Gold East Paper (Jiangsu) Co. v. United States
Court No. 10-00371; Slip Op. 13-74 (CIT 2013)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. Summary

The Department of Commerce ("Department") prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("CIT" or the "Court"), issued on June 17, 2013, in *Gold East Paper (Jiangsu) Co. v. United States*, Court No. 10-00371, Slip Op. 13-74 (CIT 2013) ("Remand Order"). These remand results concern *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 75 FR 59217 (September 27, 2010) as amended by *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Amended Final Determination of Sales at Less than Fair Value and Antidumping Order,* 75 FR 70203 (November 17, 2010), (collectively, "*Final Determination*").

As set forth in detail below, pursuant to the Court's Remand Order we: (1) calculated the value of certain inputs using only market economy purchase ("MEP") prices; (2) used prices from Korea and Thailand for purposes of valuing certain other inputs; (3) corrected certain programming errors in the targeted dumping calculation; (4) reconsidered the classification of certain of APP-China's[1] sales as export price ("EP"), without changing that classification; and (5) found that as a result of the revisions with respect to the remanded issues, our targeted dumping analysis indicates that the application of the average-to-average methodology can adequately account for the pricing differences and, thus, applied the average-to-average

[1] Gold East Paper (Jiangsu) Co., Ltd. ("GE"), Gold Huasheng Paper Co., Ltd. ("GHS"), Gold East (Hong Kong) Trading Co., Ltd. ("GEHK"), Ningbo Zhonghua Paper Co., Ltd. ("NBZH"), Ningbo Asia Pulp and Paper Co., Ltd. ("NAPP"), (collectively, "APP-China").

comparison methodology. On September 13, 2013, the Department issued the Draft Results of Redetermination Pursuant to Court Remand ("Draft Results") and requested comments from parties. On October 28, 2013, we received comments from the Petitioners[2] and APP-China.[3] On November 13, 2013, the Department released additional calculations to interested parties,[4] on which Petitioners submitted comments on November 18, 2013.[5]

B. Background

Use of Market Economy Prices for Certain Inputs

In the *Final Determination*, the Department valued inputs using a mixture of MEP prices and surrogate values in all cases where APP-China's MEPs of the input were below the Department's 33 percent threshold.[6] In the Remand Order, the CIT held that applying that threshold in instances where the market economy ("ME") prices constituted 32.9 percent of all purchases was arbitrary and capricious, as there is "no meaningful distinction for purposes of determining Normal Value between" that quantity and the Department's 33 percent threshold.[7] Accordingly, the Court held that the Department must recalculate the valuation of these disputed inputs using only the ME prices.[8]

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[2] Appleton Coated LLC, NewPage Corporation, S.D. Warren Company d/b/a/ Sappi Fine Paper North America, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("Petitioners").

[3] *See* Petitioners' submission titled "Remand from the Court of International Trade, slip opinion 13-74, Gold East Paper (Jiangsu) Co. v. United States, CIT Cons. Court No. 10-00371, Antidumping Duty Investigation of Certain Coated Paper from the People's Republic of China, Comments on Preliminary Analysis on Remand" dated October 28, 2013 and APP-China's submission titled "APP-China's Comments on Draft Results of Redetermination Certain Coated Paper from China" dated October 28, 2013.

[4] *See* the Department's memorandum titled "Release of Additional Margin Calculations," dated November 13, 2013.

[5] *See* Petitioners' submission titled "Remand from the Court of International Trade, slip opinion 13-74, Gold East Paper (Jiangsu) Co. v. United States, CIT Consol. Court No. 10-00371, Antidumping Duty Investigation of Certain Coated Paper from the People's Republic of China, Comments on Further Disclosure of Draft Results on Remand.

[6] *See Final Determination* and accompanying Issues and Decision Memorandum ("IDM") at Comment 18.

[7] *See* Remand Order at 6.

[8] *Id.* at 31.

Use of Market Economy Purchases of Inputs from Korea and Thailand

In the *Final Determination*, the Department declined to use input prices from Korea and Thailand as a basis for valuing a number of APP-China's inputs, and instead valued those inputs using import data. The Department found that, based on the existence of subsidy programs that were generally available to all exporters during the period of investigation ("POI") in those countries, there was reason to believe or suspect that those prices may have been subsidized.[9]

The CIT held that the record lacks substantial evidence for the Department's decision to reject those prices. The Court directed the Department to either; 1) reopen the record and make particularized findings in support of its decision to ignore the Korean and Thai price data (specifically referring to the criteria from *Fuyao Glass*)[10]; or 2) reverse its decision to not use the pricing data from Korea and Thailand.[11] Petitioners requested that the Department reopen the record to collect information on these prices, and met with Department officials on that topic.[12] However, as discussed below, we determined not to reopen the record in this case.

Targeted Dumping Programming Issues

Pursuant to the Department's request for a voluntary remand to examine the calculation program and, if appropriate, to correct certain alleged programming errors, the Court remanded to the Department a number of computer programming issues related to the targeted dumping calculation which was used in the *Final Determination*. The Court instructed the Department to review each of the potential issues, and to correct any errors found or explain why the Department believes the errors do not exist.[13]

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[9] *See Final Determination*, and accompanying IDM at Comment 17.
[10] *See Fuyao Glass Indus. Group Co. v. United States*, 29 CIT 109 (2005) ("*Fuyao Glass*").
[11] *See* Remand Order at 9.
[12] *See* Letter from Petitioners dated July 26, 2013, *see also* memorandum titled "Meeting with Counsel to the Petitioners" dated September 9, 2013.
[13] *Id.* at 19.

Export Price vs. Constructed Export Price Analysis

In the *Final Determination*, the Department accepted APP-China's classification of certain sales as EP despite Petitioners' contention that the fact that they were made by an affiliate, GEHK, and shipped under delivered duty paid ("DDP") and delivered duty unpaid ("DDU") terms indicates that they should be classified as constructed export price ("CEP") sales.[14] The Court remanded this issue to the Department to reopen the question of whether these sales were EP or CEP.[15] The Court held that the Department should 1) review the record to determine if there is further evidence of where the sales were made, and 2) provide further analysis of why the sales in question should be deemed EP or CEP, including a discussion of how the fact that the sales were made by an affiliate should affect that determination.[16]

Application of Targeted Dumping Remedy to All Sales

After making an affirmative finding of targeted dumping in the *Final Determination*, the Department applied its average-to-transaction calculation methodology to all of APP-China's sales.[17] The Court held, however, that the Department improperly withdrew its regulation 19 CFR 351.414(f)(2), which states that the application of targeted dumping should "normally" be limited to those sales that "constitute targeted dumping."[18] Consequently, the Court held that, "{a}ssuming the finding of targeted dumping remains positive after reconsideration of other issues addressed in this opinion, Commerce must limit application of the targeted dumping remedy to targeted sales, or provide an adequate explanation as to why the situation is not a 'normal' one before applying the remedy to all APP-China sales."[19]

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[14] *See* Final Determination.
[15] *See* Remand Order at 25.
[16] *Id.*
[17] *See* Final Determination.
[18] *See* Remand Order at 11.
[19] *Id.* at 16.

C. Analysis

Issue 1: Use of Market Economy Prices for Certain Inputs

As the Court ordered, we recalculated the valuation of APP-China's tackifier and thickener inputs by relying solely on APP-China's reported MEP prices, rather than a mixture of those prices and Indian import data.[20]

Issue 2: Use of Market Economy Purchases of Inputs from Korea and Thailand

The Court ordered that the Department should either 1) reopen the record and make particularized findings in support of its decision to disregard the Thai and Korean price data (specifically referring to the criteria from *Fuyao Glass*) or 2) reverse its decision to not use the pricing data from Korea and Thailand. Consistent with the Court's order, we reversed our decision not to use the pricing data from Korea and Thailand and included them in our dumping calculations under protest.[21]

Issue 3: Targeted Dumping Programming Issues

Consistent with the Court's order, we examined the computer programming and corrected errors, where present. Parties identified four programming issues with regard to the targeted dumping methodology applied in the *Final Determination*: APP-China raised three issues, Petitioners raised one. We address each issue below.

First, APP-China alleged that the programming language failed to compare the average price to the alleged targeted customer to the "next higher weighted-average price of sales to a non-targeted customer" as described in the *Final Determination*.[22] We agree. Because of an error in the programming, the calculation effectively identified the smallest non-targeted price

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[20] The Department is respectfully conducting this remand under protest with respect to Issue 1, these ME purchase volumes, as well as with respect to Issues 2 and 5. *Viraj Group Ltd v. United States*, 343 F.3d 1371 (Fed. Cir. 2003).

[21] *See* further discussion *infra* at Department's Position with respect to the comments on Issue 2.

[22] *See Final Determination*, and accompanying IDM at Comment 3.

above the alleged targeted price that passed the gap test by comparing each non-targeted price above the alleged targeted price in ascending order. Accordingly, we corrected this error, consistent with corrections to the targeted dumping analysis outlined in *Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (October 18, 2011) ("*Wood Flooring from the PRC* (2011)") and accompanying IDM at Comment 3. After fixing the error, the computer program now compares only the smallest non-targeted price above the alleged targeted price in the gap test, regardless of whether that comparison passes or fails the gap test.

Second, APP-China alleged that the Department, when calculating the average price gap for the second stage of the targeted dumping analysis, disregarded the prices from non-targeted customers that had average prices below the average price to the alleged targeted customer. We do not agree that this constitutes an error. As explained in the *Final Determination*, the second stage of the targeted dumping analysis aims to calculate the difference between the weighted-average price of sales to the alleged targeted customer "and the next higher weighted-average price of sales for the non-targeted group."[23] The calculation appropriately makes those exact comparisons to higher weighted-average prices, and so there is no error in this regard.

Third, APP-China alleged that the Department mistakenly applied conclusions that were based on a small subset of sales to the entire data set of sales. We find that this does not constitute a programming or other type of error, because the subset of analyzed sales depends on the pool of sales identified as part of the alleged targeted customer or region, which itself is dependent on the targeted dumping allegation. In any event, as explained in issue five, below, after reconsidering other issues on remand, the targeted dumping analysis resulted in the application of the average-to-average methodology to all APP-China's sales.

[23] *Id.*

Finally, Petitioners maintain that the Department should correct the second programming error which it corrected in *Wood Flooring from the PRC* (2011) subsequent to the *Final Determination*.[24] In this instance, the calculation of the weighted-average non-targeted gap was using a cumulative gap while the calculation should use a simple gap. We corrected this programming error, consistent with the corrections we made in *Wood Flooring from the PRC* (2011).

Issue 4: Export Price vs. Constructed Export Price Analysis

During the underlying investigation, APP-China reported as EP certain sales that were delivered under terms of DDP or DDU. For the *Final Determination*, the Department found that because these sales were sold by GEHK to unaffiliated U.S. customers prior to the date of importation (based on invoice date), the sales were correctly classified as EP sales in accordance with section 772(a) of the Tariff Act of 1930, as amended ("Act"). The Court directed the Department to review the record to determine if there is further evidence of where the sales were made, and to discuss how the fact that the sales were made by an affiliate affects the Department's determination as to whether the sales were EP or CEP.[25] We reviewed the record in accordance with the Court's instruction and continue to find that these sales should be classified as EP.

The statute defines EP as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States or to an

[24] *See Wood Flooring From the PRC* (2011), and accompanying IDM at Comment 3.

[25] We note that the original issue raised by Petitioners in the *Final Determination* as to whether these sales were properly classified as EP or CEP was focused on the role of GPS, APP-China's U.S. affiliate, in these sales. As discussed below and confirmed by the Court, the sales at issue were made by GEHK, not GPS.

unaffiliated purchaser for exportation to the United States."[26] The statute defines CEP as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the produce or exporter, to a purchaser not affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter..."[27]

First, we complied with the Court's order and discuss how the fact that the sales were made by an affiliate should affect the determination as to whether the sales were EP or CEP. The Court stated that "the statute...distinguishes between sales made by the producer and those made by another party on behalf of the producer," and that "under the statute, if GEHK was the seller but not the producer or exporter of the merchandise in question, the sale cannot be an EP sale."[28] The Court also noted that there did not appear to be any indication on the record that the Department collapsed the affiliates of Gold East (including GEHK) for purposes of the EP/CEP analysis.[29]

In the *Preliminary Determination*,[30] unchanged in the *Final Determination*, the Department found that GE, GHS, NBZH, NAPP, and GEHK were affiliated and should be treated as a single entity, consistent with 19 CFR 351.401(f)(1) and (2).[31] With respect to GEHK, the Department specifically collapsed GEHK as an exporter of subject merchandise with

[26] *See* section 772(a) of the Act.
[27] *See* section 772(b) of the Act.
[28] *See* Remand Order at 23.
[29] *Id.* at footnote 9.
[30] *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*,75 FR 24892, 24899 (May 6, 2010) ("*Preliminary Determination*").
[31] *See also* the Department's Memorandum titled, "Antidumping Duty Investigation of Certain Coated Paper from the People's Republic of China: Affiliation and Collapsing of Gold East Paper (Jiangsu) Co., Ltd., Gold Huasheng Paper Co., Ltd., Ningbo Asia Pulp and Paper Co., Ltd., Ningbo Zhoughua Paper Co., Ltd., and Gold East (Hong Kong) Trading Co., Ltd.," dated April 28, 2010 ("Collapsing Memo").

its affiliated producers GE, GHS, NAPP, and NBZH because of the significant potential for manipulation of price or production between the parties:

> While GEHK is not a producer of coated paper, we note that where companies are affiliated, and there exists a significant potential for manipulation of prices and/or export decisions, the Department has found it appropriate to treat those companies as a single entity. The Court of International Trade ("CIT") upheld the Department's decision to include export decisions in its analysis of whether there was a significant potential for manipulation. *See Hontex Enterprises v. United States*, 248 F. Supp. 2d 1323, 1343 (CIT 2003). In this case, not only is GEHK an exporter of subject merchandise, but it is an exporter of the subject merchandise produced by its four affiliated producers of subject merchandise (*i.e.*, GE, GHS, NAPP, and NBZH).[32]

Moreover, in addition to being the exporter, GEHK was involved in the production of subject merchandise, based on the toll processing arrangement GEHK maintained with certain mills. As stated in APP-China's Supplemental Section A response, GEHK purchased and provided raw materials to the mills used in the production of subject merchandise. GEHK maintained title to these inputs and paid the mills a fee for processing the raw materials into subject merchandise.[33] Because the operations of the APP-China companies are overwhelmingly intertwined, the Department collapsed the entities and determined that they should be treated as a single entity, consistent with 19 CFR 351.401(f)(1) and (2).[34] Therefore, because GEHK was collapsed in the Department's original determination and is part of APP-China, GEHK was not merely the "seller affiliated with the producer or exporter" as contemplated under section 772(b) of the Act, but rather part of the single APP-China entity, *i.e.*, the producer/exporter of subject merchandise.

Next, the Court asked the Department to review the record to determine if there is further evidence of where the sales were made. The Court states that "absent from the record is a

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[32] *See Preliminary Determination*, 75 FR at 24899.
[33] *See* March 16, 2010 Supplemental Section A at 11.
[34] *See* Collapsing Memo.

discussion of where and by whom the negotiations were held," that "there is no mention of whether there was an overall sales agreement covering the sales in question," and that "Commerce does not discuss the importance of the fact that payments went from the U.S. customers to GEHK."[35] We complied with the Court's order and reviewed the record to determine if there is further evidence as to existing agreements, transactions, and the location of negotiations for relevant sales.

APP-China had a complicated selling process, involving multiple entities and various sales channels. Based on information contained in its Section A responses, its Supplemental Section A response, and verification exhibits, APP-China's selling process for these "indirect EP sales" is as follows:[36]

- GPS, APP-China's U.S. affiliate, receives a purchase order from the unaffiliated U.S. customer, which it passes on to GEHK and the PRC mills. The purchase order represents the initial agreement with the unaffiliated U.S. customer, and all sales were made pursuant to purchase orders.
- The PRC mills produce the merchandise under an inward processing toll arrangement, whereby GEHK provides certain raw materials to the PRC mills for processing.[37] GEHK holds title to the subject merchandise sold prior to reaching the ultimate customer.[38]
- When the merchandise is ready for shipment, GEHK prepares, issues, and transmits the invoice directly to the unaffiliated U.S. customer. This invoice lists the unit price, quantity, and total amount due.

[35] *See* Remand Order, at 23.

[36] *See, e.g.*, December 23, 2009, Section A responses at 21-23 and Exhibit 3; *see also* March 16, 2010, Supplemental Section A Response at 1-3, and Exhibits SA-17-19.

[37] *See below*, for further discussion regarding this tolling arrangement.

[38] *See* March 16, 2010, Supplemental Section A Response at Exhibits SA-17-19.

- The PRC mills arrange transportation to the unaffiliated U.S. customer, arrange for PRC Customs clearance, issue the PRC tax invoice, issue the bill of lading, and pay for freight, insurance, and brokerage and handling.
- With respect to Court's observation that "Commerce does not discuss the importance of the fact that payments went from the U.S. customers to GEHK,"[39] we find that the unaffiliated U.S. customer makes the payment directly to GEHK, and GEHK then pays the PRC mills a processing fee for the processing of the merchandise pursuant to the tolling arrangement. In addition, based on our review of the payment dates, shipment dates, and entry dates, we find that the payments from the unaffiliated U.S. customer to GEHK were sometimes made prior to the date of delivery.[40]

The Court states that there is no discussion of where title transferred other than the use of DDP and DDU shipping terms. While APP-China argues that commercial law dictates that title transfers at delivery under DDP and DDU shipping terms, we continue to disagree that the shipping terms dictate where the sale was made for purposes of determining whether the sales were EP or CEP. As we stated in the *Final Determination*,

> the Department has determined to use the date of invoice as the date of sale for APP-China (GEHK)'s exports to the United States, consistent with 19 CFR 351.401(i), because the invoice date best reflects the date on which APP-China (GEHK) established the material terms of sale. We do not find that the date on which the material terms of sale were established was a function, in any way, of the delivery date of the merchandise.[41]

The Department uses the date of sale to identify the universe of sales to examine during the POI or POR, and the establishment of a proper date of sale ensures consistency across proceedings. Thus, identifying a date when the material terms of the sale are set is critical for the

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[39] *See* Remand Order at 23.

[40] *See, e.g.*, GE/GHS/NBZH/NAPP U.S. sales databases, December 23, 2009, GE Section A at Exhibit A-2, and verification exhibit 41.

[41] *See Final Determination*, and accompanying IDM at Comment 9.

Department's dumping analysis. Additionally, the date of sale serves as the basis of comparison between home market sales, U.S. sales, and costs of production in ME proceedings and the basis of comparison between U.S. sales and normal value (based on factors of production) in non-ME proceedings to calculate dumping margins. Generally, the Department will use the date of the invoice as recorded in the producer or exporter's books and records as the date of sale, though other dates may be used if the material terms of sale are established at a different point.[42]

APP-China stated in its responses that the invoice date best reflects the date of sale because sales terms may change until the invoice is issued.[43] Additionally, APP-China stated, "as there were changes to the practical terms of sale after the issuance of the sales confirmation, the invoice date (the date at which prices and quantities are set) is the appropriate date of sale for the APP Companies."[44] Thus, it is clear from the record that the material terms of the sale were set when GEHK issued the invoice to the U.S. customer, which took place outside the United States prior to the date of importation.

The Federal Circuit's decision in *Corus Staal* highlights the importance of establishing when the material terms of the sale are set in determining the date of sale or an agreement to sell. The Court stated, "{n}either a sale or agreement to sell occurs until there is mutual assent to the material terms (price and quantity)."[45] The Court in *Corus Staal* then explained that the terms "sale" and "agreement to sell," as written in the statute, have separate definitions. Citing *AK Steel*,[46] in defining "agreement to sell" the Court in *Corus Staal* stated, "{a}n 'agreement to sell' is a binding commitment that has not yet been consummated by the exchange of goods for

[42] *See* 19 CFR 351.401(i).
[43] *See* December 23, 2009, GE Section A Response at 21.
[44] *See* March 16, 2010, Supplemental Section A Response at 12.
[45] *See Corus Staal*, 502 F.3d 1370 at 1376.
[46] *See AK Steel*, 226 F.3d 1361 at 1370-71.

consideration, *i.e.*, the 'sale' itself."[47] In the instant case, although the title of the goods may not transfer until delivery under DDP and DDU terms, APP-China and its unaffiliated U.S. customer had a binding "agreement to sell" before the date of importation when the invoice was issued outside the United States, as that was when the material terms of sale were set.

Moreover, regardless of the delivery terms, the record of this case indicates that GEHK (which is part of the single entity, APP-China) was sometimes paid by the U.S. customer prior to the date of delivery.[48]

The issue of what constitutes a sale was also discussed in *Nucor*, where the Court cites to both *AK Steel* and *Corus Staal*. Though the structure of the transactions in *Nucor* differ from the instant case, the Court found that "all activities relevant to sales of ICDAS' rebar to U.S. customers – including sales negotiations, issuance of invoices, and preparation of documentation to facilitate payment – were handled outside the United States, by ICDAS personnel in Turkey."[49] *Nucor* also focused on where the terms of sale were set: "In this case, the terms of the sale, including price, were set outside the United States."[50] Here, the terms of the sale were set outside of the United States, and GEHK in Hong Kong handled processing of the sales confirmations, issuance of invoices, and preparation of documentation to facilitate payment outside the United States prior to the date of importation.[51] Therefore, we find that, if not the sale itself, but at least the agreement to sell occurred outside the United States prior to the date of importation based on the issuance of the invoice and the receipt of payment by GEHK.

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[47] *See Corus Staal*, 502 F.3d 1370 at 1376-1377.

[48] *See, e.g.*, GE/GHS/NBZH/NAPP U.S. sales databases, December 23, 2009, GE Section A at Exhibit A-2, and verification exhibit 41.

[49] *See Nucor*, 612 F.Supp. 2d 1264 at 1279.

[50] *Id.* at 1281.

[51] We note that the Court in *AK Steel* reversed the Department's practice of examining and relying on the activities of an affiliated U.S. importer to determine the classification of the sale as EP or CEP. GEHK, located in Hong Kong, is the affiliated exporter in this case. Consistent with this Court's Remand Order, as well as the Court's decisions in *AK Steel*, *Nucor* and *Corus Staal*, we are examining relevant facts to determine when and where the sales at issue took place.

Therefore, because GEHK, the exporter of the merchandise, sold, or agreed to sell (based on the issuance of the invoice to the unaffiliated U.S. customer), the subject merchandise outside the United States before the date of importation to an unaffiliated purchaser in the United States, we continue to find that the transactions in question were properly classified as EP sales.

Issue 5: Application of Targeted Dumping Remedy to All Sales

While the Department respectfully disagrees with the Court, it complied with the Court's order under protest. The Court held that, "assuming the finding of targeted dumping remains positive after reconsideration of other issues addressed in this opinion," the Department must apply the average-to-transaction methodology only to those sales which constitute targeted dumping, or provide an adequate explanation as to why this situation is not a "normal" one.[52] After making the changes to the calculations in the *Final Determination* with respect to other issues addressed in the Court's opinion, the Department continues to find that APP-China's sales prices had a pattern of pricing that differed significantly among U.S. customers for comparable merchandise during the POI. Specifically, the analysis found that targeted sales met both the "significant deviation test" threshold and the "gap test" threshold described in the *Final Determination*. However, the Department finds that it is not the case that the price differences identified cannot be taken into account using the standard average-to-average methodology because the average-to-average methodology does not account for price differences. The resulting weighted-average margin under both average-to-average comparison methodology and the average-to-transaction methodology limited to the sales that were found to be targeted is below the *de minimis* threshold.[53] Accordingly, we applied the standard average-to-average

[52] *See* Remand Order at 16.

[53] *See* memorandum titled "Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Analysis of the Draft Remand Redetermination Margin Calculation for APP-China" dated October 28, 2013.

comparison methodology to all sales to calculate weighted-average dumping margins for APP-China.

D. DISCUSSION OF INTERESTED PARTIES' COMMENTS

Issue 1: Use of Market Economy Prices for Certain Inputs

No party commented on this issue.

Issue 2: Use of Market Economy Purchase Prices of Inputs from Korea and Thailand

Summary of parties' comments

Petitioners argue that, because the Department did not explain its reasons for accepting the Korean and Thai prices other than to state that it was doing so at the Court's directive and under protest, the decision is legally erroneous. Citing *Fuyao Glass*, Petitioners contend that the Department cannot comply with the Remand Order without either agreeing with the Court's conclusion on this issue, or, alternatively, reopening the record to solicit additional evidence in support of its original position. Petitioners argue that, under these circumstances, the Department has "no choice but to seek the most accurate margin by re-opening the record so as to confirm or deny that which it has maintained in all of its NME proceedings for many years."[54]

No other party commented on this issue.

Department's Position: We disagree with Petitioners. The Court instructed the Department to either: 1) reopen the record and make particularized findings in support of its decision to ignore the Korean and Thai price data (specifically referring to the criteria from *Fuyao Glass*); or 2) reverse its decision to not use the pricing data from Korea and Thailand.[55] We respectfully disagree with both options that the Court presented to the Department, but we complied with the Court order by selecting the second option under protest.

[54] *See* Petitioners' Comments on Preliminary Analysis on Remand dated October 28, 2013, at page 9.
[55] Remand Order at 9.

As stated in the Draft Results, the Department has a long-standing practice to disregard certain prices, including those from Korea and Thailand, when we find reason to believe or suspect that those prices may have been subsidized, as we did in the *Final Determination*. If a country maintains broadly available, non-industry specific export subsidies, our practice is to find the existence of such subsidies sufficient reason to exclude it from import data used to calculate FOP values.[56] The Department found that it is reasonable to infer that all exporters from the country may have benefitted from these subsidies.[57] Based on this inference, it is also the Department's longstanding practice to not obtain further evidence or conduct a formal investigation to determine whether such prices are subsidized, but instead to base its decision only on information available to it at the time it makes its determination.[58] Therefore, we determined not to reopen the record.

With regard to Petitioners' reliance on *Fuyao Glass*, we find it to be misplaced. In that case, the CIT directed the Department to "concur with the court's conclusion" if it declined to reopen the record and collect additional evidence regarding subsidies.[59] In contrast, the Remand Order does not require the Department to concur with the Court and holds that the Department may either "reverse" its decision to reject the Korean and Thai prices or reopen the record and apply the *Fuyao Glass* analysis.[60] The Department does not believe that in this case the Court requires the agency to concur with its decision and thereby possibly undermine its options with

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[56] *See, e.g., Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 36168 (June 17, 2013).

[57] *See, e.g., Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*; 2011-2012 78 FR7 70533 (November 26, 2013) and accompanying IDM at Comment 5.

[58] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 FR 20594 (April 16, 2004), and accompanying IDM at Comment 7. Congress explained that Commerce need not "conduct a formal investigation to ensure that such prices are not subsidized, but rather…[need only] base its decision on information generally available to it at that time." H.R. Rep. No. 100-576, at 591 (1988) (Conf. Rep.).

[59] *See Fuyao Glass*, 29 CIT at 118.

[60] *See* Remand Order at 9.

respect to any potential appeal.[61] Thus, our decision in the Draft Results is in compliance with the Court's instructions.

Issue 3: Targeted Dumping Programming Issues

No party commented on this issue.

Issue 4: Export Price vs. Constructed Export Price Analysis

No party commented on this issue.

Issue 5: Application of Targeted Dumping Remedy to All Sales

Summary of parties' comments

Petitioners argue that the Department's Draft Results did not comply with its prior targeted dumping practice, as the calculations incorrectly allowed for the offset of margins within the group of sales found to be targeted with margins from the sales not found to be targeted. Further, Petitioners contend that the circumstances in this case create the type of instance whereby the Department may determine that APP-China's targeted dumping is not "normal," and so could apply the alternative methodology to all of APP-China's sales. Specifically, Petitioners note that the Court held that the Department need not limit the application of the targeted dumping methodology to targeted sales if it could explain why this case was not a "normal" one.[62]

APP-China, while agreeing with the decision in the Draft Results, contends that the Department should address how its analysis complies with its targeted dumping regulations. Even though the targeted dumping remedy was not ultimately applied, APP-China argues that the Department should fully comply with the Court's instructions by addressing the targeted dumping regulation.

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[61] *See Viraj Group Ltd v. United States*, 343 F.3d 1371 (Fed. Cir. 2003).
[62] *See* Petitioners comments dated November 18, 2013, at page 2.

Department's Position: As an initial matter, we do not agree with Petitioners that this situation is not "normal," and thus justifies the application of the average-to-transaction methodology to all of APP-China's sales. Petitioners do not cite to any prior case that requires the Department to reach the conclusion that the situation in this case is not "normal." In fact, the Department indicated that the only circumstances that may support such a decision include when "targeted dumping by a firm is so pervasive that the average-to-transaction method becomes the best benchmark for gauging the fairness of that firm's pricing practices,"[63] or, alternatively, when "the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company."[64] We find neither of these circumstances is present here. Because of the proprietary nature of this analysis, for further discussion, *see* Final Remand Analysis Memo.[65] Moreover, we discern no other distinguishing facts or features of the U.S. sales (targeted or otherwise), and Petitioners did not articulated any either, that would justify the conclusion that the "normal" targeted dumping analysis is inappropriate. Accordingly, consistent with our past practice, which was previously affirmed by this Court,[66] we decline to find that the specific circumstances of this case are abnormal.

However, we agree with Petitioners that in evaluating whether the average-to-average methodology can adequately account for the significant difference in the pattern, the calculations in the Draft Results were not consistent with prior practice. Accordingly, we adjusted the calculation to ensure that dumping within the targeted group's margins is not masked by offsets

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[63] *See Antidumping Duties; Countervailing Duties*, 61 FR 7308, 7350 (February 27, 1996).

[64] *See Preamble*, 62 FR at 27375.

[65] Memorandum to the file entitled "Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Analysis of the Final Remand Redetermination Margin Calculation for APP-China" dated concurrently with this final remand redetermination ("Final Remand Analysis Memo").

[66] *See Chang Chun Petrochemical Co. Ltd., v. United States*, 906 F.Supp.2d 1369, 2013 Ct. Int'l Trade LEXIS 51, at *13-14 (CIT 2013).

with non-dumped sales in the non-targeted group. This manner of calculating the potential uncollected dumping duty, both within targeted and non-targeted groups and when combining the groups, is consistent with prior Department decisions.[67] Further, because the calculation allows offsetting for non-dumped sales within the non-targeted group, it is consistent with the Court's directive to limit the application of the average-to-transaction methodology to sales found to be targeted.

We note, however, that the differences resulting from these revisions were insufficient to alter the Department's finding that there is no meaningful difference between the antidumping duty margin under the average-to-transaction (when applied to the targeted sales only) and the average-to-average comparison methodologies, as the resulting weighted-average margin under both methods is not above the *de minimis* threshold.[68] Accordingly, we applied the standard average-to-average comparison methodology to all sales to calculate weighted-average dumping margins for APP-China.

Regarding APP-China's argument, we disagree. The Department reconsidered its application of the targeted dumping methodology in this case and adjusted that calculation accordingly. Therefore, under protest, we complied with the Court's directive to reconsider the application of the targeted dumping remedy under the limiting rule. We do not apply the average-to-transaction comparison methodology to the targeted sales because the statutory prerequisites for its application are not satisfied. APP China acknowledges this in its comments and states that in light of this "ordinarily, APP-China would not raise this other issue" but

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[67] *See, e.g., 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 40485, (July 15, 2008) and accompanying IDM at Comment 23.E. See also, *Polyethylene Retail Carrier Bags From Indonesia: Final Determination of Sales at Less Than Fair Value* 75 FR 16431 (April 1, 2010) and accompanying IDM at Comment 1.

[68] *See* Final Remand Analysis Memo.

because the Department's determination is under protest, and there is a possibility of appeal, the Department would also need to discuss how it would apply the regulation under different facts.[69] The Department declines to speculate regarding any potential appeal or its outcome or the application of the regulation outside of the specific facts the agency addresses in context of this specific remand. Nor will we prejudge issues that may or may not end up before the Department in the future depending the outcome of any potential appeal in this or any other proceeding.

E. FINAL RESULTS OF REDETERMINATION

For the forgoing reasons the Department finds that the final weighted-average dumping margin for APP-China is 1.67 percent, which is *de minimis*.

Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

1/13/14
Date

[69] *See* APP-China Comments at 3.