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March 1, 2004

MEMORANDUM TO: James J. Jochum
Acting Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Investigation of Wax and Wax/Resin Thermal Transfer Ribbons from
Japan

SUMMARY:

On December 22, 2003, the Department of Commerce (“Department”) published in the Federal Register the Notice of Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances: Wax and Wax/Resin Thermal Transfer Ribbons from Japan (“Preliminary Determination”) 68 FR 71072, 71078 (December 22, 2003). We have analyzed the briefs and rebuttal briefs of interested parties in the less than fair value investigation of wax and wax/resin thermal transfer (“TTR”) ribbons from Japan. As a result of our analysis, we have made no changes from the Preliminary Determination.

GENERAL COMMENTS:

Comment 1: Country Of Origin
Comment2: Critical Circumstances

BACKGROUND:

The merchandise covered by the order is wax and wax/resin thermal transfer ribbons from Japan as described in the “Scope of the Investigation” section of the Federal Register notice. The period of investigation (“POI”) is April 1, 2002, through March 31, 2003. In accordance with 19 C.F.R.

§351.309(c)(ii), we invited parties to comment on our Preliminary Determination.

On February 10, 2004, Dai Nippon Printing Company, Ltd (“DNP”), Respondent in this investigation, filed a case brief on the Preliminary Determination. However, on February 10, 2004, the Department rejected DNP’s brief in accordance with section 351.302(d)(1)(i) of the Department’s regulations. See Letter from James C. Doyle to DNP Regarding the Antidumping Duty Investigation on Certain Wax and Wax/Resin Thermal Transfer Ribbons from Japan, dated February 10, 2004. On February 10, 2004, the Petitioner¹ filed a case brief on our Preliminary Determination. On February 13, 2003, DNP re-submitted their case brief omitting the portions identified by the Department in the February 10, 2004 letter. On February 17, 2004, DNP, the Petitioner and Union Chemcar Co., Ltd (“Union”), a second Respondent in this investigation, filed rebuttal briefs. On February 20, 2004, the Department held a public hearing in accordance with section §351.310(d) of the Department’s regulations.

Comment 1: Country of Origin

As noted above, the Petitioner has requested that the Department determine that TTR produced in Japan (in jumbo roll, *i.e.*, unslit form) that is slit in a third country does not change the country of origin for antidumping purposes. According to the Petitioner, because slitting does not constitute a “substantial transformation,” Japanese jumbo rolls slit in a third country should be classified as Japanese TTR for antidumping purposes, and, therefore, within the scope of this investigation and any resulting order. The Petitioner submitted comments on this request on October 28, 2003, December 5, 2003, January 5 and January 16, 2004. According to the Petitioner, substantial transformation does not take place because: 1) both slit and jumbo rolls have the same essential physical characteristics (*e.g.*, both have the same chemical properties that make them suitable for thermal transfer printing); 2) large capital investments are required for coating and ink-making (production stages prior to slitting), but not for slitting; 3) coating and ink-making require significantly more skill, expertise, and research and development; and, 4) the majority of costs and value comes from coating and ink-making. The Petitioner states that, for purposes of this issue, slitting and packaging do not account for a substantial amount of the total cost of finished TTR (depending on the degree of automation and whether new or secondhand equipment is involved); and that a slitting operation requires a small amount of capital, compared with a large amount of capital required for a coating and ink-making operation.

Armor, the sole Respondent in the TTR from France investigation, argues that slitting does constitute substantial transformation, and, therefore, that the Department should determine that French jumbo rolls slit in a third country should be considered to have originated in that third country for antidumping purposes. Armor submitted comments on November 26, 2003, December 12, 2003, and January 9, 2004. Armor argues that substantial transformation does take place because: 1) slitting, and the repackaging that necessarily goes along with it, involves transforming the product into its final end-use dimensions, the insertion of one or two cores (for loading the ribbons into printers), and the addition of

¹ Petitioner in this case is International Imaging Materials, Inc. (“IIMAK”).

leaders, bridges, and trailers, which result in a new product, with a new name, new character, and new purpose; 2) the Petitioner excluded TTR slit to fax proportions, acknowledging the importance of slitting; and, 3) U.S. Customs and Border Protection (“CBP”) and the Court of International Trade (“CIT”) have determined that slitting and repackaging amount to substantial transformation. DigiPrint, in comments received on January 2, 2004, argues that the record of this investigation indicates that slitting and packaging account for a large amount (34%) of total cost, indicating substantial transformation.

Japanese respondents did not comment on this issue.

Department’s Position

We agree with the Petitioner.

The Department has considered several factors in determining whether a substantial transformation has taken place, thereby changing a product’s country of origin. These have included: the value added to the product; the sophistication of the third-country processing; the possibility of using the third-country processing as a low cost means of circumvention; and, most prominently, whether the processed product falls into a different class or kind of product when compared to the downstream product. While all of these factors have been considered by the Department in the past, it is the last factor which is consistently examined and emphasized.² When the upstream and processed products fall into different classes or kinds of merchandise, the Department generally finds that this is indicative of substantial transformation. See, e.g., Cold-Rolled 1993, 58 FR at 37066.

Accordingly, the Department has generally found that substantial transformation has taken place when the upstream and downstream products fall within two different “classes or kinds” of merchandise: (see, e.g., steel slabs converted to hot-rolled band; wire rod converted through cold-drawing to wire; cold-rolled steel converted to corrosion resistant steel; flowers arranged into bouquets; automobile chassis converted to limousines).³ Conversely, the Department almost invariably determines substantial

²See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Argentina, 58 FR 37062, 37066 (July 9, 1993) (Cold-Rolled 1993); Final Determination of Sales at Less Than Fair Value: Limousines From Canada, 55 FR 11036, 11040, comment 10 (March 26, 1990) (Limousines); Erasable Programmable Read Only Memories (EPROMs) From Japan; Final Determination of Sales at Less than Fair Value, 51 FR 39680, 39692, comment 28 (October 30, 1986) (EPROMs); and, Cold-Rolled 1993, 58 FR at 37066; respectively.

³Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the United Kingdom, 64 FR 30688, 30703, comment 13 (June 8, 1999); Notice of

transformation has not taken place when both products are within the same “class or kind” of merchandise: (see, e.g., computer memory components assembled and tested; hot-rolled coils pickled and trimmed; cold-rolled coils converted into cold-rolled strip coils; rusty pipe fittings converted to rust free, painted pipe fittings; green rod cleaned, coated, and heat treated into wire rod).⁴ In this case, both jumbo and slit TTR are within the same class or kind of merchandise, as defined in the Department’s initiation and as defined for this final determination.

While slitting and packaging might account for 34 percent of the total cost of production,⁵ the processes and equipment involved do not amount to substantial transformation of the jumbo TTR for antidumping purposes. According to information submitted by petitioner, and not rebutted by any party to this investigation, a slitting operation requires only a fraction of the capital investment required for a coating

Final Determination of Sales at Less Than Fair Value—Stainless Steel Round Wire from Canada, 64 FR 17324, 17325, comment 1 (April 9, 1999); Cold-Rolled 1993, 58 FR at 37066; Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Review, 55 FR 20491, 20499, comment 49 (May 17, 1990); and, Limousines, 55 FR 11040; respectively.

⁴Notice of Initiation of Countervailing Duty Investigation: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 67 FR 70927, 70928 (November 27, 2002) (DRAMs); EPROMs, 51 FR at 39692; Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan; Suspension of Investigation and Amendment of Preliminary Determination, 51 FR 28396, 28397 (August 7, 1986); Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People’s Republic of China, 66 FR 22183, 22186 (May 3, 2001); Memorandum to Troy H. Cribb, Acting Assistant Secretary, from Holly Kuga, Acting Deputy Assistant Secretary, Issues and Decision Memorandum for the Investigation of Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Taiwan, comment 1 (May 22, 2000); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Steel Wire Rod From Canada, 62 FR 51572, 51573 (October 1, 1997); Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From India, 60 FR 10545, 10546 (February 27, 1995); respectively.

⁵The ITC report states that “[s]ix U.S. producers indicate that slitting and packaging accounts for an average of 34 percent of the cost of finished bar code TTR.” Certain Wax and Wax/Resin Thermal Transfer Ribbons from France, Japan, and Korea, Investigations Nos. 731-TA-1039-1041 (Preliminary), (July 2003) (ITC Report), at 7. DigiPrint apparently is referring to this figure, when it refers to 34 percent in its January 2, 2004 submission. Figures placed on the record by petitioner related to this issue are proprietary, but indicate that the relevant figure might be significantly less than 34 percent, depending on the country in which the slitter is located, the type of equipment used, the degree of automation involved, and whether the process relies more on labor than capital.

and ink-making operation.⁶ Moreover, the ITC noted in this investigation that the “slitting and packaging process is not particularly complex, especially as compared to the jumbo TTR production process.” ITC Report, at 7. The ITC also noted that the primary cost involved in a slitting and packaging operation is not capital cost, but direct labor cost, which, we note, might be hired cheaply in a third country. Id. at 14. Thus, it appears that a slitting operation could be established in a third country for circumvention purposes with far greater ease than a coating and ink-making operation.

Finally, the ITC concluded that, while slit and jumbo TTR are like products, U.S. slitting and packaging operations (or “converters”) were not part of the domestic industry for purposes of this investigation, “for lack of sufficient production related activities.” Id. at 13. The implication of the ITC’s conclusion, based on its extensive multi-pronged analysis, is that TTR is the product of coating and ink-making, not slitting and packaging: “The production related activities of converters are insufficient for such firms to be deemed producers of the domestic like product.” Id. While we are not bound by the ITC’s decisions, the ITC’s determination is important to consider in this particular instance because it is based on the full participation of respondents and petitioner, whereas respondent withdrew its information from our investigation.

As the Department has stated on numerous occasions, CBP decisions regarding substantial transformation and customs regulations, referred to by respondent, are not binding on the Department, because we make these decisions with different aims in mind (e.g., anticircumvention). See, e.g., DRAMs, 67 FR at 70928. The Department’s independent authority to determine the scope of its investigations has been upheld by the CIT. Diversified Products Corp. v. United States, 572 F. Supp. 883, 887 (CIT 1983). Presumably, a CIT decision interpreting substantial transformation in the context of CBP regulations, also cited by respondent, also is not binding on the Department.

While the other facts noted by respondent are not necessarily irrelevant to this determination, they do not overcome the conclusion indicated by the fact that the slitting and packaging of jumbo rolls into slit TTR does not create a “new and different article.” In other words, the totality of the circumstances indicates that slitting does not constitute substantial transformation for antidumping purposes. Even accepting, arguendo, DigiPrint’s statement regarding the amount of total cost accounted for by slitting and packaging, and respondent’s statements regarding how slitting and packaging transform the product into its final end-use form, the product still has not changed sufficiently to fall outside the class or kind of merchandise defined in this investigation. Jumbo rolls are intermediate products, and slit rolls are final, end-use products, but the transformation of an upstream product into a downstream product does not necessarily constitute “substantial transformation” and, in this case, does not, given the considerations listed above.

⁶These figures agree with statements made by DNP, a respondent in the Japanese TTR investigation, recorded in the preliminary report by the U.S. International Trade Commission (ITC), that capital investment in a slitting operation was “generally very small” (\$100,000 to \$300,000). Id. at 14.

Similarly, in DRAMs, we decided that wafers shipped to a third country to be used in the assembly of DRAMs (subject merchandise) did not amount to substantial transformation because the wafers were the “essential” component in the product. In this case, the ITC report notes petitioner’s statement, unrefuted by respondents, that “the essential characteristic of finished TTR, like that of jumbo TTR, is that of a strip of PET film coated with ink.” We agree and note that the essential characteristic is contained in the jumbo TTR imported into the third country.

Therefore, in light of this fact and the facts discussed below, we determine that slitting jumbo rolls does not constitute substantial transformation. Jumbo rolls originating in Japan but slit in a third country will be subject to any antidumping duties imposed on Japanese TTR, if an antidumping duty order on such products is issued.

Comment 2: Critical Circumstances

DNP argues that the Petitioner’s allegation concerning its critical circumstances is built on selective information. DNP asserts that the Petitioner has based the critical circumstances allegation on data which the CIT has declared is not applicable to TTR.⁷ Additionally, DNP notes that the Petitioner requested in its November 26, 2003 submission that the Respondents report monthly figures on shipments of subject merchandise to the United States.

DNP argues that by filing their critical circumstances allegation at the last possible moment, the Petitioner used the deadlines of the investigation in a manner that prejudiced DNP’s ability to respond before the Department’s Preliminary Determination began circulating for internal approvals. DNP notes that the Department stated that DNP’s critical circumstances data “were submitted too late for consideration in this preliminary determination.” See Preliminary Determination at 71076.

DNP argues that withdrawal from the less than fair value (“LTFV”) investigation has no bearing on DNP’s ability to submit evidence and argument concerning the critical circumstances determination, which it argues is a separate determination from the LTFV determination. DNP contends that “if it did, there would be incentive for petitioners to allege critical circumstances every time a mandatory respondent withdrew from a LTFV investigation.” See DNP’s February 13, 2004 Comments at 3.

DNP contends that the antidumping statute instructs the Department to make two determinations, one regarding a LTFV determination and the other regarding critical circumstances. In the first determination, DNP notes that section 733(b)(1)(A) of the Act states that the Department must “make a {preliminary} determination, based upon the information available to it at the time of the determination, of whether there is a reasonable basis to believe or suspect that the merchandise is being sold or is likely to be sold at” LTFV. For the second determination, DNP notes that section 733(e) of the Act directs the Department “to make a separate preliminary determin{ation}, on the basis of information available to it at the time, whether there is reasonable basis to believe or suspect” that

⁷ See DNP’s submission dated January 20, 2004 at 7, n. 13 & 14.

critical circumstances exist. DNP notes that the statute requires two final determinations as well. DNP contends that there are different sets of data that the LTFV (comparison pricing) and critical circumstances (import volumes) determinations depend upon. According to DNP, the record before the Department in an LTFV investigation, by definition, never contains the information the Department requires to make a critical circumstances determination. DNP argues that this has been the Department's practice in past investigations and is titled as such in FR notices.⁸ According to DNP, the World Trade Organization ("WTO") Antidumping Agreement refers to a "separate" determination specifically for critical circumstances. See WTO Antidumping Agreement at article 10.6.

DNP argues that section 782(c) of the Act instructs the Department to consider DNP's critical circumstances data when it is timely submitted, can be verified and is complete and reliable. DNP argues that there can be no discretion on the part of the Department on this issue, it must consider DNP's critical circumstances information.

DNP argues that the Department may not use facts available ("FA") because DNP repeatedly attempted to provide verifiable information. DNP contends that the authority to use facts available is limited to reaching the applicable determination, in this case the critical circumstances determination, for which the withheld information is relevant. See section 776(a) of the Act. According to DNP, the withdrawal of information in the LTFV determination does not impact the Department's obligation to consider the DNP information bearing on the critical circumstances determination.

DNP argues that the Department may only use adverse inferences for FA when an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. See section 776(b) of the Act. DNP contends that with respect to the critical circumstances allegation, they have been cooperative. According to DNP, the LTFV determination is separate from the critical circumstances determination and, therefore, the adverse inferences due to the withdrawal of information, should only be applied to the LTFV determination.

DNP argues that the Petitioner has based its entire allegation of critical circumstances on the claim that imports from Japan rose for product entered under Harmonized Tariff Schedule of the United States ("HTSUS") 9612.10.9030. DNP argues that all of their imports are classified under HTSUS 3702, which show double digit declines. According to DNP, the Petitioner has failed to provide the Department with any basis that could provide substantial evidence to support a finding of massive imports against DNP.

⁸ Petitioner cites two examples of this: Notice of Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances: Wax and Wax/Resin Thermal Transfer Ribbons From Japan, 68 FR 71072 (Dec. 22, 2003); and Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products from South Africa, 67 FR 62136 (Oct. 3, 2002).

The Petitioner argues that the Department, in its final determination, should make an affirmative determination of critical circumstances for Japan on a country-wide basis and not limit its finding to specific companies as was requested in the original critical circumstances allegation.⁹ The Petitioner notes that the Department, in its Preliminary Determination, made an affirmative critical circumstances determination for the Respondents DNP and Union. See Preliminary Determination. The Petitioner also notes that the Department made a negative preliminary determination of critical circumstances for the “all others” companies, citing flawed CBP data.¹⁰ *Id.* The Petitioner has previously argued that classification of the subject merchandise under the HTSUS unfortunately has been inconsistent, involving many different HTSUS numbers in various headings which cover a multitude of products, including non-subject products. The Petitioner contends that this point also was recognized by the ITC in its Staff Report to the Preliminary Determination.¹¹ The Petitioner notes that none of the identified Japanese companies reported, as requested by the ITC, in its post-conference brief, the HTSUS classification under which they imported TTR.¹²

The Petitioner argues that the Department’s regulations require that an allegation of critical circumstances be supported by “reasonably available information.” See 19 C.F.R. § 351.206(b). The Petitioner asserts that it supported their critical circumstances allegation with “reasonably available information” in the form of official CBP import data based on HTSUS numbers that the Petitioner believed had been used in the past for classification of TTR. The Petitioner notes that the actual HTSUS numbers used by the Japanese Respondents were not available to the Petitioner at that time. According to the Petitioner, the Department is faced with the unusual situation that there are no responding foreign manufacturers: the only responding company, DNP, withdrew from the investigation, whereas Union chose not to respond to the Department’s questionnaire at all. Moreover, none of the other Japanese TTR manufacturers requested to become a voluntary Respondent. The Petitioner contends that under these circumstances the Department must apply facts available to the “all others” companies as well. The Petitioner argues that the “all others” companies had an opportunity to participate in this investigation by becoming voluntary respondents. The Petitioner notes that none of them chose to do so even when DNP withdrew from the investigation. Moreover, the Petitioner argues that these companies should not benefit from their own inaction; otherwise, given the fact that official

⁹ See Letter from Thomas J. Trendl to the Hon. Donald L. Evans re Allegation of Critical Circumstances (Nov. 26, 2003).

¹⁰ After the Petitioner’s critical circumstances allegation, DNP and Union submitted import data purporting to show that critical circumstances did not exist for these companies. See Letter from DNP to the Hon. Donald L. Evans re Allegation of Critical Circumstances (Dec. 12, 2003); Letter from Union to the Secretary of Commerce re Preliminary Determination of Critical Circumstances for UC (Dec. 24, 2003). On February 9, 2004, the Department rejected these data as incomplete, untimely, and inconsistent with their prior clear statements of non-cooperation.

¹¹ See Certain Wax and Wax/Resin Thermal Transfer Ribbons From France, Japan, and Korea (Revised Issue), Inv. Nos. 731-TA-1039-1041 (Preliminary), USITC Pub. 3613, at IV-1 n.3 (July 2003).

¹² See Staff Conference Transcript: Certain Wax and Wax/Resin Thermal Transfer Ribbons From France, Japan, and Korea, Inv. Nos. 731-TA-1039-1041 (Preliminary), at 160 (June 20, 2003).

import data are flawed, the Petitioner could never prevail on a critical circumstances allegation against the “all others” companies.

In its rebuttal brief, DNP argues that, in making its critical circumstances allegation, the Petitioner relied on the legal standard applicable to preliminary determinations, not final determinations. DNP states that the requirements for a final determination,¹³ are greater than those requirements for a preliminary determination.¹⁴ DNP contends that the Petitioner is asking that the Department to make its final determination “on the basis of information available to it.” See section 733(e) of the Act. DNP argues that this should not be the standard used by the Department. Moreover, DNP argues that the Department’s final determination requires “a finding” that “there have been massive imports of the subject merchandise over a relatively short period.” See section 735(a)(3)(B) of the Act. According to DNP, it is not sufficient for the Department to have a “reasonable basis to believe or suspect” of such an increase, the Department must show that there has been a massive increase¹⁵ and it cannot merely “suspect” such an increase. See section 733(e) of the Act. DNP argues that there is insufficient information on the record for a finding that there was a massive increase in imports.

DNP argues that, in determining whether there has been a massive increase of TTR into the United States, the Department cannot rely solely on the information supplied by the Petitioner. According to DNP, the Petitioner’s critical circumstances allegation “depends entirely on the premise that DNP and other Japanese TTR producers engage in blatant mis-classification and frontal disregard of the proper tariff classification” that the CIT has ruled is applicable to HTSUS 3702, the HTSUS number under which DNP says it imports TTR. See DNP’s February 17, 2004 Comments at 2. DNP notes that the Petitioner has never alleged that DNP’s imports are not imported under HTS 3702. Moreover, DNP alleges that CBP data for HTSUS 3702 show double-digit declines for Japanese TTR imports in the relevant period. DNP notes that CBP maintains records on each shipment of TTR entering the United States and that those records are readily available to the Department. DNP contends that the Department cannot make the critical circumstances determination without considering CBP’s records for DNP. Additionally, DNP argues that any final determination on critical circumstances that attempts to penalize DNP without taking this step will be arbitrary, capricious, and contrary to the statute.

Moreover, DNP in rebuttal, reiterates its argument that LTFV determinations and critical circumstances determinations are distinct. DNP notes that they withdrew their pricing-related information for the

¹³ See section 735(a)(3)(B) of the Act.

¹⁴ See section 733(e) of the Act.

¹⁵ See section 735(a)(3)(B) of the Act, which deletes qualifying language that appears in section 733(e) of the Act and imposes higher standard for final determinations on critical circumstances. Also see World Trade Organization (“WTO”) Antidumping Agreement at article 10.6, which permits retroactive duties “when the authorities determine for the dumped product in question . . . that the injury is caused by massive dumped import of a product in a relatively short time.”

LTFV investigation before the Petitioner filed their critical circumstances allegation. DNP argues that the Department cannot ignore DNP's "timely submitted, verifiable, complete information." See DNP's February 17, 2004 Comments at 4. Additionally, DNP contends that the questionnaire data obtained in a LTFV investigation would not provide the information required for a critical circumstances determination, because it does not provide the monthly breakout that the Department needs under its established critical circumstances methodology.

DNP contends that their failure to provide HTSUS data to the ITC has no relevance to this proceeding. DNP argues that when examining shipment data, the Petitioner urged the ITC to disregard the HTSUS data as unreliable due to reporting changes in HTSUS codes for TTR. As an alternative measure, DNP notes, the Petitioner urged the ITC to rely on data derived from Petitioner's examination of the Port of Import Export Reporting Service ("PIERS") data.¹⁶ In the ITC proceeding, DNP countered that, for purposes of the ITC's injury analysis, the ITC should rely on the questionnaire data it collected. DNP further argued that the Department's HTSUS based data cannot be dis-aggregated to yield meaningful results because it is notoriously incomplete and unreliable, and relying on PIERS data would require the ITC staff to review the veracity of virtually every entry.¹⁷ DNP makes the same argument in this instance, that the Department must use the questionnaire data collected by the ITC, and the data submitted by DNP to the Department for the final determination.

Furthermore, DNP argues that the Petitioner cannot claim "that there are no responding foreign manufacturers" because DNP and UC provided the Department with complete, verifiable, company specific data. The Petitioner has done its best to block the inclusion of data from the Respondents on the critical circumstances issue.

As noted above, Union only submitted rebuttal comments. Union notes that they submitted import data on December 24, 2003, after the Petitioner filed their critical circumstances claim, and within the period authorized by the regulations. See 19 C.F.R. § 351.301(b)(1). Union contends that the information submitted on December 24, 2003 addressed the very information that the Petitioner had stated in its critical circumstances allegation, raised long after Union had timely declined to respond to the Department's questionnaires, the Department should collect.

Union argues that a critical circumstances determination is separate from a LTFV determination. See section 735(b)(1)(A) of the Act. According to Union, the Department has no legal basis for asserting that Union's refusal to provide data for the LTFV investigation precludes Union from providing data for a separate, related inquiry as to the existence of critical circumstances. Moreover, according to Union, the Department is statutorily required to consider the data submitted by Union. See section 782(e) of

¹⁶ See Certain Wax and Wax/Resin Thermal Transfer Ribbons From France, Japan, and Korea (Revised Issue), Inv. Nos. 731-TA-1039-1041 (Preliminary), USITC Pub. 3613, at IV-1 n.3 (July 2003) which notes that the Petitioner claimed that "the PIERS data are more reliable."

¹⁷ ITC Postconference Brief of DNP (Public Version), Inv. No. 731-TA-1039-1041, dated June 26, 2003 at 7 n.12.

the Act.

Additionally, Union argues that the Department's refusal to consider Union's critical circumstances data is also improper in view of the WTO obligations of the United States stating that "all information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion . . . should be taken into account when determinations are made."¹⁸

Union refutes the Petitioner's claim that "the Department is faced with the unusual situation that there are no responding foreign manufacturers." See Petitioner's February 10, 2004 Comments at 7. Union argues that both it and DNP have responded to the Petitioner's critical circumstances allegations. Union contends that declining to respond to the Department's questionnaire does not impact Union's ability to submit data and arguments in a separate critical circumstances determination. Union argues that there is nothing in the statute, regulations, or the Department's practice that prohibits a party from submitting data in a critical circumstances proceeding even if the party declines to respond to the questionnaire.

Moreover, Union argues that the Department should reject Petitioner's claim that the Department's refusal to consider the critical circumstances data, submitted by Union on December 24, 2003, was proper and that the Department should reverse its decision. According to Union, their letter was timely filed under the regulations and its critical circumstances import data should be accepted. Union contends that they are prepared to resubmit its import data – and to undergo an immediate verification of such data – when advised by the Department that the data will be accepted.

In their rebuttal comments, the Petitioner notes that it filed its critical circumstances allegation on November 26, 2003, within the time prescribed by 19 C.F.R. § 351.206(c)(2)(i). The Petitioner contends that while the submission was made on the last day allowed by the regulation, it was timely and that DNP's characterizations of an "11th hour" filing are inaccurate because they were made within the time prescribed by 19 C.F.R. § 206(c)(2)(i). The Petitioner notes that because DNP chose not to participate over three weeks earlier, it would not have made any difference had Petitioner made the allegation earlier.

The Petitioner notes that at DNP's request, all business proprietary information submitted by DNP was returned or destroyed. The Petitioner contends that because of DNP's request, any information previously placed on the record by DNP was never verified or determined to be complete and accurate by the Department. The Petitioner also notes that on February 9, 2004 and February 10, 2004, the Department rejected DNP's attempts to submit factual information on the record in response to Petitioner's critical circumstances allegation. The Petitioner argues that the Department's actions are consistent with the Department's long standing practice to not allow Respondents to selectively place

¹⁸ See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex II, Paragraph 3.

information on the record a practice which has been upheld by the courts. According to the Petitioner, the “best information rule prevents a respondent from controlling the results of the investigation by providing partial information or otherwise hindering the investigation.” See Pistacio Group, 671 F. Supp. 31, 40 (CIT 1987) (citing Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984)).

The Petitioner argues that the Department’s statute and regulations require it to verify information used in the final determination. See section 782(i) of the Act and 19 C.F.R. § 351.307(b)(1)(i). The information required to reasonably ascertain the completeness and accuracy of information relevant to a critical circumstances allegation would involve a great deal of information, including full quantity and value data, affiliated party information, reconciliation data, and a host of other information.²⁰ The Petitioner contends that some of the information required in this regard was exactly the type of information DNP chose not to provide to the Department in the LTFV investigation, including the quantity and value of sales pre-period of investigation. The Petitioner argues that there is no factual basis on the record upon which to consider any DNP critical circumstance information.

The Petitioner contends that the classification of the subject merchandise involves many different HTSUS numbers in various headings which cover a multitude of products, including non-subject products. The Petitioner notes that this was acknowledged by the Department in its Preliminary Determination and recognized by the ITC in its Staff Report accompanying its Preliminary Determination.²¹ According to the Petitioner, there is no information on the record which states which HTSUS codes DNP or other Japanese Respondents have imported TTR. The Petitioner argues that DNP’s citation in its comments of a CIT decision concerning the classification of certain “imported color ink sheet rolls” in which the CIT discussed two of the various HTSUS numbers under which certain TTR has been imported,²² does not provide the data upon which the decision to exclude a respondent from a critical circumstances determination should be made. The Petitioner argues that this case involved the classification of non-subject merchandise which was classified under a HTSUS subheading for “photographic film in rolls.”²³ The Petitioner notes that TTR has been imported under several HTSUS numbers which contain many products, subject and non-subject, including the HTSUS number at issue in the CIT case.

²⁰ The Petitioner noted this in its January 7, 2004 submission to the Department. See Letter from Thomas J. Trendl to the Hon. Donald L. Evans Re: Comments Regarding Use of Critical Circumstances Data Submitted by Union and DNP (January 7, 2004).

²¹ See Certain Wax and Wax/Resin Thermal Transfer Ribbons From France, Japan, and Korea (Revised Issue), Inv. Nos. 731-TA-1039-1041 (Preliminary), USITC Pub. 3613, at IV-1 n.3 (July 2003).

²² DNP’s February 13, 2004 Comments at 7.

²³ QMS, Inc. v. United States, 19 Ct. Int’l Trade 551, 552, 561 (1995). This case is discussed extensively in the Petitioner’s November 12, 2003 submission to the Department. Letter from Petitioner to the Hon. Donald L. Evans Re: Country of Origin of Subject TTR Slit in Third Countries at 16 (November 21, 2003).

Department's Position:

As noted in the Preliminary Determination, on November 3, 2003, DNP withdrew from the investigation. At the time of DNP's withdrawal from the investigation, DNP had not responded to numerous supplemental questionnaires. On November 26, 2003, the Petitioners filed a timely, formal critical circumstances allegation in accordance with 19 C.F.R. 351.206(c)(2)(i). As noted earlier, on December 12, 2003, DNP submitted proprietary shipment data in response to the Petitioner's critical circumstances allegation. This information was not considered for the Preliminary Determination and was consequently rejected by the Department on February 9, 2004.

With regard to DNP's argument that the Petitioner's critical circumstances allegation was unfairly late in the investigation, therefore prejudicing DNP's ability to respond before the Department's preliminary determination, we disagree. The Petitioner may make a critical circumstances allegation in an investigation twenty days before a final determination.²⁴ Because the Petitioner filed the critical circumstance allegation within the appropriate deadline, it was considered for the preliminary determination (see 19 CFR 351.206(c)(2)(1)). Moreover, while DNP or Union make the case that they made their decision not to participate in the investigation prior to being aware of Petitioner's intent to file a critical circumstances allegation, we note that both the statute and the regulations indicate when critical circumstances allegations may be filed. Despite these provisions, the Respondents chose not to participate in the investigation.

With regard to DNP's argument that a critical circumstances determination is separate from the LTFV determination, we agree in part. While they are separate determinations, they are both part of the same proceeding, intricately linked within an investigation, and both are placed on the same administrative record.²⁵ As we stated in our letter of February 9, 2004, "when the Department considers proprietary, company-specific information, it does so using the totality of the information on the administrative record, which encompasses necessary information for *both* determinations."

Information provided by a respondent in an investigation includes information such as quantity and value of sales, corporate structure and affiliations, date of sale, sales process, etc., which are key to understanding the LTFV determination, but also needed when analyzing a critical circumstances allegation with respect to specific producers. For example, because questions regarding DNP's affiliation with other entities were not finalized due to DNP's withdrawal from the investigation, the Department is unable to determine whether the import data that was provided by DNP was complete. Moreover, the Department is unable to determine the accuracy of the dates used by DNP to report the import volumes (*e.g.*, date of sale, date of shipment, etc.). Therefore, given that information key to an

²⁴ See section 733(e)(1) of the Act.

²⁵ We note that the Department makes several determinations within an investigation. For example, the Department may make determinations on topics such as scope, home market viability and sales-below-cost allegations.

analysis of critical circumstances is missing because DNP withdrew from the investigation, the Department is unable to use company-specific information, which limits the analysis to the data on the record. Therefore, although the LTFV determination and the critical circumstances allegations may be separately determined by the Department, both determinations share significant amounts of necessary information.

With regard to DNP's and UC's argument that the Department verify the rejected critical circumstances data, we disagree. In essence, DNP and UC are requesting that the Department verify a selective piece of information only. Assuming, *arguendo*, the Department verified the data submitted by DNP and UC, such verification would necessarily rely on significant new information because, as demonstrated above with respect to the type of TTR they imported, the supporting information was withdrawn or was never submitted. If we were to verify the information submitted by DNP and UC, the Department would break a key concept of verification, which is to confirm the completeness and accuracy of information already submitted on the record. Moreover, verification is not an opportunity for parties to submit information they either withdrew or failed to provide on the due date requested by the Department. Although DNP offered to provide additional information to facilitate the Department in a possible verification, DNP would be required to resubmit all data which they had already withdrawn. In any case, because DNP withdrew from the investigation and the critical circumstances data was rejected, there is no data on the record to verify.

With regard to DNP's arguments regarding the proper HTSUS code for an analysis of import increases, we disagree. DNP argues that the HTSUS codes used by the Petitioner in its critical circumstances allegation and consequently relied upon by the Department in the Preliminary Determination are not reflective of DNP's imports. DNP argues that HTSUS code 3702 is the HTSUS code used by DNP for imports of TTR from Japan to the United States during the period of analysis. Furthermore, DNP argues that the Department should either use ITC data to confirm its claim or request that CBP provide this information to the Department. However, inherent in DNP's arguments is a fact which is not on the record of this investigation; DNP imported TTR from Japan under HTSUS 3702. First, when DNP withdrew from the investigation, all business proprietary information submitted by DNP was destroyed at its request on November 3, 2003, which the Department did on November 17, 2003. Therefore, any information on the record regarding the HTSUS code provided by DNP would have been destroyed.

Second, DNP's request that the Department seek the CBP data for purposes of confirming that DNP uses HTSUS code 3702 is not appropriate. In making this request, DNP exposes a critical fault in its underlying data in that there is no support on the record for its assertion that it imported all its TTR exclusively under HTSUS code 3702. It therefore suggests that the Department has the burden for filling that hole in the supporting data. "The burden of production {belongs} to the party in possession of the necessary information." Zenith Elecs. Corp. vs. United States, 988 F.2d 1573, 1583 (Fed. Cir. 1993). Moreover, information which would have supported DNP's claim was withdrawn at its own request not only creating the lacuna in the data, which it now expects the Department to remediate, but also providing a clear example that the data it withdrew (which it characterized in an oversimplified

manner as “LTFV” or “price-comparison data”) is directly relevant to the critical circumstances analysis. While it is undeniable that an allegation of critical circumstances results in the Department requesting certain additional information, such additional information supplements the data already on the record. For these reasons, the Department declines to request and review such data from CBP.

With regard to DNP’s argument that it should not receive AFA treatment with respect to the Department’s determination on critical circumstances, we disagree. At a minimum, AFA continues to be appropriate because the above example shows the claimed distinct LTFV and critical circumstances data are linked. Therefore, failure to provide responses to Section A-C of the questionnaire (withdrawing its responses and not answering supplemental questionnaires) demonstrates a failure to cooperate to the best of their ability in the investigation that must result in AFA for both the LTFV and the critical circumstances determinations. In such a context, Petitioner’s request that we solicit the critical circumstances data was inappropriate, and resulted in our not collecting the data.

With regard to the Petitioner’s argument that the Department use AFA for the “all others” critical circumstances, we disagree. Using AFA critical circumstances for the “all others” companies, the Department would inappropriately treat the “all others” as mandatory respondents. The standards for the mandatory respondents are not applicable to the “all others”. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Japan, 64 FR 30574 (June 8, 1999). Consequently, our preliminary determination with respect to the critical circumstances allegation for the “all others” remains unchanged.

Therefore, we have not changed our determination with respect to the critical circumstances determinations for DNP, Union or the “all others” from the Preliminary Determination.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of the investigation and the final weighted-average dumping margins in the Federal Register.

AGREE _____ DISAGREE _____

James J. Jochum
Assistant Secretary
for Import Administration

Date