COMMITTEE TO SUPPORT U.S. TRADE LAWS

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BY HAND AND VIA E-MAIL

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

Dear Mr. Spooner:

On behalf of the Committee to Support U.S. Trade Laws ("CSUSTL"), we hereby file comments in response to the Department's request for comments regarding targeted dumping in antidumping investigations.[1]

I. INTRODUCTION

We appreciate the opportunity to respond to the Department's request for comments on developing standards for targeted dumping.[2] This is a critical area of the antidumping law – especially now that the Department has eliminated the practice of "zeroing" in investigations under its normal average-to-average methodology. Indeed, the very purpose of the targeted

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[1] *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 Fed. Reg. 60651 (October 25, 2007). The Department originally requested comments by November 26, 2007, but extended the deadline on November 20, 2007. The comment period was extended until December 10, 2007. *See* http://ia.ita.doc.gov/ia-highlights-and-news.html.

[2] *Targeted Dumping in Antidumping Investigations: Request for Comment*, 72 Fed. Reg. 60651 (Oct. 25, 2007).

dumping provision, as explained in the Statement of Administrative Action ("SAA"), was to prevent the concealment of dumping through averaging and offsets. With the elimination of zeroing, the problem of concealed dumping will only grow, as will the importance of applying the targeted dumping provision to avert such concealment. To that end, we applaud the Department's recent decision not to follow the (nearly impossible) standards for identifying targeted dumping as set forth in *Pasta from Italy.*[3]

In general, we believe that the Department should adopt the standard proposed by petitioner in *Coated Free Sheet Paper from Korea* for what constitutes a "pattern" of "significant" price differences. In that case, the petitioner proposed a methodology that could be used to identify targeted dumping that it entitled the "preponderance at 2 percent below test," or the "P/2 Test."[4] Under this test, targeted dumping would be found to exist where the weighted-average net price to an alleged targeted group[5] 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). This methodology uses standard and appropriate statistical techniques in accordance with 19 C.F.R. § 351.414(f)(1)(i) that are consistent with approaches applied in other contexts of the antidumping law.

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[3] *See Coated Free Sheet Paper from Korea*, 72 Fed. Reg. 60630 (Oct. 25, 2007) (final determination).

[4] *Id.*

[5] A targeted group may consist of (i) sales to a particular customer, region, or time period, (ii) sales to sets of customers, regions, or time periods, or (iii) subsets of sales to customer(s), region(s), or time period(s).

It is important that the Department not establish any standard that requires a showing of intent to target by any producer or exporter. There is simply no requirement in the statute for such an element. Nor is there any statutory requirement that a petitioner explain why the producer or exporter might have targeted a particular group. The targeted dumping provision requires only that patterns of significant price differences exist, and nothing more.

Finally, the Department should clarify when it will apply the average-to-transaction methodology to all sales, rather than only to the targeted sales. We think it would be appropriate for the Department to apply the average-to-transaction method to all sales, and not just the targeted sales, where the targeted quantity exceeds twenty percent of the U.S. sales database.

II. THE DEPARTMENT SHOULD ADOPT STANDARDS TO IDENTIFY TARGETED DUMPING WHICH FURTHER CONGRESS' INTENT THAT DUMPING NOT BE MASKED

The targeted dumping provision was designed to limit the problem of masking that occurred under the average-to-average methodology whereby higher-priced sales of a product would, through averaging, conceal dumping margins attributable to lower-priced sales. As noted in the SAA,

> 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.[6]

At the time the URAA was enacted, zeroing was the established practice. The average-to-average method did not permit offsets, except to the limited extent that U.S. prices within a single CONNUM were averaged together. Accordingly, the average-to-average method tended not to conceal dumping margins to any significant degree. With the elimination of zeroing, however, that changed entirely. 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 become far more pernicious. Patterns of significant price differences that before made little or no difference in the dumping margins can now conceal dumping margins entirely. Stated differently, patterns of price differences that Commerce might previously have deemed not "significant" under the old *Pasta* test can now have a large impact in the margin calculations.

Accordingly, Commerce should adopt an approach to identifying "patterns of significant price differences" that recognizes the fact that less well-defined patterns of less significant price differences are now far more important (in terms of their margin impact) than they had been at the time of the *Pasta* decision (and at the time the URAA was enacted). Failure to do so would frustrate Congress' intent to provide a mechanism to avoid the problem of masked dumping margins. We believe that the methodology outlined below will further that policy, and is consistent with the Department's other statutory and regulatory obligations.

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[6] SAA at 842-843 (1994).

III. THE DEPARTMENT SHOULD ADOPT THE STANDARD PROPOSED BY PETITIONER IN *COATED FREE SHEET FROM KOREA* FOR WHAT CONSTITUTES A "PATTERN" OF "SIGNIFICANT" PRICE DIFFERENCES

In *Coated Free Sheet Paper from Korea*, the petitioner proposed the "P/2 Test" to identify targeted dumping.[7] Under this test, targeted dumping would 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.[8] This methodology uses standard and appropriate statistical techniques that are consistent with approaches applied in other contexts of the antidumping law and that meet the requirements of 19 C.F.R. § 351.414(f)(1)(i). Consequently, Commerce should adopt the P/2 Test to analyze targeted dumping in future cases.

A. The Department Should Adopt A Two Percent Threshold For Determining What Is A "Significant" Price Difference, Except For Investigations Involving Custom-Made Goods

In all other contexts where the Department compares prices in antidumping investigations, a price difference is deemed "significant" where it exceeds two percent. For

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[7] *Coated Free Sheet Paper from Korea*, 72 Fed. Reg. 60630 (Oct. 25, 2007) (final determination).

[8] In *Coated Free Sheet*, the petitioner performed these "P/2" comparisons on identical CONNUMs. However, this may not be feasible in some cases, such as where the exporter did not sell identical merchandise to the targeted and non-targeted groupings. In such instances, the Department should allow petitioners some discretion to utilize DIFMER data to expand the targeted dumping analysis to include comparisons of similar merchandise. Furthermore, although the petitioner in *Coated Free Sheet* applied the "P/2" test on a monthly basis, petitioners should have some discretion in other cases to determine the duration of the relevant comparison periods – particularly in targeted dumping allegations based upon time periods, or in situations where there are a limited number of sales available for comparison on a monthly basis.

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*.[9] Similarly, in applying the arm's length test – which compares transfer prices between affiliates with arm's length prices between unrelated parties – differences of less than two percent are considered not significant.[10] 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."

Certain respondents in *Coated Free Sheet Paper* argued that the statutory two percent *de minimis* standard is not analogous because the word "significant" is not the same thing as "above *de minimis*." But the word "*de minimis*" is defined as "lacking significance or importance : so minor as to merit disregard."[11] Thus, if something is not *de minimis* (such as a price difference exceeding two percent), it is not "lacking significance." In other words, it is *significant*. There is absolutely no reason why the Department cannot look to other areas of the

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[9] 19 U.S.C. § 1673b(b)(3).

[10] *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.*

[11] Merriam-Webster's Online Dictionary, available at http://www.merriam-webster.com/dictionary/de%20minimis.

law where price comparisons are involved (*i.e.,* the antidumping comparisons and the arm's-length comparisons) for guidance in determining what is a "significant" price difference when comparing targeted and non-targeted sales.

Other respondents in *Coated Free Sheet Paper* argued that a more appropriate measure for what is "significant" would be a price difference of 25 percent, noting that under 19 C.F.R. § 351.224(g)(1), a "significant ministerial error" is defined as one that would change the margin by at least 25 percent. Yet this regulation has nothing to do with *price comparisons*, and says nothing about what is a significant *price difference*. Whether something is "significant" depends, of course, upon what is being measured. A doctor might tell you that any quantity of cyanide in your coffee exceeding 0.0001% is "significant," and it would undoubtedly be an accurate use of the word, but it would have no more relevance to price comparisons than the ministerial error regulation. In contrast, the 2 percent tests in the dumping calculations and arm's-length programs deal precisely with price comparisons, and with what constitutes a significant *price difference*.

We recognize the potential tension between adoption of a bright-line two percent threshold and the SAA's admonition to proceed "on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."[12] This tension, however, would be resolved by employing a rebuttable presumption that a two percent price difference is significant.

In *Coated Free Sheet Paper,* the Department found that small price differences may be

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[12] SAA at 843.

significant because the subject merchandise was a "commodity product sold in a competitive market."[13] That finding was uncontroversial in *Coated Free Sheet Paper*, as the parties had already agreed that the merchandise was a commodity product, and the Commission had made a finding to that effect.[14] The Department should not, however, apply a "commodity product" standard in future investigations to determine whether or not a two percent price difference is significant. In many cases, there will be no specific finding by the Commission on this topic, or the relevant data may not appear on the public record in the Commission's report. Moreover, the word "commodity" does not appear anywhere in Commerce's regulations, nor does the Department typically collect information that would allow it to make a finding regarding whether a product is a "commodity."

The regulations do, however, refer to "custom-made" products. Indeed, the Department generally applies a different date-of-sale methodology,[15] or even a different dumping calculation methodology,[16] for "custom-made" products. Custom-made products, for obvious reasons, tend to compete on price to a lesser extent than other products. It may be reasonable, therefore, not to apply a two percent threshold to such products. In cases involving custom-made products,

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[13] *Coated Free Sheet Paper from Korea*, 72 Fed. Reg. 60630 (Oct. 25, 2007) (final determination) at Comment 3.

[14] *Id.*

[15] *Preamble to the Final Regulations*, 62 Fed. Reg. 27296, 27349 (May 19, 2997) ("For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice")

[16] *See* 19 CFR 351.414(c)(1) (stating that the Department may utilize a transaction-to-transaction methodology for "custom-made" products).

therefore, the Department could develop a standard for what constitutes a "significant" price difference on case-by-case basis. However, absent a showing that the merchandise qualifies as "custom-made" under the regulations, the Department should normally find that price differences of two percent or more are "significant."

B. The Department Should Adopt The Same Standard For Finding A "Pattern" As It Uses In The Level Of Trade Context

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.[17] The Department has established a relatively simple 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."[18] As the Department recently elaborated:

> 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

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[17] 19 U.S.C. § 1677b(a)(7)(A)(ii).

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

> 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.[19]

A "preponderance" is commonly understood to mean the "majority" (*i.e.,* greater than 50 percent).[20] 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).[21] 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.

In *Coated Free Sheet Paper*, certain respondents argued that it would be inappropriate to apply the level of trade methodology of identifying patterns in this context because the Court of International Trade upheld the Department's decision not to do so in *Pasta*. Yet the Department is not bound by *Pasta*, nor the Court decision upholding the *Pasta* methodology. While *Borden I*

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[19] *Id.*

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

[21] Again, as noted above, there should be some flexibility for petitioners to perform these comparisons other than on an identical CONNUM/month basis in situations where it is not feasible to do so, such as where there are insufficient sales that can be so compared.

upheld as reasonable the adoption of a stricter standard for identifying a pattern in the targeted dumping context than in the LOT context, the Court never stated that this was required by the statute.[22] In any event, the standard proposed herein is more rigorous than that employed in the LOT context because it requires that price differences be at least two percent. That is, a "pattern" would be found to exist only 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.

IV. THE DEPARTMENT MUST NOT ADOPT A STANDARD THAT REQUIRES A SHOWING OF INTENT, OR AN EXPLANATION FOR WHY A PARTICULAR CUSTOMER OR REGION WAS TARGETED

A. There Is No Element Of Intent In The Statute

Certain respondents in *Coated Free Sheet Paper* argued that it is insufficient merely to identify a pattern of price differences, because those differences might be explained by normal pricing behavior and are not necessarily the result of some predatory intent to "target" a particular customer, region, or time period. The Department properly rejected those arguments. As the Department noted, the targeting analysis should control for factors such as product mix and level of trade, and should adjust "for all movement charges and selling expenses as they would be in our margin calculations."[23] However, the Department emphasized that "the statute

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[22] *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221, 1230-31 (Ct. Int'l Trade 1998) ("*Borden I*").

[23] *Coated Free Sheet Paper from Korea*, 72 Fed. Reg. 60630 (Oct. 25, 2007) (final determination) at Comment 1.

does not require the Department to consider all the various reasons why targeting might occur, only the existence of targeting."[24]

Targeting, put simply, is nothing more than a pattern of significant price differences among purchasers, regions, or periods of time.[25] There is nothing in the statute or in the SAA to indicate that targeting requires any element of intent, or that it matters "why" the patterns of price differences exist. Accordingly, the Department should continue to find targeted dumping wherever such patterns of price differences exist, and should not entertain arguments and explanations for why such patterns exist.

B. Petitioners Should Not Be Required To Explain Why A Particular Customer, Region, Or Period Of Time Was Targeted

Certain respondents in *Coated Free Sheet Paper* argued that it is insufficient for a petitioner merely to identify a pattern of price differences without some further explanation as to why it believes a particular customer or region was targeted. Otherwise, according to those respondents, the targeting analysis becomes "circular," because Petitioner will just allege "arbitrarily" that the lowest priced customer or region – whatever it is – was targeted.

These arguments are without merit, and were properly rejected in *Coated Free Sheet Paper*. Again, the statute requires only that a pattern of significant pricing differences among purchasers, regions, or time periods actually exists. It does not specify how such patterns must be identified. Obviously, a petitioner must identify the patterns of significant price differences by examining the U.S. sales data provided by respondents. But the results of the analysis are not

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[24] *Id.*

[25] 19 U.S.C. § 1677f-1(d)(1)(B); SAA at 842-43.

predetermined, as there is no way to know beforehand whether there will be any such patterns that meet the P/2 standard. The targeted dumping provision requires only that patterns of significant price differences exist, and nothing more. Moreover, there is no reason to believe that the proposed P/2 standard will result in a finding of targeted dumping in every investigation.

It should be re-emphasized that the statute was designed to prevent the *concealment of dumping margins* whenever there are significant price differences within the U.S. database.[26] When patterns of significant price differences exist, those dumping margins are concealed – regardless of "why" the patterns exist. In order to effectuate the purpose of the targeted dumping provision, therefore, Commerce must limit its examination to whether such patterns exist, and not require any further showings by the petitioner.

V. THE DEPARTMENT SHOULD APPLY THE AVERAGE-TO-TRANSACTION METHOD TO *ALL* SALES, AND NOT JUST THE TARGETED SALES, WHERE THE TARGETED QUANTITY EXCEEDS TWENTY PERCENT OF THE U.S. SALES DATABASE

Although there is absolutely nothing in the statute at 19 U.S.C. § 1677f-1(d)(1)(B) requiring Commerce to limit its application of the average-to-transaction methodology to the targeted sales, the Department's regulations at 19 C.F.R. § 351.414(f)(2) state that the Department "normally" will do so. 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."[27] As further discussed in the *Preamble*,

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[26] SAA at 842-843 (1994).

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

> the Department contemplates that in some instances it may be necessary to apply the average-to-transaction method to all sales to the targeted area, such as a region or a customer, or even all sales of a particular respondent. For example, where 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. Moreover, the Department recognizes that where a firm engages extensively in the practice of targeted dumping, the only adequate yardstick available to measure such pricing behavior may be the average-to-transaction methodology.[28]

In *Coated Free Sheet Paper*, the Department found – despite the existence of widespread and pervasive targeting – that it was "able to segregate the targeted sales prices, by region or customer as appropriate, from the normal pricing behavior of the company."[29] It is unclear why the Department considered that factor dispositive, given that "administrative impracticability" was only one example identified in the *Preamble*.

The Department should clarify the circumstances under which it will apply the average-to-transaction methodology to all sales. In particular, the Department should, in order to provide some predictability to all parties, establish a threshold for what constitutes "widespread" or "pervasive" targeting. An appropriate threshold would be twenty percent of the U.S. sales, by quantity. In *Pasta from Italy* – which the Department has, appropriately, decided no longer to follow – the Department had capped the percentage of sales that could even be alleged to have

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[28] *Id.*

[29] *Coated Free Sheet Paper from Korea*, 72 Fed. Reg. 60630 (Oct. 25, 2007) (final determination) at Comment 7.

been "targeted" at 20 percent.[30] 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.

VI. CONCLUSION

For the reasons discussed above, the Department should adopt the P/2 Test as the standard for identifying targeted dumping. That is, targeted dumping should 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 non-targeted groups in CONNUM/month combinations representing a preponderance of the targeted quantity.

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

Respectfully submitted,

David Schneiderman for David Hartquist

DAVID A. HARTQUIST
Executive Director
Committee to Support U.S. Trade Laws

cc: Anthony Hill
Michael Rill

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[30] *Borden, Inc. v. United States*, 23 C.I.T. 372, 373 (1999) ("*Borden II*") (The "price to the allegedly targeted purchaser must be in the lowest 20 percent of all average transaction prices").