be a reasonable threshold for establishing a pattern indicative of targeted dumping.²⁹ Accordingly, we find this standard to be consistent with the pattern requirement of section 777A(d)(1)(B)(i) of the Act.

Fifth, with respect to the second stage of the Department’s targeted dumping test, we disagree with the petitioner’s claim that the price gap test is unnecessary and based on an arbitrary threshold. As stated in Comment 6, at page 22 of Nails UAE IDM, the Department must be able to “determine whether the price charged to the alleged target differs significantly within the meaning of section 777A(d)(1)(B)(i) of the Act and 19 CFR 351.414(f)(1)(i).” The price gap test determines whether the price differences associated with the alleged target are “significant” relative to the price differences in the non-targeted group. That is, using only the sales that meet the pattern requirement, we calculate the difference between the average price to the alleged target and the next higher average price to a non-targeted customer, region, or time period for a given CONNUM. This difference is compared to the average price gap, weighted by volume, within the group of non-targeted prices that fall above the price to the alleged target. If the difference exceeds the average price gap found in the group of non-targeted prices, then the difference in the price to the alleged target for that CONNUM is found to be significant. If the volume of sales for which the price differences are found to be significant meets the 5-percent threshold, then the customer, region, or time period is deemed to have been targeted. Accordingly, the price gap test itself is not based on any bright-line standard or threshold because significance is defined in terms of the price differences associated with the alleged target and the market in question. In this regard, we have not set a bright-line standard or threshold, such as a fixed percentage, for measuring the price gap.³⁰

Conversely, we consider a 5-percent share of sales to the alleged target, by volume, that are found to be at prices that differ significantly to be a reasonable indication of whether or not the alleged targeting has occurred. The use of this threshold must be considered together with the standard deviation test and the 33-percent sales volume threshold for determining whether there is a pattern of prices that differ significantly, as required by the statute. We believe that the combination of the pattern and significant difference requirement meets the statutory criteria for discerning targeted dumping. Accordingly, we find this standard to be consistent with the significance requirement of section 777A(d)(1)(B)(i) of the Act and 19 CFR 351.414(f)(1)(i).³¹

Sixth, with respect to the significance test, we disagree with the petitioner’s assertion that the P/2 test is more accurate and reliable than the targeted dumping methodology applied in the instant investigation. The P/2 test collapses the pattern and significant difference requirements, which are analyzed separately under our new methodology. The P/2 test relies on a single, bright-line

²⁹ Id.

³⁰ See PRC Tires IDM at Comment 23. B, page 73.

³¹ Id.

price threshold of two percent to define targeted dumping that does not account for price variations specific to the market in question. In contrast to the P/2 test, we find that the Nails PRC test is reliable because the standard deviation test uses a measurement common in statistical analysis to provide a more appropriate and balanced threshold for identifying a pattern and the gap test provides a more reasonable analysis for defining and identifying significant price differences.³²

Finally, we disagree with the petitioner's claim that the Department's test is invalid because it fails to identify obvious cases of targeted dumping. The two-percent price difference threshold advocated by the petitioner does not adequately account for price variations specific to the market in question. Additionally, the P/2 test collapses the pattern and significant price difference requirements of the statute. As a result, the P/2 test may find targeted dumping in many cases when arguably no such dumping is occurring. Thus, we do not find the results of the P/2 test to be a reliable indicator that "obvious" targeted dumping has occurred, as the petitioner claims.³³ While we recognize that the Department's new targeted dumping methodology may require further refinement, which we seek to accomplish through Targeted Dumping II³⁴ and application in subsequent investigations, we consider it to be statutorily and statistically superior to the P/2 test for identifying targeted dumping in this final determination.

Comment 3: Whether the Department Should Apply any Margins Calculated for Koehler Pursuant to its Targeted Dumping Test to Mitsubishi HiTec Paper and the Non-Selected Respondents

The petitioner argues that if the Department were to find that Koehler targeted sales of LWTP during the POI, the Department should apply the average-to-transaction methodology to all of Koehler's sales to targeted customers, regions and time periods. Specifically, the petitioner asserts that, when there are CONNUMs that cannot be analyzed for possible targeting (e.g., non-identical CONNUMs), but there is an overall pricing pattern to a targeted customer or region, the Department should treat all sales of all CONNUMs to the targeted customer or region as being "targeted." Furthermore, the petitioner states that the Department must not assume that any CONNUM that cannot be identically compared under Nails PRC is not "targeted" for purposes of 19 C.F.R. 351.414(f)(2). In conclusion, the petitioner claims that the current implementation of Nails PRC is inconsistent with the Preamble, and should be revised.

Mitsubishi HiTec Paper and MIC rebut, arguing that the petitioner implicitly acknowledges that if the Department were to find that Koehler targeted sales of LWTP during the POI, the Department's application of the average-to-transaction methodology should be limited to

³² See UAE Nails IDM at Comments 3, 6 and 8.

³³ See UAE Nails IDM at Comment 7, page 23.

³⁴ The Department notes that it has initiated a separate process to seek further comments from the public on its targeted dumping methodology, including what standards, if any, the Department should adopt for accepting an allegation of targeted dumping. See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 FR 26371, 26372 (May 9, 2008) (Targeted Dumping II).

Koehler's sales to targeted customers, regions and time periods.³⁵ Mitsubishi HiTec Paper and MIC argue that, as respondents to which an allegation of targeted dumping has not been received by the Department and, thus, not found to have targeted, the Department is precluded from applying any margin calculated pursuant to its average-to-transaction comparison methodology to Mitsubishi HiTec Paper and MIC. Therefore, Mitsubishi HiTec Paper and MIC assert that if the Department were to find in its final determination that Koehler targeted sales of LWTP during the POI, the Department may not apply any weighted-average margins calculated for sales within the targeted subset to Mitsubishi HiTec Paper and MIC. Instead, Mitsubishi HiTec Paper and MIC state that any margins applied to Mitsubishi HiTec Paper and MIC must be based exclusively on the weighted-average margins calculated for sales outside the targeted subset pursuant to the Department's normal or general average-to-average comparison methodology.

Mitsubishi HiTec Paper and MIC argue that the petitioner may not allege that Mitsubishi HiTec Paper and MIC engaged in targeted dumping because the deadlines for new factual information and filing a targeted dumping allegation have passed. See Mitsubishi HiTec Paper and MIC's rebuttal brief, dated August 5, 2008 at 13, fn 3. In addition, Mitsubishi HiTec Paper and MIC assert that a finding of targeted dumping by a mandatory respondent and the corresponding weighted-average margin based on the average-to-transaction methodology cannot be applied to a non-mandatory respondent to which an allegation of targeted dumping has not been timely received by the Department is supported by the statute and consistent with the Department's practice with respect to margins based upon adverse facts available (AFA).³⁶ In its letter of April 23, 2008, referenced by Mitsubishi HiTec Paper and MIC, Mitsubishi HiTec Paper and MIC state that the Department has determined that it is inappropriate to apply any rate based upon AFA to a non-mandatory respondent where the Department's selection methodology is based upon the largest exporter.³⁷ Mitsubishi HiTec Paper and MIC also state that the Court of International Trade (CIT) and the Department have determined that it would be "inequitable if Commerce were to assign an adverse facts available rate" to non-selected respondents, claiming the application of a punitive, or quasi-punitive, rate to innocent parties would be contrary to the intent that antidumping law be remedial.³⁸

Department's Position:

The Department has found no targeted dumping for Koehler. Therefore, we find that it is not necessary to address parties' arguments, which are based on a finding of targeted dumping.

³⁵ See also; April 23, 2008 letter from Mitsubishi HiTec Paper and MIC to the Department.

³⁶ Id. at 14-19. See also; 19 U.S.C. § 1673d(c)(5)(A).

³⁷ See, e.g., Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 44827 (August 9, 2007).

³⁸ See Nat'l Knitwear & Sportswear Assoc. v. United States, 779 F. Supp. 1364, 1372-73 (1991).

Comment 4: Whether Margins Should be Calculated Without Applying Offsets for Non-Dumped Sales

The petitioner asserts that, even if the Department applies the average-to-average methodology, the margins must be calculated without applying offsets for non-dumped sales. First, the petitioner asserts that there is no basis to adopt inconsistent interpretations of section 771(35)(A) of the Act in investigations and administrative reviews. Section 771(35)(A) of the Act states that “the term ‘dumping margin’ means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” The petitioner argues that there is nothing in the statute which indicates that Congress intended the terms “dumping margin” or “exceeds” to have different meanings in reviews and investigations.

The petitioner asserts that the statute provides for the elimination of negative margins from the numerator weighted-average dumping margin because section 771(35)(B) of the Act states that the numerator of the “weighted average dumping margin” consists of the aggregate of the “dumping margins” (which the petitioner asserts can include only positive numbers). Specifically, the petitioner cites several recent case decisions from reviews in which the Department interprets section 771(35)(B) stating, “as no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales.”³⁹ The petitioner maintains that, if the statutory language does not permit the existence of a “negative” dumping margin in reviews, there is no basis to interpret the identical statutory language as permitting such “negative” dumping margins in investigations.

Citing Timken,⁴⁰ the petitioner states that the U.S. Court of Appeals for the Federal Circuit (CAFC) already has upheld as reasonable the interpretation that 19 U.S.C. §§ 1677(35)(A) and (B) do not permit offsets, and do not envision the existence of “negative” margins.

The petitioner also argues that section 777A of the Act would become meaningless if offsets were permitted. Citing 19 U.S.C. § 1677f-1(d)(1)(A) and 1677f-1(d)(1)(B), the petitioner highlights the difference between investigations and administrative reviews with respect to comparison methodologies. The petitioner asserts that these provisions show that Congress specifically provided for different comparison methods to be used to calculate dumping margins (*i.e.*, either comparing normal values to weighted-average U.S. prices or to individual U.S. transaction prices) depending on the circumstances of the case. Based on these statutory provisions, the petitioner argues that it would have been meaningless for Congress to provide for

³⁹ See Chlorinated Isocyanurates from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 159 (January 2, 2008), and accompanying Issues and Decision Memorandum (Chlor-Isos IDM) at Comment 18; Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review, 73 FR 7710 (February 11, 2008), and accompanying Issues and Decision Memorandum (SSSS from Mexico IDM) at Comment 2; Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of Antidumping Duty Order, 73 FR 18259 (April 3, 2008) (PET Film CCR IDM) at Comment 6.

⁴⁰ See Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004), cert. denied, 543 U.S. 976 (2004).

the different comparison methods in the statute if the offsetting of dumping margins with non-dumped sales was allowed. Specifically, the petitioner asserts that applying offsets for non-dumped sales would result in the same dumping margin whether the Department compared weighted-average normal values to weighted-average U.S. prices or to individual U.S. transaction prices. In conclusion, the petitioner argues that, because the provisions of section 1677f-1(d) have meaning only when dumping margins are calculated without the use of offsets, and are nullified if offsets are used, it is clear that the statute requires the Department not to offset dumping margins with non-dumped sales.

Koehler argues that the Department should apply offsets for non-dumped sales for the final determination. Koehler also argues that the Department should not find that Koehler engaged in targeted dumping. Citing a 2005 World Trade Organization dispute settlement report and Final Modification, Koehler asserts that the Department may not disallow offsets for non-dumped sales in {antidumping duty} investigations. Furthermore, Koehler states that the statute does not mandate the disallowance of offsets for non-dumped sales.⁴¹ In conclusion, Koehler claims that the petitioner has provided no basis to distinguish Nails PRC from the instant investigation and it has not provided any basis to overrule Nails PRC.

Mitsubishi HiTec Paper and MIC also argues that the Department should apply offsets for non-dumped sales for the final determination. Mitsubishi HiTec Paper and MIC state that the petitioner is essentially asking the Department to disregard the obligations of the United States as a member of the WTO and, with respect to applying offsets, issue a final determination that is contrary to current U.S. law.⁴²

Mitsubishi HiTec Paper and MIC state that both the CAFC and the WTO have ruled that, for purposes of applying offsets for non-dumped sales, the differences between administrative reviews and investigations are not relevant.⁴³ Therefore, Mitsubishi HiTec Paper and MIC assert that the Department should reject the petitioner's request and find that disallowing offsets for non-dumped sales is impermissible in any aggregation of margins in an antidumping proceeding.

Department's Position:

We disagree with the petitioner's proposed methodology to disallow offsets when using average-to-average comparisons for non-targeted sales, as it is inconsistent with Final Modification. As indicated in Final Modification, the Department modified its methodology for determining weighted-average dumping margins and does allow offsets when using average-to-average comparisons for non-targeted sales in investigations. Id. at 77722. Specifically, in Final

⁴¹ See the October 2005 WTO dispute settlement panel report, United States – Laws, Regulations, and Methodology for Calculating Dumping Margins (Zeroing) (WT/DS294); see also Final Modification.

⁴² Id.; see also Mitsubishi HiTec Paper and MIC's rebuttal brief at page 3.

⁴³ See Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Federal Circuit 2005), reh'g denied, 2005 U.S. App. LEXIS 10462 (Federal Circuit May 18, 2005) cert. denied, 126 S. Ct. 1023 (2006); see also; United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/A/R at ¶ 135 (WTO Appellate Body, December 15, 2003).

Modification, the Department stated that it “will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.” Id. at 77723. Therefore, in this investigation, when calculating a respondent-specific weighted-average margin, we combined the margin calculated for the targeted sales using the average-to-transaction methodology⁴⁴ with the margins calculated for the non-targeted sales using the average-to-average methodology.⁴⁵ In combining the margins for the targeted and non-targeted U.S. sales databases, we did not offset any margins found among the targeted U.S. sales.

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 determination of this investigation and the final weighted-average dumping margin for the investigated firm in the Federal Register.

Agree _____ Disagree _____

David M. Spooner
Assistant Secretary
for Import Administration

(Date)

⁴⁴ See 19 CFR 351.414(f)(2).

⁴⁵ See 19 CFR 351.414(d)(1).