KING & SPALDING

1700 Pennsylvania Avenue, N.W.
Washington, DC 20006-4706
Phone: 202/737-0500
Fax: 202/626-3737
www.kslaw.com

June 23, 2008

BY HAND AND VIA E-MAIL

The Honorable David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
APO/Dockets Unit, Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

PUBLIC DOCUMENT

Re: Comments Regarding Proposed Methodology For Identifying And Analyzing Targeted Dumping In Antidumping Investigations

Dear Mr. Spooner:

This submission is filed in response to the Department's May 9, 2008 request for comments regarding its proposed methodology for identifying and analyzing targeted dumping in antidumping investigations.[1] These comments are filed by King & Spalding LLP on behalf of Appleton Papers, Inc. and Bridgestone Americas Holding, Inc.

I. INTRODUCTION

The Department's proposed new test for targeted dumping – as first announced in *Nails from China* ("*Nails*") and as further described in the *Request for Comments* – is arbitrary and frustrates the purpose of the statute. The Department should abandon the *Nails* test and should identify targeted dumping in this case using the same "P/2 Test" that was accepted in *Coated*

[1] *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26371, 26372 (May 9, 2008).

Free Sheet Paper from Korea.[2] The P/2 Test, unlike the *Nails* test, utilizes non-arbitrary statistical tests, and furthers the statutory goal of ensuring that dumping is not masked.

In implementing the targeted dumping methodology, the Department should apply the average-to-transaction methodology to *all* sales, including sales to non-targeted customers, regions, or time periods, whenever the targeting behavior is found to be "extensive." The Department should adopt a clear threshold that, where 20 percent of the U.S. sales quantity was sold to a targeted customer, region, or time period, the targeting will be found to be "extensive," and the average-to-transaction methodology will be applied to all sales. Even in those cases where the Department does not apply the average-to-transaction methodology to non-targeted sales, it must at the very least apply that methodology to all sales to the targeted customers, regions, and time periods. There is no basis under the statute or regulations to limit application of the average-to-transaction methodology to only subsets of sales (*e.g.*, particular CONNUMs) to the targeted customer, region, or time period.

II. THE DEPARTMENT SHOULD IDENTIFY TARGETED DUMPING USING THE P/2 TEST RATHER THAN THE NEW *NAILS* TEST

A. The *Nails* Test Is Arbitrary And Fails To Identify Obvious Targeting

The Department proposes a two-stage test to identify targeted dumping.[3] The first stage consists of a "standard deviation test," in which the Department determines the share of the allegedly targeted customer's purchases that are at prices more than one standard deviation

---

[2] *Coated Free Sheet Paper from Korea*, 72 Fed. Reg. 60630 (Oct. 25, 2007) (final determination), Issues & Decision Memorandum.

[3] *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26371, 26372 (May 9, 2008).

below the weighted-average price to all customers, both targeted and non-targeted. If that share exceeds 33 percent of the total value of customer's purchases, the first requirement of the test is deemed to be met.

If the first test is met, the Department performs a second stage "price gap test." The Department calculates the weighted-average price gap between the targeted customer (considering only those sales which meet the standard deviation requirement) and the non-targeted customer with the next higher price. That gap is then compared to the weighted-average price gap between non-targeted customers. If the targeted/non-targeted price gap is greater than the weighted-average non-targeted price gap for more than 5 percent of sales to the targeted customer, then the Department concludes customer targeting has occurred.

There is no statistical justification for the Department's test, and the various cutoffs chosen by the Department (*i.e.*, 1 standard deviation and 33 percent for the standard deviation test and 5 percent for the price gap test) are arbitrary. In fact, the Department has provided no explanation for why these cutoffs were chosen. The Department's test also is invalid because, as the example below demonstrates, it fails to identify obvious cases of targeted dumping that should be captured by any reasonable targeted dumping test.

A test for targeted dumping must answer the question of whether prices to the targeted customer are lower than prices to non-targeted customers. The first stage of the Department's test fails to even analyze this question correctly, because the test performs an incorrect comparison. Instead of comparing the average price paid by the targeted customer to the average price paid by non-targeted customers, the Department's test compares the average price paid by the targeted customer to the average price paid by all customers, both targeted and non-targeted.

Because this average includes the low prices paid by the targeted customer, the Department's average is a biased estimator. In statistical terms, bias is a "systematic tendency for an estimate to be too high or too low."[4] In the current situation, since the Department's calculation includes the low prices paid by the targeted customer along with the higher prices paid by non-targeted customers, the resulting estimate of the average price to non-targeted customers is too low.

The effect of this error is best illustrated through a simple example, as shown in the following table. In this hypothetical example, sales to the targeted customer occur at a price of \$5, and sales to non-targeted customers occur at an average price of \$10.[5] Since the targeted customer pays a price that is 50% less than the average price paid by non-targeted customers, any reasonable test of targeted dumping should find that targeting has occurred. Because of the error in the Department's standard deviation test, however, the test fails to identify this case of obvious targeting. Because the Department's calculation includes the low prices paid by the targeted customer in the calculation of the average, the comparison price is not \$10 but \$7.50. Because the standard deviation is \$2.55, *none* of the targeted customer's purchases (let alone 33%) falls more than one standard deviation below the Department's average price, and thus the Department's standard deviation test concludes that no targeting has occurred.

Customer	Price
Targeted	\$ 5.00
Targeted	\$ 5.00
Targeted	\$ 5.00
Targeted	\$ 5.00

[4] D. Kaye and D. Freedman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* (2000) at 160.

[5] For simplicity, it is assumed that quantities are the same for all transactions.

Targeted	$ 5.00
Non-Targeted	$ 9.00
Non-Targeted	$ 9.50
Non-Targeted	$ 10.00
Non-Targeted	$ 10.50
Non-Targeted	$ 11.00
Average Targeted Price	$ 5.00
Average Non-Targeted Price	$ 10.00
Overall Average Price	$ 7.50
Standard Deviation	$ 2.55
Overall Average - Std Dev	$ 4.95

Although the flaws in the first stage of the Department's test are sufficient to invalidate it, the Department's second stage further invalidates the methodology. Most importantly, the second stage "price gap" test is unnecessary. If a correctly specified test finds that the targeted price differs significantly from the non-targeted prices, then that result establishes a pattern of prices that differ significantly. The price gap comparison that constitutes the second stage of the Department's test provides no additional information about the occurrence of targeting, and serves only to add another element of arbitrariness to the targeting determination.

As an example of the arbitrary nature of the price gap test, compare two hypothetical price patterns, both of which are reflective of targeted dumping. In both hypotheticals, the targeted customer pays a price of $1. In the first hypothetical, there are two non-targeted customers who pay prices of $7 and $11, respectively. Because the price gap between the targeted customer and the next higher non-targeted customer is $6, and the price gap between the non-targeted customers is $4, in this situation the price gap test would confirm the presence of targeting. In the very similar situation in which the non-targeted customers pay prices of $6 and $12, however, the price gap test would reject the presence of targeting. As this example

demonstrates, the Department's price gap test is arbitrary, unnecessary, and rejects even obvious examples of targeting.

B. The P/2 Test, Unlike *Nails*, Uses Non-Arbitrary Statistical Techniques

In *Coated Free Sheet Paper from Korea*, the Department found the existence of targeted dumping based upon an allegation utilizing what has come to be called the "P/2 Test" (*i.e.*, preponderance at two percent test) to identify targeted dumping.[6] Under this test, targeted dumping will be found to exist where the weighted-average net price to an alleged targeted group is at least two percent lower than the weighted-average net price to the non-targeted group in CONNUM/MONTH combinations representing a preponderance of the targeted quantity that can be compared. This methodology uses standard and appropriate statistical techniques that are not arbitrary because they are consistent with approaches applied in other contexts of the antidumping law.

In all other contexts where the Department compares prices in antidumping investigations, a price difference is deemed "significant" where it exceeds two percent. For example, in calculating the overall weighted-average dumping margin – which normally compares prices in the United States with prices in the country of manufacture – a difference of less than two percent is considered *de minimis*.[7] Similarly, in applying the arm's length test – which compares transfer prices between affiliates with arm's length prices between unrelated

---

[6] *Coated Free Sheet Paper from Korea*, 72 Fed. Reg. 60630 (Oct. 25, 2007) (final determination), Issues & Decision Memorandum.

[7] 19 U.S.C. § 1673b(b)(3).

parties – differences of less than two percent are considered not significant.[8] Where price differences in these comparisons exceed two percent, the Department concludes that they are significant, and thus reflect distortions caused by dumping or transfer pricing rather than mere random price differences. It is entirely reasonable, therefore, to conclude that price differences exceeding two percent between targeted and non-targeted purchasers or regions reflect distortions caused by targeting, rather than mere random differences, and are thus "significant." In fact, the Department has already recognized this in *Coated Free Sheet Paper from Korea.*

Similarly, in determining how to recognize a "pattern" of significant price differences, Commerce should once again look to analogous areas of the antidumping law. There is only one other context in which Commerce is required to identify a "pattern" of prices. That is, the statute requires Commerce to find "a pattern of consistent price differences between sales at different levels of trade" before making a level of trade adjustment.[9] The Department has established a straightforward method for identifying such a pattern: "If the average prices were higher at one of the LOTs for a preponderance of the models, we considered this to demonstrate a pattern of consistent price differences."[10] As the Department recently elaborated:

---

8 *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69186 (Nov. 15, 2002). Under the arm's length test, where transfer prices are within plus or minus two percent of the arm's length price (*i.e.*, between 98% and 102%), sales to that affiliate "pass" the arm's length test. Where transfer prices differ from arm's length prices by more than two percent, sales to that affiliate "fail" the arm's length test. *Id.*

9 19 U.S.C. § 1677b(a)(7)(A)(ii).

10 *Final Results of the Third Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada*, 72 Fed. Reg. 26591 (May 10, 2007), Issues and Decision Memorandum at Comment 2.

> It is not necessary that all of Sivaco's sales be priced higher than all of IRM's comparable sales to determine that a pattern of consistent price differences exists. As explained in the SAA "{w}hile the pattern of pricing at the two levels of trade under section 773(a)(7)(A) must be different, the prices at the levels need not be mutually exclusive, there may be some overlap between prices at different LOTs." Thus, our analysis does not have to demonstrate that 100 percent of the prices at the more advanced LOT (Sivaco's sales) are higher when compared to the prices at the less advanced LOT (IRM's sales) to determine that a pattern of consistent price differences exists. Given the fact that Sivaco's selling prices are higher than those of IRM for a preponderance of the quantities and products sold during the POR, the use of a LOT adjustment pursuant to section 773(a)(7) of the Act is warranted in this review.[11]

A "preponderance" is commonly understood to mean the "majority" (*i.e.,* greater than 50 percent).[12] Under this standard, therefore, a pattern of significant price differences should be found in the targeted dumping context whenever prices to the alleged targeted group are at least two percent lower than prices to the non-targeted group *more than 50 percent of the time*. Thus, targeted dumping would exist where the weighted-average net price to an alleged targeted group is at least two percent lower than the weighted-average net price to the non-targeted group in CONNUM/MONTH combinations representing a preponderance of the targeted quantity (that can be so compared). Such an approach employs "standard and appropriate statistical techniques" that are consistent with how the Department identifies patterns and significant price differences in all other contexts of the antidumping law.

The *Nails* test, by contrast, utilizes numerical thresholds – such as the 33 percent standard deviation test and the five percent price gap test – that are inconsistent with how Commerce

---

11 *Id.*

12 *Webster's New Collegiate Dictionary*, G & C Merriam Company (1977) at 909.

identifies "patterns" and "significant price differences" in other contexts of the dumping law. Indeed, these numerical thresholds are entirely arbitrary. Accordingly, the Department should abandon this unsupportable new *Nails* test and continue to use the P/2 test.

C. The *Nails* Test, Unlike The P/2 Test, Frustrates The Statutory Purpose Of Ensuring That Dumping Margins Are Not Masked Through Offsets

The targeted dumping provision of the statute, *i.e.,* 19 U.S.C. § 1677f-1(d)(1)(B), was designed to limit the problem of masking that occurs under the average-to-average methodology whereby higher-priced sales of a product would, through averaging, conceal dumping margins attributable to lower-priced sales. Under the statute, the targeted dumping methodology is applied only when, *inter alia*, there is a pattern of significant price differences *that cannot be taken into account under the average-to-average method.*[13] As explained in the Statement of Administrative Action:

> In part, the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions....
>
> New section 777A(d)(l)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods. *i.e.,* where targeted dumping may be occurring.[14]

When the URAA was enacted, zeroing was the established practice. The average-to-

---

[13] 19 U.S.C. § 1677f-1(d)(1)(B).

[14] Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act ("URAA"), H.R. Doc. 103-316, Vol. 1 (1994) at 842-843.

average calculation method did not permit offsets, except to the limited extent that U.S. prices within a single CONNUM were averaged together. With the elimination of zeroing in investigations, however, that changed entirely.[15] Not only will high-priced sales offset dumped sales within a CONNUM, but margins for entire CONNUMs will be permitted to offset one another. The result, of course, is that the masking problem which the targeted dumping methodology was designed to address has been exacerbated greatly.

To the extent that Congress and the administration expressed "reluctance to use an average-to-average methodology" that permitted offsets only with a CONNUM, that reluctance must be exponentially higher now that the methodology permits offsets between CONNUMs. Where offsets occur in such a way as to conceal dumping margins, the statute clearly intends that Commerce use the average-to-transaction (*i.e.,* targeting) methodology. In order to achieve this statutory purpose, the Department must not define "targeted dumping" so restrictively that it cannot be satisfied even in situations where dumping margins are clearly masked because high-priced sales are offsetting low-priced (*i.e.,* dumped) sales. Rather, in order to effectuate the purpose of the statute, Commerce must construe broadly what constitutes a "pattern of significant price differences" that can be addressed under the targeted dumping provision. Failure to do so would frustrate Congress' intent to provide a useful mechanism to avoid the problem of masked dumping margins.

The *Nails* approach is inconsistent with the statute because it fails to apply the average-

[15] On December 27, 2006, Commerce announced that it will begin permitting credits from non-dumped sales to offset margins for dumped sales (*i.e.,* "zeroing" will be eliminated) in the A2A methodology. *See Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006).

to-transaction methodology even when dumping margins clearly are masked by offsets. Moreover, it adopts a very narrow definition of the phrase "patterns of significant price differences" that would exclude most situations otherwise satisfying any common sense meaning of that phrase. As explained above, there are examples of obvious patterns of significant price differences – such as where one customer always pays twice as much for the same product as a second customer – that would not be considered "targeted dumping" under *Nails*. The restrictive *Nails* method is thus inconsistent with 19 U.S.C. § 1677f-1(d)(1)(B)(i). Commerce should adopt a more sensible approach to identifying "patterns of significant price differences," such as that embodied in the P/2 test. The P/2 test, unlike the *Nails* test, can detect obvious patterns of significant price differences, and can further the statutory goal of avoiding the masking of dumping margins.

III. WHERE TARGETED DUMPING IS EXTENSIVE, THE DEPARTMENT SHOULD APPLY THE AVERAGE-TO-TRANSACTION MARGIN CALCULATION METHODOLOGY TO ALL SALES

The Department's regulations at 19 C.F.R. § 351.414(f)(2) state that the Department "normally" will limit its application of the average-to-transaction methodology to the targeted sales. As discussed in the *Preamble* to the final regulations, however, "there may be situations in which 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."[16] Indeed, the Department "recognizes that where a firm engages extensively in the practice of targeted

[16] *Preamble to the Final Regulations*, 62 Fed. Reg. 27296, 27375 (May 19, 1997).

dumping, the only adequate yardstick available to measure such pricing behavior may be the average-to-transaction methodology."[17]

Where the identified targeting encompasses 20 percent of the U.S. sales, it should be found to be "extensive" and "pervasive."[18] Accordingly, the Department should adopt a clear standard that when 20 percent of the U.S. sales quantity was to a targeted customer, region, or time period, the average-to-transaction methodology will be applied to all sales (*i.e.,* both targeted and non-targeted sales).

IV. WHERE THE DEPARTMENT LIMITS APPLICATION OF THE AVERAGE-TO-TRANSACTION METHOD, IT SHOULD, AT THE VERY LEAST, TREAT ALL SALES TO TARGETED CUSTOMERS, REGIONS, OR TIME PERIODS AS BEING "TARGETED"

In its request for comments, the Department asks whether the targeted dumping methodology should be applied to all sales to a targeted customer, region, or time period – including CONNUMs that did not pass the two-prong test.[19] If it were to limit application of its targeted dumping methodology only to those CONNUMs passing the restrictive new tests, the effect in most cases would be to apply the average-to-transaction methodology only to a very

---

[17] *Id.*

[18] In *Pasta from Italy,* the Department had capped the percentage of sales that could even be alleged to have been "targeted" at 20 percent. *Borden, Inc. v. United States*, 23 C.I.T. 372, 373 (1999) (The "price to the allegedly targeted purchaser must be in the lowest 20 percent of all average transaction prices"). Clearly, therefore, where a respondent targets sales in excess of 20 percent of the U.S. sales quantity, the Department should find that it has engaged in "widespread" or "pervasive" targeting, and should not limit application of the average-to-transaction method in that circumstance.

[19] *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26371, 26372 (May 9, 2008).

small fraction of the sales to the targeted customer, region, or time period – thereby eviscerating the targeting remedy.

Such limitation is nowhere required by the statute at 19 U.S.C. § 1677f-1(d)(1)(B). Nor is it required by the Department's regulations at 19 C.F.R. § 351.414(f)(2). Although the regulation states that Commerce "normally will limit application of the average-to-transaction method to those sales that constitute targeted dumping," it does not define the set of sales that should be considered "targeted." The most reasonable way to interpret this language is to treat *all sales* to a targeted region or customer as "constituting targeted dumping."

There are three reasons why this interpretation is appropriate. First, the *Nails* methodology tests for targeted dumping at the customer or regional level. A region will either pass or fail the standard deviation and price gaps test in its entirety. If the region as a whole fails either test, the Department does not find targeted dumping – even if a particular CONNUM sold to that region might, by itself, pass the tests. In other words, a customer or region is either targeted or it is not.

There must be symmetry between (1) the level at which targeted dumping is identified, and (2) the level at which the targeted dumping remedy is implemented. It simply makes no sense to require that an entire customer or region pass the two-prong test, but then find that only a portion of the sales to that customer or region were "targeted." Accordingly, the Department should find that *all* sales to a targeted customer or region are "targeted" for purposes of 19 C.F.R. § 351.414(f)(2). If it did not do so, it would have to revise the *Nails* test so that individual CONNUMs sold to a region or customer may be found to be targeted, even if the customer or region does not pass the standard deviation and price gaps tests on an overall basis.

Second, the *Nails* methodology is limited to comparing identical CONNUMs.[20] Where, for example, a CONNUM was sold to the targeted region, but that same CONNUM was not also sold to a non-targeted region, the current program simply ignores that CONNUM and treats it as being non-targeted. This is unfair, because it means that Petitioners can never demonstrate that non-identical CONNUMs have been targeted. Such unfairness is compounded because, if the region as a whole passes the two-prong test, it would be far more reasonable to conclude that those overall pricing patterns extend even to those CONNUMs that cannot be tested under *Nails*.

Indeed, the *Preamble to the Final Rule* recognizes that where it is "administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company," Commerce should apply the average-to-transaction methodology to *all sales* to the targeted customer or region.[21] In other words, when there are CONNUMs that cannot be analyzed for possible targeting (*e.g.,* non-identical CONNUMs), but there is an overall pricing pattern to a targeted customer or region, Commerce should treat all sales of all CONNUMs to the targeted customer or region as being "targeted." The current implementation of *Nails* is flatly inconsistent with the *Preamble*, and should be revised. Commerce must not automatically assume that any CONNUM that cannot be identically compared under *Nails* is not "targeted" for purposes of 19 C.F.R. § 351.414(f)(2).

Third, as a general principle, the Department should not endeavor to limit application of the average-to-transaction methodology as much as it possibly can. As noted above, the statute

---

[20] *Certain Steel Nails from China*, Issues and Decision Memorandum for the Final Determination (June 6, 2008) at Comment 4.

[21] *Preamble to the Final Regulations*, 62 Fed. Reg. 27296, 27375 (May 19, 1997).

does not contemplate any such limitations; it envisions the application of the average-to-transaction methodology to all sales whenever there is a pattern of significant price differences.[22] Indeed, any limitation on application of the average-to-transaction methodology only serves to frustrate the purpose of the statute, which is to avoid the problem of masked dumping margins. Accordingly, in implementing the targeted dumping remedy, the Department should, at a minimum, apply the average-to-transaction method to *all sales* to a targeted region, customer, or time period.

V. CONCLUSION

The Department should abandon the proposed *Nails* test and should identify targeted dumping in this case using the same "P/2 Test" that was accepted in *Coated Free Sheet Paper from Korea*. If the Department continues to apply the *Nails* test, however, it should – at the very least – implement the targeted dumping methodology in such a way that all sales to the targeted customer, region, or time period are treated as "targeted" for purposes of 19 C.F.R. § 351.414(f)(2).

Please contact us if you have any questions about this submission.

Respectfully submitted,

Gilbert B. Kaplan
Joseph W. Dorn
Stephen A. Jones
J. Michael Taylor
Daniel L. Schneiderman

King & Spalding LLP

---

[22] 19 U.S.C. § 1677f-1(d)(1)(B).