September 30, 2014

Mid Continent Nail Corporation v. United States
Consol. Court No. 12-00133; Slip Op. 14-72

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. Summary

The Department of Commerce (the 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 26, 2014, in *Mid Continent Nail Corporation v. United States*, Consol. Court No. 12-00133; Slip Op. 14-72 (CIT 2014) (Remand Order). These remand results concern *Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value*, 77 FR 17029 (March 23, 2012) as amended by *Certain Steel Nails from the United Arab Emirates: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 77 FR 27421 (May 10, 2012), (collectively, *Final Determination*).

As set forth in detail below, pursuant to the Court's Remand Order we applied the previously-withdrawn targeted dumping regulation, 19 CFR 351.414(f)(2) (1997), such that we limited the application of the average-to-transaction comparison method only to those sales that the Department identified as targeted. Further, in accordance with the Remand Order, the Department provided an explanation, pursuant to section 777A(d)(1) of the Tariff Act of 1930, as amended (the Act), as to why the transaction-to-transaction comparison method cannot account for the differences in the U.S. sales prices of Dubai Wire FZE (DWE) and Precision Fasteners, LLC (Precision).

We released our draft results of remand redetermination to interested parties on August 12, 2014 (*Draft Remand*) and provided parties the opportunity to comment.[1] We received comments separately from DWE, Precision, and Mid Continent Nail Corporation (the petitioner) on August 19, 2014.[2]

In the *Final Determination*, the Department determined a weighted-average dumping margin of 6.09 percent for DWE and 2.51 percent for Precision. In these final results of remand redetermination, the Department determines a weighted-average dumping margin of 2.68 percent for DWE and 0.00 percent for Precision.

B. Background

After making an affirmative finding of targeted dumping in the *Final Determination*, the Department applied the average-to-transaction comparison method to all of DWE's and Precision's U.S. sales.[3] The Court held, however, that the Department had improperly withdrawn its regulations governing targeted dumping,[4] including 19 CFR 351.414(f)(2) (1997), which states that the application of average-to-transaction method will "normally" be limited to those sales that "constitute targeted dumping."[5] Consequently, the Court found that the Department "must apply the targeted dumping regulation …, mandating that {the Department} limit the scope of the average-to-transaction method to those sales {the Department} identifies as targeted sales"[6] and that the Department must determine whether any pattern of prices that differ significantly can be accounted for using either the average-to-average or the transaction-to-

[1] *See* the Department's August 12, 2014, comment deadline letters to interested parties.
[2] *See* DWE's brief dated August 19, 2014, Precision's brief dated August 19, 2014, and Mid Continent Nail Corporation's brief dated August 19, 2014 (Petitioner brief).
[3] *See Final Determination*.
[4] *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008) (*Withdrawal Notice*).
[5] *See* Remand Order at 26-31.
[6] *Id*., at 26-27.

transaction comparison method.[7] The Court also emphasized that the Department did not address whether the transaction-to-transaction comparison method would have been able to account for the targeted dumping found with respect to DWE and Precision, and ordered the Department to do so in its remand redetermination.[8]

C. Analysis

I. The Transaction-to-Transaction Comparison Method

In its Remand Order, the Court found that the *Final Determination* lacked an explanation regarding the insufficiency of using the transaction-to-transaction method in this investigation and ordered the Department to provide in the remand redetermination its rationale for abstaining from the consideration of this comparison methodology. For the following reasons, we find that use of the transaction-to-transaction method is inappropriate in this investigation.[9]

Section 777A(d)(1)(A) of the Act sets forth the general rule that the average-to-average method or the transaction-to-transaction method will be employed in less-than-fair-value investigations to calculate estimated weighted-average dumping margins. Section 777A(d)(1)(B) of the Act sets forth the exception to this general rule, by which the Department may employ the average-to-transaction method if (1) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time; and (2) the agency explains why such differences cannot be taken into account using the average-to-average method or the transaction-to-transaction method.

The Department's discretion to employ a preferred method is evidenced by the statute's use of the disjunctive term "or" in section 777A(d)(1)(B)(ii) of the Act, which signifies that the

[7] *Id*., at 31-32.
[8] *Id*., at 32, fn. 5
[9] The Department did not include an analysis with respect to the use of the transaction-to-transaction method in the *Final Determination* because no party raised this issue.

Department need only explain why one of the listed options (*i.e.*, the average-to-average method or the transaction-to-transaction method) cannot account for such differences. An interpretation of the statute by which the Department would be required to explain why both the average-to-average and the transaction-to-transaction methods cannot account for such differences would read into the statute's express terms a requirement that is not present. The statute does not say that the Department must "explain why such differences cannot be taken into account using the methods described in paragraphs (1)(A)(i) and (ii)." Nor does it say that the Department must "explain why neither the method described in paragraph (1)(A)(i) nor the method described in paragraph (1)(A)(ii) can take such differences into account." Rather, it simply says that the Department must explain "why such differences cannot be taken into account using *a* method described in paragraph (1)(A)(i) *or* (ii)" (emphasis added).

In considering the express terms and objectives of the statute, we find instructive the SAA,[10] the *Preamble* to the Department's regulations,[11] the regulations, and the Department's previous experience using the transaction-to-transaction method in *Softwood Lumber*.[12] Pursuant to 19 CFR 351.414(c)(1) (2012), the transaction-to-transaction method will be employed only in "unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." The *Preamble* to the regulations similarly provides that, "Congress did not contemplate broad application of the transaction-to-transaction method."[13] It then reiterates the points articulated in the SAA and

[10] *See* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 316, 103d Cong. 2d Session (1994), at 842-43.
[11] *See Antidumping Duties and Countervailing Duties*, 62 FR 27296 (May 19, 1997) (*Preamble*).
[12] *See Notice of Final Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 FR 22636 (May 2, 2005) (*Softwood Lumber*).
[13] *See Preamble*, 62 FR at 27374.

concludes that, "we continue to maintain that the transaction-to-transaction methodology should only be applied in unusual situations."[14]

The SAA explains that the Department will employ the transaction-to-transaction method "far less frequently" than the average-to-average method given the agency's "past experience with this methodology" and the "difficulty in selecting appropriate comparison transactions."[15] Like the regulations, the SAA further elaborates that the transaction-to-transaction method would be appropriate where "there are very few sales and the merchandise sold in each market is identical or very similar or is custom made."[16]

Each of these sources demonstrates that Congress intended that the Department would employ the transaction-to-transaction method in limited situations.[17] In this investigation, use of the transaction-to-transaction method is inappropriate because none of the unusual situations identified by Congress that may warrant use of this method are present, *i.e.*, there are a substantial number of sales.

The unique factual circumstances in *Softwood Lumber* that warranted use of the transaction-to-transaction method are also not present here. Specifically, in *Softwood Lumber*, the Department determined that use of the transaction-to-transaction method was appropriate because "among other things, the volatility of prices of subject merchandise and of the product sold in Canada during the {period of investigation} distinguishes this case from the norm."[18] The reason set forth in *Softwood Lumber* that warranted use of the transaction-to-transaction method – the volatility of prices – is not applicable to the instant proceeding because those

[14] *Id*., at 27373-74.
[15] *See* SAA at 842-43.
[16] *Id*., at 842.
[17] *See 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 at Comments 5, 6.
[18] *See Softwood Lumber*, 70 FR at 22639.

circumstances are not present with respect to DWE's and Precision's sales.[19] Thus, we find that the *Softwood Lumber* investigation is distinguishable.

For these reasons, we find that use of the transaction-to-transaction method is inappropriate because none of the unique circumstances that may warrant its use are present.[20] As such, the Department considered whether the average-to-average method could account for the pattern of prices that differ significantly.

II. Application of the Limiting Rule in 19 CFR 351.414(f)(2) (1997)

While the Department respectfully disagrees with the Court, it complies with the Court's order under protest.[21] The Court held that the targeted dumping regulations, including 19 CFR 351.414(f)(2) (1997), were improperly withdrawn because the *Withdrawal Notice* was invalid as it violated the notice and comment requirements of the Administrative Procedure Act (APA). Consequently, the Court ordered the Department to apply the withdrawn regulation. The Department continues to find that for both DWE and Precision, there was a pattern of export prices (or constructed export prices) for comparable merchandise that differed significantly among U.S. customers, regions, and time periods during the period of investigation. Specifically, our analysis revealed that targeted sales met both the "standard deviation test" threshold and the "gap test" threshold described in the *Final Determination.*[22] We note that 19 CFR 351.414(f)(2) (1997) states that the Department "normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping." Consistent with the regulation and the Court's order, we applied the average-to-transaction method to only those

[19] *Id*.
[20] *See Chang Chun Petrochemical Co. v. United States*, 906 F. Supp. 2d 1369 (CIT 2013) (affirming the Department's decision not to use the transaction-to-transaction method in a remand proceeding where none of the unique circumstances supporting its use were present).
[21] *See Viraj Group Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003).
[22] *See Final Determination*, 77 FR at 17031.

sales found to be targeted. Furthermore, we find that the record does not contain evidence to suggest that this normal limitation should not be applied.

For Precision, the Department finds that that the price differences identified can be taken into account using the standard average-to-average methodology. Specifically, the resulting weighted-average dumping margin for Precision under both the average-to-average comparison method and the average-to-transaction comparison method (limited to the sales that were found to be targeted) is *de minimis*.[23] Accordingly, the Department applied the standard average-to-average comparison method to all sales in order to calculate the weighted-average dumping margin for Precision.

For DWE, the Department finds that the observed pattern of prices that differ significantly cannot be taken into account using the standard average-to-average method. Specifically, the resulting weighted-average dumping margin for DWE under the average-to-average comparison methodology is *de minimis*, while under the average-to-transaction comparison methodology (limited to the sales that were found to be targeted) the resulting weighted-average dumping margin, *i.e.*, 2.68 percent, is above the *de minimis* threshold.[24] Accordingly, the Department applied the alternative average-to-transaction comparison methodology, limited only to targeted sales, in order to calculate the weighted-average dumping margin for DWE.

[23] *See* memorandum titled "Analysis Memorandum for Results of Redetermination (Consol. Court No 12-00133) for Precision Fasteners LLC in the Antidumping Duty Investigation of Certain Steel Nails from the United Arab Emirates" dated concurrently with these final results (Precision Remand Results Analysis Memo); *see also* memorandum titled "Antidumping Duty Investigation on Certain Steel Nails from the United Arab Emirates: Analysis Memorandum for Precision Fasteners, LLC with respect to the Ministerial Errors in the Final Determination" dated April 23, 2012, at page 374.

[24] *See* memorandum titled "Analysis Memorandum for Results of Redetermination (Consol. Court No 12-00133) for Dubai Wire FZE in the Antidumping Duty Investigation of Certain Steel Nails From the United Arab Emirates" dated concurrently with these final results (DWE Remand Results Analysis Memo); *see also* memorandum titled "Antidumping Duty Investigation on Certain Steel Nails from the United Arab Emirates: Analysis Memorandum for Dubai Wire FZE with Respect to the Ministerial Errors in the Final Determination" dated April 23, 2012, at page 340.

D. Comments

Precision

Precision comments that the *Draft Remand* properly implements the Court's Remand Order with respect to Precision. Precision comments that the Department should finalize the results of its Draft Remand and issue them as final within the deadline prescribed by the Court. Further, Precision comments that, given the Department's finding of a 0.00 percent estimated weighted-average dumping margin for Precision, the Department should issue an amended final determination of sales at not less than fair value with respect to Precision.

Mid Continent

The petitioner, Mid Continent, argues that, as established in the SAA,[25] and as recognized by the Department[26] and the courts,[27] the intent of Congress is clear that the statute authorizes the Department to employ the average-to-transaction comparison methodology for the purpose of addressing masked dumping when a pattern of prices that differ significantly is found to exist, and the masked dumping cannot be addressed using one of the standard comparison methodologies. The petitioner asserts that, notwithstanding the Court's finding that the Department's *Withdrawal Notice* violated the requirements of the APA, the Department's recognition that Congress intended it to use the average-to-transaction comparison methodology to unmask dumping remains an accurate and appropriate expression of clear Congressional intent – the Court in this case did not assume that the Department was unable to apply the withdrawn regulation consistently with the intent of Congress. The petitioner asserts that, in complying with the Court's Remand Order and applying the withdrawn regulation, however, the

[25] *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994) (SAA), at 842-843.
[26] The petitioner cites *Withdrawal Notice*, 73 FR at 74930, 74931.
[27] The petitioner cites *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1363 (CAFC 2010).

Department is not free to dispense with the underlying statutory requirements that the former regulation was originally intended to implement.[28]

The petitioner argues that the former targeted dumping regulation, as the Department interpreted it in the *Preamble*,[29] begins with the presumption that, in order to address targeted dumping, it "normally" will be sufficient to apply the average-to-transaction comparison methodology only to the sales found to be targeted; nevertheless, the Department expressly reserved the right to determine, on a case-by-case basis, whether a broader application of the alternative comparison methodology would be appropriate. The petitioner claims that the Department explained in the *Preamble* that it intended to make that determination based on whether a broader application of the alternative comparison methodology was necessary to fully account for the pricing behavior of a particular respondent, in cases where the Department finds the firm engaged extensively in the practice of targeted dumping.[30]

The petitioner asserts that the Department erred in the *Draft Remand* when it stated that the record does not contain evidence supporting a broader application of the average-to-transaction methodology in this case. The petitioner claims that the first type of evidence is the difference in the weighted-average dumping margins when the alternative comparison methodology is applied only to sales found to be targeted and when it is applied to all sales, for both DWE and Precision. The petitioner asserts that this comparison in margins shows that an application of the alternative comparison methodology only to targeted sales is not adequate to address the pricing behaviors of these two companies. The petitioner contends that the application of the average-to-average comparison methodology to all sales except sales found to be targeted is in a close proximity to the application of the average-to-average comparison

[28] *See* Petitioner brief at 1-4.
[29] *See Preamble*, 62 FR at 27295, 27375.
[30] *See* Petitioner brief at 4-8.

methodology to all sales which, as the Department found in the *Final Determination* and as the Department argued before this Court, is inadequate to address each of the respondent's pricing behavior. The petitioner contends that nothing has changed on remand, and the Department's methodology should not change either, even when the withdrawn regulation is applied in this case.[31]

The petitioner argues that, given the strict limitations of the targeted dumping analysis that the Department used in the *Final Determination* in qualifying certain transactions as having been targeted, even if a minority of sales is found to be targeted, it would not be illogical to find that the targeting practice was extensive. Pointing to the respective proportions, by volume, of DWE's and Precision's sales found to be targeted, the petitioner argues that they are quite substantial and support a finding that both DWE and Precision engaged in extensive targeting, as contemplated by the *Preamble*. The petitioner claims that this is the second type of evidence supporting a broader application of the average-to-transaction methodology in this case. For a confirmation that these levels of targeted sales would have been considered extensive even under the former regulation, the petitioner points to a single example[32] of the Department's application of the withdrawn targeted dumping regulations, which the petitioner asserts is instructive in this case. In that case, where on remand the Department explained that "the price to the allegedly targeted purchaser must be in the lowest 20 percent of all average transaction prices," the petitioner asserts that this signifies that the Department limited the potential universe of targeted transactions to 20 percent of all sales, a level illustrative of how much targeting the Department would have considered "extensive" when its practice was still governed by the 1997 regulations. Accordingly, the petitioner argues, the Department should find that DWE and Precision engaged

[31] *See* Petitioner brief at 8-11.
[32] The petitioner's example involves a remand in the less-than-fair-value investigation of certain pasta from Italy (sustained in *Borden, Inc. v. United States*, 23 C.I.T. 372, 373 (1999)).

in extensive targeting such that, as contemplated in the *Preamble* and the former regulation, the "normal" rule, limiting the application of the alternative comparison methodology only to sales found to be targeted, should not be followed in this case.[33]

As for the third type of evidence, the petitioners argue that the so-called *Nails* test that the Department used in its calculations in the *Final Determination* and in the *Draft Remand*, first articulated in *Nails from PRC*,[34] was not designed to identify the entire universe of sales that constitute a pattern of prices that differ significantly and that supports the use of the alternative comparison methodology to determine the weighted-average margin of dumping; rather, it was designed simply to identify whether such a pattern exists within the total universe of U.S. sales. Importantly, the petitioner argues, if a particular model is sold to only one customer, in one region, or during one time period, then the *Nails* test ignores those sales rather than compare them to sales of a similar product. The petitioner comments that the Department acknowledged this limitation in *Nails from PRC*. In fact, the petitioner argues, in the calculations accompanying the *Draft Remand*, the Department eliminated a number of sales from the targeting analysis on this basis for both DWE and Precision. The petitioner asserts that it is the Department's expressed understanding[35] that the *Nails* test only detects whether there is a pattern of prices that differ significantly *within* the total universe of U.S. sales, and not the universe of sales to which the alternative comparison methodology should be applied in order to address that pattern. Accordingly, the petitioner argues, the Department must be mindful of the particular approach it has taken to identifying whether a pattern of prices that differ significantly exists

[33] *See* Petitioner brief at 11-14.
[34] *See 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 from PRC*) and accompanying Issues and Decision Memorandum at Comments 1 through 9.
[35] The petitioner cites *Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination; 2011-2012*, 78 FR 42492 (July 16, 2013) and accompanying Issues and Decision Memorandum at Comment 18.

when it determines if the limited application of the average-to-transaction method under the former regulation is appropriate.[36]

Lastly, the petitioner argues that the Department can "harmonize" its targeted dumping analysis with the former regulation by employing a test that parallels the Department's consideration of whether the average-to-average comparison methodology accounts for the respondent's pricing behavior. Specifically, the petitioner argues, the Department should determine whether the limited application of the average-to-transaction method under the regulation (*i.e.*, only to targeted sales) is adequate to account for respondents' pricing behavior by comparing the weighted-average dumping margins calculated using the average-to-transaction comparison methodology applied to targeted sales only versus to all sales.[37] If the difference is significant, then the use of the broader application of the average-to-transaction method under the regulation, rather than the limited one, is appropriate and necessary to accomplish the Congressional intent.[38]

Department's Position: We agree, in principle, with the conceptual framework that the petitioner advocates concerning the appropriate interpretation and application of the former targeted dumping regulations within the statutory objective of section 777A(d)(1)(B) of the Act; concepts which formed the reasoning behind the Department's 2008 withdrawal of the targeted dumping regulations. In its Remand Order, however, the Court rejected similar arguments and instructed the Department to apply the withdrawn targeted dumping regulations, specifically 19 CFR 351.414(f)(2) (1997),[39] and to determine whether any pattern of prices that differ

[36] *See* Petitioner brief at 14-16.
[37] The petitioner acknowledges that this additional step is not required by the statute.
[38] *See* Petitioner brief at 16-17.
[39] *See* Remand Order at 26-27.

significantly can be accounted for using either the average-to-average or the transaction-to-transaction comparison method.[40]

The limiting rule in 19 CFR 351.414(f)(2) (1997) provided that the Department would normally apply the average-to-transaction method to those sales found to be targeted. The *Preamble* further explained that the Department would consider applying the average-to-transaction method to all sales, rather than only targeted sales, when, for example, "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" or when "the Department recognizes that {} a firm engages extensively in the practice of targeted dumping . . . ."[41] Petitioner provides several arguments why the Department should apply the average-to-transaction method to all respondents' sales in this investigation, each of which we disagree with for the following reasons.

With respect to petitioner's claims regarding the evidence present in this case, we disagree with the argument that the difference in the weighted-average dumping margins under the average-to-transaction comparison methodology as applied only to sales found to be targeted versus all sales is evidence that warrants a broad application of the average-to-transaction method. As the petitioner itself observed in its comments, the Department's targeted dumping analysis addresses the statutory requirement of section 777A(d)(1)(B)(ii) of the Act by comparing the weighted-average dumping margins calculated using the standard comparison methodology and an appropriate alternative comparison methodology, to ascertain whether the standard methodology takes into account the identified pattern of prices that differ significantly among purchasers, regions, or periods of time. In addressing the respondent's pricing behavior,

[40] *Id.*, at 31-32.
[41] *See Preamble*, 62 FR at 27375.

the statute does not go beyond that consideration in as far as contemplating further comparisons of weighted-average dumping margins calculated using various potential alternative comparison methodologies. The Department's evolving approach is to determine an appropriate alternative comparison methodology, based on an application of the average-to-transaction method, in response to the extent of the pattern of prices that differ significantly under the first requirement of the statute, *i.e.*, section 777A(d)(1)(B)(i) of the Act. Under the targeted dumping regulations, the Department applied the average-to-transaction method in direct proportion to the targeting identified by the *Nails* test. With the experience gained in considering an alternative comparison method to address masked dumping under section 777A(d)(1)(B) of the Act, the Department found that the targeted dumping regulations restricted its ability to address masked dumping such that it found it necessary to immediately withdraw these regulations in order to provide the relief due to the domestic industry through the broader application of the average-to-transaction method.[42]

However, the Court found that this withdrawal of the targeted dumping regulations was improper such that these regulations still govern the conduct of this less-than-fair-value investigation. As such, the Department must satisfy a different standard as articulated in the 1997 regulations with regard to the extent of the pattern of prices that differ significantly (*i.e.*, that this pattern be extensive as described in the *Preamble*) in order to consider a broader application of the average-to-transaction method. Simply because the broader application of the average-to-transaction method results in a significantly different weighted-average dumping margin than that calculated when limiting the application of the average-to-transaction method to only those sales found to be targeted does not, in and of itself, support the broader application of the average-to-transaction method. The difference in such rates is not an indication of whether

[42] *See*, generally, *Withdrawal Notice*.

the targeting is extensive. The extent to which targeting is identified is a result of the Department examination of whether there exists a pattern of prices that differ significantly, *i.e.*, the requirement provided for in section 777A(d)(1)(B)(i) of the Act, as determined by the results of the *Nails* test, and it is these results which inform the Department on the appropriate application of the average-to-transaction method as an alternative to the standard comparison method. Therefore, since the Court directed the Department to conduct its analysis of the requirements of section 777A(d)(1)(B) of the Act pursuant to the targeted dumping regulations, we find that the appropriate comparison methodology is based on the limited application of the average-to-transaction method to the targeted sales, and that the appropriate consideration of whether the average-to-average method can account for such differences should be based on the comparison of the weighted-average dumping margins calculated using the standard average-to-average method and an alternative comparison method based on the limited application of the average-to-transaction method.

Furthermore, we disagree with the petitioner's argument that the proportion of sales for DWE and Precision found to be targeted supports a finding that both companies engaged in extensive targeting, and, thus, warrants a broader application of the average-to-transaction comparison methodology under the former targeted dumping regulations.[43] The *Preamble* explains that the Department may depart from the "normal" application of the average-to-transaction method to targeted sales when "the targeted dumping practice is so widespread that it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior or a company."[44] Based upon the facts of this case, we do not believe that the

[43] *See* Precision Remand Results Analysis Memo at 222 and DWE Remand Results Analysis Memo at 237.
[44] *See Preamble*, 62 FR at 27375.

percentage of targeted sales for DWE or Precision constitutes a targeting practice so widespread that we cannot apply the normal limitation provided for in the regulation.[45]

We do not find the petitioner's sole example (*Pasta from Italy*) instructive in determining what constitutes the "significant" level of targeting, because the petitioner conflates the lowest 20 percentile of average prices with the proportion of sales found to be targeted. In the *Pasta from Italy* excerpt that the petitioner relies upon, the Department was considering the maximum point of the lowest average transaction prices (*i.e.*, 20 percent) for the purpose of defining what constitutes the targeted price; the petitioner makes a reaching conclusion that this amounts to the potential universe of targeted transactions being limited to 20 percent of all sales which, in most cases, will not hold true. Thus, the analysis in *Pasta from Italy* concerned a different concept than what is at issue here, regarding the extent to which Precision and DWE engaged in targeting. Furthermore, in *Pasta from Italy* the Court did not address the application of the average-to-transaction method to a particular group of sales, but rather considered plaintiff's arguments regarding other aspects of the targeted dumping analysis and whether the statutory criteria were satisfied.[46]

We disagree with the petitioner's argument that the "limitations" of the *Nails* test (in that it does not identify the entire universe of sales that constitute a pattern of prices that differ significantly) present a certain type of evidence that warrants a broader application of the average-to-transaction methodology. To the contrary, the record evidence in this investigation shows unequivocally that the limitations which the petitioner identifies have virtually no impact on the extent of targeting that we found for DWE and Precision. For this discussion, "tested sales" refers to sales to the allegedly target groups for which we found sales of the identical

[45] *See* Precision Remand Results Analysis Memo at 3 and DWE Remand Results Analysis Memo at 3.
[46] *See Borden*, 23 CIT at 378-380.

products to groups that were not alleged to have been targeted (*i.e.*, sales which we were able to test). Conversely, "non-tested sales" refers to sales to the allegedly target groups for which there were no sales of the identical products to groups that were not alleged to have been targeted (*i.e.*, sales which we were not able to test). To assist in analyzing the petitioner's claims, we modified the *Draft Remand* SAS program to determine the volume of non-tested sales. Specifically, we added steps to calculate: 1) the volume of tested sales which we found to be targeted; 2) the volume of tested sales which we found not to be targeted based on comparisons to sales of the identical product to groups that were not alleged to have been targeted; 3) the volume of non-tested sales; and 4) the volume of sales to purchasers, regions, or time periods that were not alleged to have been targeted.[47] We found, even if one assumes that all non-tested sales were targeted, that the targeted sales continue to be neither extensive nor widespread such as to warrant the broader application of the average-to-transaction method to all of DWE's or to all of Precision's U.S. sales.[48]

Lastly, we are not persuaded by petitioner's proposal to introduce an additional step to the targeted dumping analysis when applying the 1997 regulation. The Department's targeted dumping analysis, including the *Nails* test, has been used in a number of cases and has been judicially upheld.[49] As explained above in response to a petitioner's argument that the Department should compare the results of applying the average-to-transaction method to only targeted sales to the results of applying the average-to-transaction method to all sales, we do not believe that such a comparison would demonstrate whether the targeting is extensive under the *Nails* test such that the normal limited application of the average-to-transaction method specified

[47] Because the details of this analysis are proprietary, *see* Precision Remand Results Analysis Memo at 2-3 and DWE Remand Results Analysis Memo at 2-3.
[48] *Id.*
[49] *See Mid Continent Nail v. United States*, 712 F. Supp. 1370 (CIT 2010) (sustaining the Nails test); *see also Borusan Mannesmann v. United States*, 990 F. Supp. 2d 1384, 1389 (CIT 2014) (*Borusan Mannesmann*).

in the regulation would not apply. Furthermore, it would be inappropriate to introduce this type of analysis when considering the second statutory requirement under section 777A(1)(d)(B)(ii) of the Act. This provision requires only that the Department explain why "such differences cannot be taken into account using {either the average-to-average method or the transaction-to-transaction method}." Therefore, the approach advocated by petitioner is not provided for under the statute.

DWE

First, DWE argues that, in calculating the weighted–average dumping margin for DWE in the *Draft Remand*, the Department should not have set to zero the net value of offsets for non-dumped sales derived from the average-to-average comparison method when combining the results of this method with the total amount of dumping derived from the average-to-transaction comparison method (limited to the sales that were found to be targeted). DWE asserts that if the net value of offsets for non-dumped sales under the average-to-average comparison method is allowed to offset the total amount of dumping under the average-to-transaction comparison method (limited to the sales that were found to be targeted), then the resulting weighted-average dumping margin for DWE is *de minimis*. DWE urges the Department to recalculate DWE's weighted-average dumping margin in these final results of remand redetermination "to achieve this legally correct result."[50]

Second, DWE asserts that in the *Draft Remand* the Department failed to make a finding of targeting that accounts for differences in U.S. prices that result from differences in costs. DWE asserts that in the *Final Determination*, the Department calculated quarterly differences in the cost of a major input, wire rod, indexed U.S. prices to account for such differences, and subsequently determined that DWE continued to engage in "targeted dumping," albeit with the

[50] *See* DWE's brief at 2.

magnitude of sales found to be targeted, by time period, declining dramatically.[51] DWE asserts that the Department should adjust its calculations to account for the changes in U.S. sale prices which the Department acknowledged were attributable to changes in wire rod costs, thereby reducing the number of sales that were targeted, and the number of sales subject to the average-to-transaction comparison method.[52]

Third, DWE argues that in the *Draft Remand*, the Department failed to "conform its targeted dumping analysis to the basic principles of law," discussed in detail in DWE's Memorandum of Law, filed with the Court on October 15, 2012. In this regard, DWE asserts that 1) the Department improperly relied on a strict mathematical test to determine whether sales were "target dumped," rather than considering the reasons why there were differences in U.S. sale prices; 2) the Department improperly found a pattern of targeted dumping when a *de minimis* quantity of sales were "target dumped" by customer and region; 3) the Department improperly found that sales which were not dumped were target dumped; and 4) The Department improperly found that DWE target dumped when it increased prices to account for increased costs, thereby engaging in a business practice which is the antithesis of dumping.[53]

Department's Position: Concerning DWE's first argument, we disagree. The average-to-average method and the average-to-transaction method are two distinct methods by which the Department calculates an amount of dumping for particular groups of U.S. sales (just as facts available is another method by which the Department may calculate an amount of dumping for a specified group of U.S. sales). To allow for offsets when combining the results of these distinct methods, as argued here by DWE, would defeat the purpose of addressing masked dumping with the application of the average-to-transaction comparison method, where a pattern of prices for

[51] *Id.*
[52] *Id.* at 3.
[53] *Id.*

comparable merchandise was found to differ significantly among purchasers, regions, and periods of time. Such an approach would allow the results of average-to-average comparison method to reduce or completely negate the results of the average-to-transaction method prescribed by section 777A(d)(1)(B) of the Act. Instead, by preserving the results of the average-to-transaction method (limited to the sales that were found to be targeted), the Department ensures that the purpose of the average-to-transaction method to uncover masked dumping is fulfilled, just as it is when the Department applies the average-to-transaction method as a singular comparison method.

Concerning DWE's second argument, we do not find it appropriate to alter our finding of time-period targeting that accounts for differences in U.S. prices that result from differences in quarterly costs of wire rod during the period of investigation. We addressed this issue in the *Final Determination*. Specifically, we stated:

> {w}e examined the wire rod costs as they affect the comparability of nail prices during the POI in connection with our examination of the quarterly cost methodology. For the reasons stated in Comment 11, *infra*, the Department finds that changes in wire rod costs do not compromise price comparability in the POI for purposes of the dumping margin calculations. For the same reasons, we find that changes in wire rod costs do not compromise price comparability in the POI for targeted dumping analysis purposes.[54]
>
> We also do not agree with Dubai Wire's assertion that we must incorporate changes in wire rod costs in our time period targeted analysis by adjusting U.S. prices. In *Nails/PRC* and accompanying IDM at Comment 2, we stated that the statute and the regulations do not provide detailed guidance on comparing different sets of U.S. prices for purposes of determining the existence of targeted dumping. The Department interprets comparability in the context of a targeted dumping analysis without determining "why" an exporter's pricing behavior may differ significantly as between different customers, regions or time periods. Indeed, inserting this kind of standard into a targeted dumping analysis is nowhere found in the Act and it would likely create an unmanageable standard for the

[54] *See Final Determination*, and accompanying Issues and Decision Memorandum at Comment 1.

> Department. Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to "why."[55]

With respect to DWE's third argument that the Department failed to "conform its targeted dumping analysis to the basic principles of law," the Department disagrees. DWE contends that "the Department improperly found that sales which were not dumped were target dumped," the statute does not require that the Department consider whether sales have been dumped to be considered part of a pattern of prices that differ significantly. The statute provides no such consideration of normal value in section 777A(d)(1)(B)(i) of the Act, and refers only "export prices (or constructed export prices)." Furthermore, while higher or lower priced sales could be dumped or could be providing offsets for other dumped sales, this is immaterial in the Department's analysis, including the use of the *Nails* test in this investigation, and in answering the question of whether there is a pattern of export prices that differ significantly. This analysis includes no comparisons with normal value and section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons. DWE's argument that sales must be both targeted and dumped in order to find that there exists a pattern of prices that differ significantly appears to derive from DWE's equating the language in the SAA, i.e., "targeted dumping," with the requirements of section 777A(d)(1)(B) of the Act. Such a linkage is inappropriate. Congress provided in the statute the option of an alternative comparison method in less-than-fair-value investigations when the stipulated requirements of the *Nails* test have been satisfied. To reduce section 777A(d)(1)(B) of the Act, however, to a concern over targeting, rather than the statutory

[55] *Id.*; *see also Borusan Mannesmann*, 990 F. Supp. 2d at 1389 (in addressing whether "targeted dumping connotes purposeful behavior," the Court found that it "cannot identify any language in the statute or SAA that might require Commerce to investigate whether a given respondent has a legitimate commercial reason for such a pricing practice. Doing so would add a new element to the targeted dumping analysis, requiring Commerce to also consider whether respondents intended to engage in targeted dumping… The court, therefore, cannot read into the statue {sic} some sort of 'intent' requirement that does not exist. It would impose a 'burden on Commerce that is not required or suggested by the statue {sic}.'") (internal citation omitted).

requirement of whether there exists a pattern of prices that differ significantly, is to misconstrue the statute and to insert requirements which do not exist therein.

Concerning the other issues that DWE identifies in its comments on the draft remand, the Department addressed these arguments in the *Final Determination* and incorporates these explanations by reference in this redetermination. The Department addressed DWE's claim that it should have considered the reasons why there were differences in U.S. sales prices on pages 4-5, 6-7, 8-10; addressed DWE's claim that the quantity of sales that were targeted by customer and region was *de minimis* on pages 14-15; and addressed DWE's claim that it increased prices to account for increased costs during the period of investigation on pages 5-7.

E. Results of Redetermination

In accordance with the Remand Order, the Department provided an explanation why the transaction-to-transaction method is not appropriate to use in this investigation, and limited the application of the average-to-transaction comparison method only to those sales that the Department identified as targeted. Based on these changes, the Department determines that for Precision there is no meaningful difference between the results of the standard and alternative comparison methods because the weighted-average dumping margins using both the average-to-average comparison methodology and the average-to-transaction comparison methodology (limited to the sales that were found to be targeted) is *de minimis*. For DWE, there is a meaningful difference between the results of the standard and alternative comparison methods because the weighted-average dumping margin using the average-to-average comparison methodology is *de minimis* while the weighted-average dumping margin using the average-to-transaction comparison methodology (limited to the sales that were found to be targeted) is not *de minimis*. Accordingly, the Department recalculated DWE's and Precision's weighted-average

dumping margins by applying the standard average-to-average method for Precision and an alternative average-to-transaction method, based on the application of the average-to-transaction method to sales found to be targeted, for DWE. The recalculated weighted-average dumping margin is 2.68 percent for DWE and 0.00 percent for Precision. The "all–others" rate, previously an average of Precision's and DWE's weighted-average dumping margins, is now based only upon DWE's rate, and is 2.68 percent.[56]

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

30 SEPTEMBER 2014
(Date)

[56] *See* section 735(c)(5)(A) of the Act.