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VIA HAND DELIVERY

The Honorable Carlos M. Gutierrez
Secretary of Commerce
U.S. Department of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street & Constitution Avenue, NW
Washington, D.C. 20230

Re: Targeted Dumping in Antidumping Investigations: Response to Request for Public Comments

Dear Secretary Gutierrez:

These public comments are filed on behalf of Hansol Paper Co., Ltd., POSCO, and Samsung Electronics Co., Ltd. in response to the Department's recent request for comments on the appropriate methodology for determining whether targeted dumping is occurring in antidumping investigations. *See Targeted Dumping in Antidumping Investigations: Request for Comment*, 72 Fed. Reg. 60651 (Oct. 25, 2007) ("*Request for Comments*"). Each of the above-named companies is a major Korean and multinational corporation that, in recent years, has participated in the Department's antidumping proceedings and has extensive experience with

antidumping methodologies. In accordance with the Department's instructions, we are submitting an original and six copies of these comments and are simultaneously transmitting an electronic version via e-mail to the Department's webmaster. This submission contains no business proprietary information.

I. INTRODUCTION

In order for the Department to find that targeted dumping has occurred during the period of investigation, the antidumping statute and regulations require it to find:

(1) a *pattern* of U.S. prices (i.e., export prices or constructed export prices) for comparable merchandise that differ *significantly* among purchasers, regions, or periods of time; and

(2) the Department cannot take into account such significant price differences using either the average-to-average or the transaction-to-transaction comparison methods.

19 U.S.C. § 1677f-1(d)(1)(B); 19 C.F.R. § 351.414(f)(1). With regard to the first factor, the Department's regulations further require that the pattern of significant price differences be demonstrated "through the use of, among other things, *standard and appropriate statistical techniques*." 19 C.F.R. § 351.414(f)(1)(i) (emphasis added).

In the preamble to its regulations, the Department explained that it intended "to employ common statistical methods in its targeted dumping determinations in order to ensure that the test is applied on a consistent basis and in a manner that ensures transparency and predictability to all parties concerned." *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27295, 27374 (May 19, 1997) ("*Preamble to Final Regulations*"). The Department subsequently developed evidentiary requirements and testing procedures for analyzing a targeted dumping

allegation in the context of a remand determination arising out of the Department's antidumping duty investigation of *Certain Pasta from Italy*. *See Borden, Inc. et al. v. United States*, 4 F. Supp. 2d 1221, 1231 (Ct. Int'l Trade 1998), *aff'd* on remand, 23 C.I.T. 372, 373 (1999) (*citing* Case No. A-475-818, *Redetermination on Remand; Final Determination of Sales at Less than Fair Value; Certain Pasta from Italy*, Aug. 28, 1998 ("*Pasta Remand Redetermination*")).[1] The Department explained to the U.S. Court of International Trade ("CIT") that it had developed general standards by which it could evaluate targeted dumping petitions. *Id.* In fact, The *Pasta Test* was carefully designed to incorporate all of the relevant elements of the statute so that it could serve as the basis for evaluating similar types of allegations in the future.

Since the *Pasta Remand Determination*, the Department did not consider any allegations of targeted dumping until a recent antidumping investigation involving *Coated Free Sheet Paper from the Republic of Korea*. *See* 72 Fed. Reg. 60630 (Oct. 25, 2007) ("*Coated Free Sheet Paper*"). In the *Coated Free Sheet Paper* investigation, the Department declined to use the previously developed *Pasta Test* and instead accepted a far less rigorous approach proffered by the petitioner in that case, which resulted in the Department's acceptance of a targeted dumping allegation for the first time. *Id.*, Issues and Decision Memorandum at Comment 2.[2] In doing so,

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[1] Throughout these comments, we refer to the Department's evidentiary requirements and statistical testing procedures for targeted dumping allegations from the *Pasta Remand Determination* as the "*Pasta Test.*" For the Department's reference, **Attachment 1** contains a copy of the *Pasta Test*. See Case No. A-475-818 (Investigation Remand), Memorandum to the File, "Remand on Pasta from Italy; Delverde Revised Targeted Dumping Remand Procedures," Aug. 20, 1998. **Attachment 2** contains a copy of the *Pasta Remand Determination.*

[2] Prior to *Coated Free Sheet Paper*, the Department rejected each targeted dumping allegation that it had received for failing to satisfy the statutory and regulatory requirements. *See Stainless Steel Wire Rod from Taiwan*, 63 Fed. Reg. 10836, 10837 (Mar. 5, 1998) (preliminary determination) ("*SSWR from Taiwan*"); *Fresh Tomatoes*

however, the Department explained that it was not "endorsing the petitioner's test standards and procedures as a general practice" and that it intended to seek public comments on the targeted dumping methodology to be employed in future investigations.

The Department is now soliciting these public comments on three specific aspects of the methodology that it will employ in future antidumping investigations to determine whether targeted dumping is occurring:

(1) the standards and methods that should be used to show whether a "pattern" of price differences exists among different purchasers, regions, or periods of time;

(2) the threshold, if any, for showing that price differences are "significant"; and

(3) the "standard and appropriate statistical techniques" that should be used to evaluate whether targeted dumping exists.

Request for Comments, 72 Fed. Reg. at 60651.[3]

For the reasons described below, Hansol, POSCO, and Samsung submit that the Department should use the *Pasta Test*'s evidentiary thresholds and statistical testing procedures to evaluate targeted dumping allegations made in future antidumping investigations. The Department created the *Pasta Test* as a means of objectively analyzing whether patterns of price

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from Mexico, 61 Fed. Reg. 56608, 56610 (Nov. 1, 1996) (preliminary determination); *Certain Pasta from Italy*, 61 Fed. Reg. 30326, 30329 (June 14, 1996) (final determination); *Polyvinyl Alcohol from Taiwan*, 61 Fed. Reg. 14064, 14065 (Mar. 29, 1996) (final determination); *Certain Pasta from Turkey*, 61 Fed. Reg. 1351, 1353 (Jan. 19, 1996) (preliminary determination).

[3] The Department's *Request for Comments* did not seek comments on how the Department should determine whether to make average-to-average or transaction-to-transaction comparisons in antidumping investigations, or how it should evaluate whether the selected comparison method can take into account price differences that may exist among different purchasers, regions, or time periods. Accordingly, we do not address these issues here. For the record, however, we strongly urge the Department to continue using the average-to-average comparison method as its preferred method in all future investigations and decline to use the transaction-to-transaction method except in the most unusual cases, consistent with 19 C.F.R. § 351.414(c)(1) and its longstanding practice.

differences exist among different purchasers, regions, or time periods, and whether such price differences are statistically "significant." Moreover, the Department intentionally structured the *Pasta Test* so that it could be easily modified to fit the facts of any future investigations, and thus it is unnecessary for the Department to create wholesale new statistical testing procedures. However, if the Department decides to craft a new targeted dumping methodology, then we request that the Department do so in a manner that is neutral and rigorous so that the targeted dumping provisions do not become a means of unduly penalizing respondents in future antidumping investigations.

II. THE *PASTA TEST* IS CONSISTENT WITH THE TARGETED DUMPING PROVISIONS UNDER THE ANTIDUMPING STATUTE AND THE DEPARTMENT'S REGULATIONS

In the *Coated Free Sheet Paper* investigation, the Department did not apply its previously articulated *Pasta Test* to evaluate the targeted dumping allegations, claiming that the *Pasta Test* had been developed specifically for the *Pasta Remand Determination* and that it did not have any subsequent experience with analyzing targeted dumping. *Coated Free Sheet Paper*, *supra*, Issues and Decision Memorandum at Comment 2. However, as described below, the standards and thresholds from the Department's *Pasta Test* fairly and completely embody the statutory and regulatory requirements for evaluating targeted dumping allegations. Accordingly, the *Pasta Test* can and should form the basis of a standardized practice to be applied in future antidumping investigations.

A. The Department Intended to Apply the *Pasta Test* in Future Antidumping Investigations

In the preamble to its regulations, the Department explained that it intended "to employ common statistical methods in its targeted dumping determinations in order to ensure that the test is applied on a consistent basis and in a manner that ensures transparency and predictability to all parties concerned." *Preamble to Final Regulations*, 62 Fed. Reg. at 27374. Subsequent to the promulgation of the final regulations, the Department articulated statistical methods in the context of the appeal arising out of *Certain Pasta from Italy*. Specifically, in the context of that appeal, the CIT reminded the Department that it was obligated "to articulate the standards by which it would determine that a 'pattern of export prices' that 'differ significantly' did or did not exist." *Borden*, 4 F. Supp. 2d at 1229. The CIT then held that:

> To facilitate future inquiries, Commerce will need at some point to explain what targeted dumping is, what methods will identify or rule out the pricing patterns referred to by the statute, what degree of significance in those patterns will trigger Commerce to exercise its discretion to make a case-by-case determination to depart from its normal methodology, and on what basis it will make that decision. For example, regarding the significance of the pattern, bearing in mind that Congress intended a case-by-case analysis with reference to variations in price sensitivity by industry, SAA at 843, Commerce might suggest a calculus which relates pricing patterns with price elasticity.

Id. It then charged the Department to either "articulate the standards by which it evaluates a domestic industry's targeted dumping petitions, in general or for only this case." *Id.* The Department then developed the *Pasta Test* and presented it to the CIT as part of the *Pasta Remand Determination*.

In *Coated Free Sheet Paper*, the Department attempted to walk away from its *Pasta Test* by characterizing it as having been developed specifically and only for the *Pasta Remand Determination*. However, a close review of the *Pasta Remand Determination* clearly demonstrates that the Department intended for its *Pasta Test* to serve as the foundation for evaluating all future targeted dumping allegations, albeit with case-specific modifications where appropriate. Specifically, in the *Borden* remand instructions, the CIT "required that Commerce either articulate standards by which it would evaluate a targeted dumping petition or, if not yet prepared to do so, that Commerce conduct its own analysis of the data to determine whether to calculate dumping margins for Delverde using transaction-specific rather than weighted-average prices." *Borden*, 23 C.I.T. at 373. In reviewing the *Pasta Remand Determination*, the CIT observed that the Department "*chose to articulate the standards by which it would evaluate a targeted dumping petition*, explicitly noting that the methodology developed for this case might vary in the future." *Id.* (emphasis added). In other words, the Department represented that it had developed general standards by which it would evaluate targeted dumping petitions, rather than case-specific standards for the pasta investigation.

Indeed, when the Department responded to interested party comments on its draft remand results, the Department explained that it had applied two series of tests to perform its targeted dumping analysis with respect to respondent Delverde, but that it "{did} not intend to perform the second series of tests in future cases." *See Pasta Remand Determination* at 21, 22. The clear implication of that statement is that the Department *did* intend to perform the first series of tests developed in the *Pasta Remand Determination* in future cases. Similarly, with respect to the

Pasta Test's 20 percent threshold for identifying the targeted group, the Department stated that it "finds it necessary to set out a threshold that must generally be met by petitioners alleging targeted dumping," again signaling that the procedures were general in nature and that petitioners in future cases would be required to follow them. *Id.* at 19.

The foregoing establishes that, although the Department reserved the discretion to refine specific elements of the *Pasta Test* in future cases, it indisputably intended to use the overall methodology as the starting point for evaluating future targeted dumping allegations. The Department merely caveated that the *Pasta Test* "might vary" in future cases, meaning that the test might be modified or refined depending on the circumstances of future cases, but did not indicate that the test "might be abandoned entirely" subsequent to the *Pasta Remand Determination*. The Department's decision to walk away from the *Pasta Test* in *Coated Free Sheet Paper* seriously undermined the consistency, transparency, and predictability that it sought to achieve through the promulgation of the general standards in the *Pasta Remand Determination*. The Department, therefore, should reaffirm that its *Pasta Test* will serve as the standard test for all future antidumping investigations.

B. The *Pasta Test* Utilizes "Standard and Appropriate Statistical Techniques"

The Department's regulations require that "standard and appropriate statistical techniques" must be used when evaluating whether a pattern of significant price differences exists among purchasers, regions, or time periods. 19 C.F.R. § 351.414(f)(1)(i). The Department specified relevant statistical techniques in the context of the *Pasta Remand Determination*, which the CIT described as follows:

> Commerce defined price difference as a separation in price,[4] defining price as gross unit prices less adjustments for movement charges, discounts, rebates, and post-sale price adjustments. Accordingly, if targeting had occurred, the allegedly targeted purchaser would receive a lower average price than each allegedly non-targeted purchaser, and that price difference would not be attributable to non-targeting factors such as product type, level of trade, time of sale, or terms/conditions of sale.
>
> Commerce defined two ways it would identify price differences significant enough to trigger a targeted dumping investigation. First, to avoid the illogical conclusion that the majority of purchasers were targeted, the price to the allegedly targeted purchaser must be in the lowest 20 percent of all average transaction prices. Second, to determine what magnitude of price differences is significant for the market at hand, Commerce requires that the price separation between allegedly targeted and non-targeted customers must be equal to or greater than the maximum price separation within the non-targeted group, unless a party shows the exporter's data to be non-representative of the industry as a whole.
>
> Commerce also defined which significant price differences would qualify as a pattern. Specifically, {Commerce} would recognize a pattern of significant price differences if i) they existed, on average, over all relevant time periods and for all products sold by the exporter to the allegedly targeted customer or customers, and ii) average transaction prices exhibited a "downward skewness" with respect to allegedly targeted customers. Commerce noted, in response to comments from the parties, that the department would relax its standards if a party could show that the allegedly targeted purchasers comprised a well-defined group, such as those who buy for a niche market or those who recently changed suppliers due to price-undercutting.

Borden, 23 C.I.T. at 373-74.

The Department's *Pasta Test* undisputedly relies on "standard and appropriate statistical techniques," as required by the regulations. Specifically, the *Pasta Test* involves a "difference-in-means" test, or a "price mean" comparison, by which it segregates the relevant U.S. sales

[4] The Department defined a "separation in price" as existing when an "alleged targeted customer receives a lower average price than each alleged non-targeted customer" and such price differences are not attributable to other factors such as product type, levels of trade, time of sale, or terms and conditions of sale. *Pasta Remand Determination* at 16.

database into two groups and then performs statistical tests on the average prices within each group. Through multiple statistical techniques embodied in a SAS computer program, the *Pasta Test* identifies potentially targeted customers, regions, or time periods that are in the bottom 20 percent of the rank-ordered prices (i.e., "frequently at the bottom") based on the calculated price differences.[5] The Department's computer program then evaluates whether the price differences are "significant" and whether they constitute a "pattern." Therefore, the *Pasta Test* carefully avoids predetermining the outcome by examining all transactions for patterns and significant price differences using various statistical tests.

The Department's SAS computer program can be modified easily to fit the facts of future cases, as the Department itself recognized in the *Pasta Remand Determination* (at 15-16).[6] That is, the Department carefully constructed the *Pasta Test* to embody the statutory and regulatory factors that the Department is required to analyze – i.e., whether a "pattern" of "significant" price differences actually exist among different purchasers, regions, or time periods. Although certain aspects of the *Pasta Test* were tailored to the facts of that case, the statistical testing procedures developed were predominantly general in nature, mutually exclusive of the characteristics of the

[5] The Department intentionally limited the potentially targeted group to those in the bottom 20 percent of average transaction prices "to avoid the illogical conclusion that the majority of purchasers were targeted." *Borden*, 23 C.I.T. at 373. Even if the Department does not use the *Pasta Test* in future antidumping investigations, it must still ensure that the alleged targeted group does not exceed 20 percent of all transactions so that petitioners do not unreasonably overstate the degree of the alleged targeting.

[6] In *Coated Free Sheet Paper*, Hansol submitted for the Department's review a version of the *Pasta Test* that was modified slightly to fit the facts of that investigation, but the Department did not consider it. Nevertheless, Hansol demonstrated that the *Pasta Test*'s computer programming language, which was developed in the context of a purchaser-based allegation, could be tailored easily to fit a regional targeting allegation and the characteristics of the databases submitted in another investigation.

databases in the *Pasta* case, and can easily be applied to future cases whether the allegations are made on a purchaser, regional, or time period basis.

The Department decided not to use the *Pasta Test* in *Coated Free Sheet Paper*, but at no point did the Department question or dispute that the *Pasta Test* relies on standard and appropriate statistical techniques. Similarly, the Department did not, nor could it, identify any defects in its *Pasta Test* that render this statistical testing procedure invalid with respect to the targeted dumping analysis because, simply put, none exist. On the contrary, the objectivity of the *Pasta Test* renders it far more superior than the type of methodology that the Department previously rejected in other cases, but accepted in *Coated Free Sheet Paper*, which segregates the U.S. sales population into two groups *before* actually performing the analysis. Techniques such as the one used in *Coated Free Sheet Paper*, which predetermine the targeted group based on apparently lower prices, cannot be considered statistically valid because they begin with an inherent bias and merely confirm what is already known – that prices in the targeted group are lower.

C. The *Pasta Test* Shows Whether a "Pattern" of Significant Price Differences Exists

As indicated above, the Department's *Pasta Test* was intentionally designed to evaluate whether a "pattern" of significant price differences exist. According to the *Pasta Remand Determination*, the *Pasta Test* finds that a pattern exists if "the significant price difference{s} . . . exist, on average, over all relevant time periods and for all products sold by the exporter to the allegedly targeted customer(s)" and the "average transaction prices . . . exhibit a downward

skewness with respect to allegedly targeted customers." *Pasta Remand Determination* at 16.[7] In other words, a pattern exists if "the difference between the highest average CONNUM price for the alleged targeted group and the median average CONNUM price (for all customers) must exceed the difference between the median average CONNUM price to all customers and the highest average CONNUM price for the non-targeted group."[8] Differently stated, no pattern exists if the average price to each allegedly targeted purchaser, region, or time period is skewed vis-à-vis the median average price. *Pasta Remand Determination* at 20.

The *Pasta Test* evaluates whether a pattern of significant price differences exists by examining:

- whether the weighted-average of (a) the consecutive pair-wise differences between prices in the non-targeted group, equals or exceeds (b) the difference between the lower price among the non-targeted group and the highest prices among those "frequently at the bottom" (the "gap test"); and
- whether (c) the difference between the highest price among the non-targeted group and the median price for all customers, regions, or time periods, equals or exceeds that of (d) the difference between the median price in (c) and the highest price among those frequently at the bottom (the "skewness test").

If (a) equals or exceeds (b) in the gap test, or if (c) equals or exceeds (d) in the skewness test, then the Department's SAS program concludes that the purchaser, region, or time period

[7] The *Pasta Remand Determination* refers to customers because the Department there evaluated a purchased-based targeted dumping allegation, but the same rationale would hold true for allegations based on regions or time periods.

[8] *See* Case No. A-475-818 (Investigation Remand), Letter from Richard W. Moreland, Deputy Assistant Secretary, Import Administration, Group I, dated June 12, 1998, re Proposed Standards for Targeted Dumping Analysis in Pasta from Italy, provided at **Attachment 3**.

frequently at the bottom is *not* targeted. Otherwise, if a particular purchaser, region, or time period passes both the gap test and skewness test, then it is considered targeted.

As the foregoing establishes, the Department's *Pasta Test* rigorously examines whether patterns of significant price differences exist. As such, it should be employed in future antidumping investigations.

D. The *Pasta Test* Utilizes Statistical Procedures for Demonstrating Whether Price Differences Are "Significant"

1. The Department Should Not Impose a Bright-Line Threshold for Establishing Significance

Under 19 U.S.C. § 1677f-1(d)(1)(B), the Department must determine that the price differences among purchasers, regions, or time periods are "significant." Neither the statute nor the regulations define what constitutes a "significant" price difference for purposes of targeted dumping. However, the Department's regulations specifically require that the determination of "significant" price differences derive from "standard and appropriate statistical techniques." 19 C.F.R. § 351.414(f)(1)(i). The CIT confirmed this fact when, in *Borden*, it explained that, "regarding the significance of the pattern, bearing in mind that Congress intended a case-by-case analysis with reference to variations in price sensitivity by industry, SAA at 843, Commerce might suggest a calculus which relates pricing patterns with price elasticity." *Borden*, 4 F. Supp. 2d at 1229.

For that reason, the Department's *Pasta Test* contains a general statistical procedure for defining significant price differences, namely, that "the price separation between allegedly targeted and non-targeted customers must be equal to or greater than the maximum price

separation within the non-targeted group, unless a party shows the exporter's data to be non-representative of the industry as a whole." *Borden*, 23 C.I.T. at 373 (*citing Pasta Remand Redetermination* at 16). This method of demonstrating statistical significance is wholly founded in statistical testing procedures, which makes it more objective than any specific bright-line thresholds that may be imposed. Moreover, this statistical procedure is consistent with Congress's intent that "significance" be determined "on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another." Statement of Administrative Action ("SAA"), H. R., Doc. No. 103-316, Vol. 1 (1994), at 843. Accordingly, it is unnecessary for the Department to develop any bright-line percentages for establishing significance in the targeted dumping context.

2. If the Department Establishes a Bright-Line Threshold for Significance, It Should Draw on Other Areas of Its Antidumping Practice

To the extent that the Department decides to adopt a specific percentage regarding the definition of significance in adopting its new targeted dumping methodology (or modifying the existing *Pasta Test*), the Department should consider other areas of its practice that expressly address significance or similar standards. First, the Department's regulations define "significant" in the context of ministerial error allegations. In an antidumping investigation, the Department will only amend a preliminary determination if it makes a "significant" ministerial error, which 19 C.F.R. § 351.224(g) defines as a difference of "not less than 25 percent." A similar 25-percent significance threshold in the targeted dumping context would be consistent with the Department's own regulations. Moreover, the CIT has held that, "It is correct that where the

identical word or phrase is used more than once in the same act, there is a presumption that they have the same meaning." *Borden*, 4 F. Supp. 2d at 1231.

Second, in non-market economy proceedings, the Department instituted a policy presuming that "market economy input prices are the best available information for valuing an entire input when the total volume of the input purchased from all market economy sources during the period of investigation or review exceeds 33 percent of the total volume of the input purchased from all sources during the period." *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61716, 61717-18 (Oct. 19, 2006). The Department then went on to describe the 33 percent threshold as constituting a "significant" quantity for purposes of establishing when to use market economy input prices rather than surrogate values in establishing normal value. *Id.* at 61718.

Third, in determining whether a "reasonable allowance for differences in physical characteristics" can be made when comparing similar merchandise under 19 C.F.R. § 351.411, the Department employs a 20 percent difference-in-merchandise test in which it will not compare two products if the differences in their variable costs of manufacturing exceed 20 percent.

The foregoing examples of the Department's rules and practice demonstrate that, in evaluating whether differences are significant, it would be inappropriate and inconsistent to set an artificially low bright-line threshold in the targeted dumping context. Indeed, in the targeted dumping context, the CIT recognized that "significant" means "a noticeably or measurably large amount" and then referenced pricing differences of at least 20 to 25 percent as examples of

possible significant differences. *Borden*, 4 F. Supp. 2d at 1231. Small differences, such as the two-percent threshold proposed by the petitioner in *Coated Free Sheet Paper*, certainly do not rise to the level of "a noticeably or measurably large amount" under the CIT's rationale, the plain meaning of the word "significant," and the Department's regulations and practice.

III. IF THE DEPARTMENT ADOPTS NEW STATISTICAL TESTING PROCEDURES, IT MUST CREATE A FAIR, OBJECTIVE, AND RIGOROUS TEST

For the reasons described above, the Department should use its *Pasta Test* to evaluate targeted dumping allegations in future investigations. If, however, the Department decides to develop new evidentiary standards and statistical techniques, they must be similarly rigorous and objective, particularly given clear Congressional intent that targeted dumping findings would be the exception and not the rule.[9] Otherwise, if the analytical threshold for finding targeted dumping is set too low, then petitioners in each future antidumping investigation could potentially bring a successful targeted dumping allegation, which would be an illogical and unfair outcome that would effectively reduce the targeted dumping provisions to a nullity. We submit below additional comments for the Department's consideration in the event that it decides not to standardize the *Pasta Test* for future investigations.

[9] *See, e.g.*, SAA at 842-43 (stating that, "in an investigation, Commerce normally will establish and measure dumping margins on the basis of a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices," and referring to the use of the transaction-to-transaction and average-to-transaction methods in investigations as "exceptions").

A. The Department Should Reject the Methodology Used in *Coated Free Sheet Paper*

Hansol, POSCO, and Samsung respectfully urge the Department to reject any proposed targeted dumping methodology that fails to rely on appropriate statistical procedures, as mandated by the Department's regulations. For example, in *Coated Free Sheet Paper*, the Department accepted a targeted dumping allegation that it characterized as "a simple comparison of monthly-average prices for identical products sold to targeted and non-targeted customers (or regions, as appropriate)." *Coated Free Sheet Paper*, *supra*, Issues and Decision Memorandum at Comment 1. This methodology is substantially similar to the approach that the Department traditionally uses to calculation a level of trade adjustment, which, under 19 U.S.C. § 1677b(a)(7)(A)(ii), must be calculated based on "a pattern of consistent price differences between sales at different levels of trade."

We respectfully disagree with the Department's claim that this methodology rises to the level of "standard and appropriate statistical techniques," as required by 19 C.F.R. § 351.414(f)(1)(i). On the contrary, the methodology is substantially similar to the type of methodology that the Department had disavowed in prior investigations. In *SSWR from Taiwan*, the Department rejected the petitioner's targeted dumping allegation because its analysis provided only a "simple comparison of average prices to different customers" and that such a superficial analysis, "without further statistical analysis, does not yield meaningful conclusions about a pattern of export prices differing significantly among purchasers." *SSWR from Taiwan*, 63 Fed. Reg. at 10837 (*citing Stainless Steel Wire Rod from Taiwan*, Case No. A-583-828

(Investigation), Memorandum to Holly Kuga, Senior Director, AD/CVD Enforcement, "Concurrence Memorandum for Preliminary Determination of Investigation," dated Feb. 25, 1998), at 7-9 (rejecting the petitioner's targeted dumping allegation because "{t}he petitioners' statistical analysis goes no further than simply averaging the POI prices for specific control numbers to Yieh Hsing's two customers.")

Similarly, in *Certain Pasta from Italy*, the Department originally rejected the targeted dumping allegation at the preliminary determination because it "was based on conclusions drawn from simple averaging or from minimum and maximum price differentials and was not supported by any more specific analysis." *Certain Pasta from Italy*, 61 Fed. Reg. 1344, 1347 (Jan. 19, 1996) (preliminary determination). In the final determination of that case, the Department again rejected the targeted dumping allegation, explaining that the results of the petitioner's targeted dumping analysis had been "predetermined by the initial composition of the different groups" of customers, which it had selected based on relatively higher and lower prices. *Certain Pasta from Italy*, 61 Fed. Reg. at 30329. Thus, the Department's decision to reject the targeted dumping allegation was motivated by that petitioner's use of a procedure akin to the Department's method for calculating level of trade adjustments, which the Department found to constitute a failure to rely on appropriate statistical techniques.

Subsequently, in *Borden*, the petitioner in *Certain Pasta from Italy* challenged the Department's use of different standards for its level of trade adjustment and targeted dumping analyses. *Borden*, 4 F. Supp. 2d at 1230. The CIT disagreed with the petitioner, and agreed with the Department, that the targeted dumping analysis requires "application of a stricter standard"

that is more rigorous than the level of trade adjustment analysis because: (1) the Department's treatment of patterns of pricing differences in a level of trade analysis is different from, and irrelevant to, its treatment of patterns of pricing differences in a targeted dumping analysis; and (2) the level of trade analysis is mandatory and standard, whereas the targeted dumping analysis is an exception to the general rule that also requires the Department to explain why it is deviating from its normal comparison methodology. *Id.* at 1231.[10]

Despite the Department's prior position, as affirmed by the CIT, the methodology that the Department accepted in *Coated Free Sheet Paper* was substantially similar to those that it had previously rejected insofar as it consisted merely of simplistic price averaging and did not contain the additional statistical analysis that the Department's regulations and consistent practice require for targeted dumping allegations. Nothing in the Department's final determination remotely suggests that the interim methodology used constitutes a "standard and appropriate statistical technique" or that it yields statistically meaningful conclusions. Indeed, the Department's decision to solicit comments on the methodology to be employed in future cases suggests concern about the validity of the procedures accepted in *Coated Free Sheet Paper*.

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[10] *Compare* 19 C.F.R. § 351.414(f)(1)(i) (requiring the use of standard statistical techniques to determine the pattern of pricing differences for targeted dumping analyses) *with* 19 C.F.R. § 351.412(d) (imposing no requirement that price differences for level of trade adjustments rely on standard statistical techniques). Whereas level of trade adjustments may reflect "normal variations in customer prices," the Department has expressly stated that normal price variations do not serve as an adequate basis upon which to make a targeted dumping finding. *See Pasta Remand Determination* at 19. The Department's *Pasta Test* undeniably relies on standard and appropriate statistical techniques (i.e., price mean comparisons), whereas the Department's method for calculating level of trade adjustments does not.

Accordingly, in future investigations, the Department should refrain from using superficial pricing analyses as the basis for evaluating whether targeted dumping has occurred because the Department must apply "standard and appropriate statistical techniques." An analysis based on the level of trade adjustment test falls far short of meeting that standard.[11] For the reasons described *supra*, the *Pasta Test* undeniably utilizes appropriate statistical testing procedures and can be modified easily to fit the facts of any future investigations.

B. Petitioners Should Be Required to Submit Detailed Information to Support Any Future Targeted Dumping Allegations

The preamble to the Department's regulations explains the burden that domestic producers must bear when making targeted dumping allegations:

> It is the Department's view that normally any targeted dumping examination should begin with domestic interested parties. It is the domestic industry that possesses intimate knowledge of regional markets, types of customers, and the effect of specific time periods on pricing in the U.S. market in general. Without the assistance of the domestic industry, the Department would be unable to focus appropriately any analysis of targeted dumping. For example, the Department would not know what regions may be targeted for a particular product, or what time periods are most significant and can impact prices in the U.S. market. Ultimately, the domestic industry possesses the expertise and knowledge of the product and the U.S. market. Information on these factors are significant for both the burden aspect and the determination itself. If the Department were required to explore the contours of the U.S. market for every product subject to an investigation, absent the knowledge as to how the market functions, the Department would be compelled to conduct countless comparisons of prices between customers, possible regions, and possibly significant time periods in every case. Absent any guiding insight as to how the market truly functions, such a requirement would be an enormous undertaking. Fundamentally, the

[11] Moreover, if using the level of trade adjustment methodology served as an adequate basis for conducting targeted dumping analyses, the Department would not have needed to develop the rigorous statistical framework in the *Pasta Remand Determination* that conscientiously incorporated the requisite statutory elements, and it certainly would not need to solicit additional comments on what methodology to employ in future investigations.

> Department needs the assistance of the domestic industry to focus the inquiry and to properly investigate the possibility of targeted dumping.

Preamble to Final Regulations, 62 Fed. Reg. at 27374.

In future antidumping investigations, the Department should require domestic producers to support their targeted dumping allegations with detailed factual information about how the relevant market functions. Otherwise, the Department could receive allegations of targeting that are the product of results-oriented gerrymandering that bear no relationship to how the U.S. market functions or how the respondents sell subject merchandise in the normal course of business. If the Department permits domestic producers to reverse-engineer respondents' data in order to create artificial targeted groups that help achieve the outcome they desire, with no "guiding insight as to how the market truly functions," then the targeted dumping provisions would become an easily manipulated tool to unduly penalize respondents.

IV. IF THE DEPARTMENT FINDS THE EXISTENCE OF TARGETED DUMPING, IT SHOULD NOT EMPLOY ZEROING WHEN CALCULATING RESPONDENTS' WEIGHTED-AVERAGE DUMPING MARGINS

In *Coated Free Sheet Paper*, which is the only investigation in which the Department issued an affirmative targeted dumping determination, the Department continued to employ its practice of "zeroing" negative dumping margins when making average-to-transaction comparisons for U.S. sales found to be targeted. It did, however, provide offsets for negative dumping margins when making average-to-average comparisons for U.S. sales that were deemed non-targeted, consistent with its stated policy. *See Antidumping Proceedings: Calculation of the*

Weighted-Average Dumping Margin during an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (Dec. 27, 2006) ("*Zeroing Policy Modification*").[12]

In future investigations, the Department should amend its *Zeroing Policy Modification* by similarly terminating its practice of "zeroing" under *all* comparison methods utilized in original investigations, including average-to-transaction comparisons made as the result of a targeted dumping finding. Although the U.S. courts and the World Trade Organization have not yet been called upon to review the consistency of zeroing when making average-to-transaction comparisons in original investigations, the WTO Appellate Body has held that the Department's practice of zeroing when using the average-to-transaction comparison method in administrative reviews is inconsistent with the WTO Antidumping Agreement. *See United States – Measures Relating to Zeroing and Sunset Reviews*, Report of the Appellate Body, WT/DS322/AB/R (Jan. 9, 2007); *see also United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, Report of the Appellate Body, WT/DS294/AB/R (Apr. 18, 2006). Because the Department's targeted dumping analysis in *Coated Free Sheet Paper* relied on the same average-to-transaction method that it normally applies in administrative reviews, the methodology is equally inconsistent with the United States' international obligations under the WTO Antidumping Agreement.

[12] The Department's decision in *Coated Free Sheet Paper* to employ zeroing when aggregating the dumping margins calculated for U.S. sales in the "targeted" region, and then again when aggregating the margins for targeted and non-targeted U.S. sales for purposes of calculating the overall weighted-average margin, is contrary to law and the Department's stated policy because it denies the full benefit of the offset for non-dumped comparisons.

Furthermore, the Department has acknowledged that neither the statute nor the regulations mandate the use of zeroing when calculating weighted-average dumping margins. *See Zeroing Policy Modification* at 77723 (explaining that "the courts have consistently held that the denial of offsets is not required by statute, but rather is a result of an interpretation of the statute.") (citations omitted); *Timken Co. v. United States*, 354 F.3d 1334, 1341 (Fed. Cir. 2004), *cert denied sub. nom., Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004) (explaining that "the statute does not plainly require consideration of only those dumping margins with a positive value"). Thus, the Department is not required to zero negative dumping margins when making average-to-transaction comparisons in original investigations.

Accordingly, if the Department makes average-to-transaction comparisons in future investigations based on affirmative findings of targeted dumping, it must still provide offsets for non-dumped comparisons because the use of zeroing under any comparison method is WTO-inconsistent. It will also ensure that the targeted dumping provisions do not become misused as a means of circumventing the Department's decision to provide offsets for non-dumped comparisons under the average-to-average method.

V. CONCLUSION

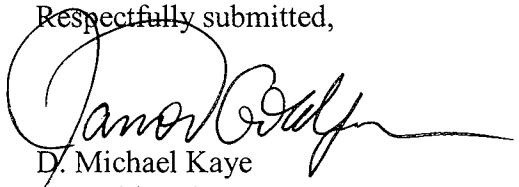
For the foregoing reasons, Hansol, POSCO, and Samsung strongly urge the Department to reaffirm its meticulously articulated *Pasta Test*, which fairly and objectively evaluates whether a pattern of significant price differences exist among different purchasers, regions, or time periods. In doing so, the Department should reject arguments by domestic interested parties calling for the creation of unreasonably low standards that would lead to the illogical conclusion

that targeted dumping exists in every new investigation. The statutory targeted dumping provisions must not be used as a means of circumventing the Department's policy of not employing zeroing when making average-to-average comparisons in investigations.

* * * * *

If you have any questions regarding this submission or require any additional information, please do not hesitate to contact the undersigned.

Respectfully submitted,



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ATTACHMENT 1

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-475-818
Remand (Investigation)
Public Document
GpI/Off2: JRB

PUBLIC FILE

August 20, 1998

TO: File

FROM: John Brinkmann
Program Manager
IA/GpI/Off2

SUBJECT: Remand on Pasta from Italy
Delverde Revised Targeted Dumping Remand Procedures

Attached is the "Revised Targeted Dumping Evidentiary Requirements and Testing Procedures" memo which reflects the methodologies employed in the Department's August 20, 1998, targeted dumping "Draft Remand Determination ." This memo supercedes the procedures memo dated July 22, 1998.

August 20, 1998

REVISED TARGETED DUMPING EVIDENTIARY REQUIREMENTS AND TESTING PROCEDURES (Replaces attachment issued on July 22, 1998)

Below are the procedures (numbered consecutively for continuity purposes) for (a) demonstrating that a given customer is "frequently at the bottom" and (b) determining whether each such customer was, in fact, targeted within the meaning of 771A(d)(1)(B).

(a) Procedures for Meeting Petition Requirements:

(1) Determine the largest-volume connums that account for at least 50% of Delverde's total POI sales. Call this set of connums "S". [Note: all subsequent references to totals and averages, in part (b) as well, apply to S only, unless specified otherwise.]

(2) The prices used in this analysis should be, to the extent possible, (i) adjusted for discounts and rebates, (ii) segregated by customer category and type of sale (*i.e.*, EP or CEP), and (iii) reported on an ex-factory basis in the case of EP sales or on an ex-U.S. importer (or some other common-point) basis in the case of CEP sales. Separately for EP and CEP sales and for each customer category (retailer, wholesaler/distributor, OEM), for each connum in S and each month of the POI in which sales of that type (EP or CEP) and connum and to that customer category occurred, calculate the (quantity) weighted-average transaction price for each customer that purchased that connum in that month.

(3) Separately for EP and CEP sales and each customer category, for each connum/month combination, rank-order the average transaction prices calculated in (2) from high to low. The result in each case should be a matrix (one for each customer category and sale type combination) of rank-ordered weighted-average transaction prices, by connum and month.

The remaining procedures below apply to each of the matrices created above.

(4) For each connum/month combination, identify the weighted-average transaction price at the top end of the bottom-fifth of the rank-ordered prices. Call this price "$P_{.20}$".

Drop from the allegation, but not from the data set, all customers that do not have a weighted-average transaction price less than $P_{.20}$ in at least one connum/month combination. Henceforth, refer to the remaining customers as "customers at the bottom."

(5) For each connum in S, and for each customer at the bottom (in at least one month), count (i) the number of months in which that customer made purchases (call this number "N") and (ii) the number of those months in which the customer was at the bottom (call this number "B"). Also calculate the average number of months in which a customer made purchases of the connum during the POI, averaging across all purchasers of that connum in the POI. Call this average "Z".

(6) For each connum, drop from the data base those customers at the bottom (and their corresponding weighted-average transaction prices) for whom N in (5) is less than Z in (5) OR for whom the number B/N is less than .80. (The customers dropped at this point are not needed in the subsequent analysis and should be ignored -- they are neither targeted nor non-targeted.) Henceforth, the customers NOT dropped at this point will be referred to as customers frequently at the bottom. The set of customers frequently at the bottom is determined, again, on a connum-by-connum basis.

The Department would then investigate the possible targeting of all customers that you have found frequently at the bottom. The testing procedures that the Department would employ are described below.

(b) Customer Targeting Testing Procedures:

(7) For each connum/month combination, given a customer category and sale type and reflective of an expanded set S that covers the largest volume connums that account for 80% or more of Delverde's POI sales, there should be two groups of customers (and a single weighted-average transaction price corresponding to each customer in each of these two groups) for each connum/month combination: (i) the non-targeted group, *i.e.*,customers not part of the allegation who have weighted-average transaction prices that exceed the HIGHEST of the weighted-average transaction prices associated with the allegedly targeted customers found to be frequently at the bottom; and (ii) the group of allegedly targeted customers found frequently at the bottom. The second group of customers, although

defined for a given connum, may nevertheless vary from month to month, like the first group, as customers enter, exit and re-enter the market at different times.

For each connum/month combination, compute the average sales volume for each customer in both of these groups, and determine the minimum and maximum of the volumes for customers frequently at the bottom. If there is only one customer at the bottom in a given month, use as the min/max range that customer's average sales volume, plus or minus 25%.

(8) For each connum/month combination, delete from the non-targeted group the customers (and their respective weighted-average transaction prices) with average sales (purchase) volumes that lie OUTSIDE the min/max range established in (7). This results in a matrix of rank-ordered weighted-average transaction prices, by connum and customer, for customers that, on average, purchase comparable volumes.

(9) From the group of customers frequently at the bottom for at least one connum, identify and group together those customers who are frequently at the bottom for the largest-volume connums that account for 50% or more of their respective, individual total purchases during the POI. Call this group of customers BF. There is a BF group for each matrix (one for each customer category and sale type combination).

(10) For each customer in each BF group, identify the connum/month combinations looking across all connums and months) in which that customer is at the bottom, *i.e.*, where that customer's weighted-average transaction price is less than $P_{.20}$.

(11) For each combination in (10), using the price ranking generated in (8), compute:

(a) consecutive pair-wise differences between prices in the non-targeted group;

(b) the difference between the lowest price among non-targeted customers and the highest prices among customers frequently at the bottom;

(c) the difference between the highest price among non-targeted customers and the median price for all customers; and

(d) the difference between the median price in

(c) and the highest price among customers frequently at the bottom.

(12) Weight average the maximum of (a) in (11) over all months in which the customer was at the bottom, using aggregate purchases of the customer (in (10) in each month as the weighing factor.

(13) Similarly weight average (b), (c) and (d) in (11) across all months in which the customer was at the bottom.

(14) If the weight-average of (a) equals or exceeds that of (b), or if that of (c) equals or exceeds that of (d), STOP and conclude that the customer in (10) was not targeted for the given customer category and sale type. Otherwise, go to (15).

(15) Determine whether average-to-average or transaction-to-transaction price comparisons can be used. If not, use average-to-transaction comparisons for all sales to the customer, for the given customer category and sale type.

(16) Return to step (10) and analyze (one by one) all remaining customer(s) in each BF.

ATTACHMENT 2

A-475-818
Remand (Investigation)
Public Document
GpIOff2: JRB

FOR PUBLIC FILE

August 28, 1998

REDETERMINATION ON REMAND
FINAL DETERMINATION OF SALES AT LESS THAN FAIR VALUE
CERTAIN PASTA FROM ITALY (A-475-818)

Borden, Inc., Gooch Foods, Inc., and Hershey Foods Corp.
v. United States
Consol. Court No. 96-08-01970

BACKGROUND

On April 1, 1998, the United States Court of International Trade (CIT) in Borden, Inc., Gooch Foods, Inc., and Hershey Foods Corp. v. United States, Consol. Court No. 96-08-01970, Slip. Op. 98-36, remanded to the Department of Commerce (the Department) the Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy, 61 FR 30326 (final determination) and 61 FR 38547 (amended final determination).

The issues that the Court remanded are as follows:

(1) The Court remanded to Commerce to apply a level of trade methodology conditioned on the terms of the statute. The inquiry must be analytically distinct from the price calculation itself.

(2) The Court remanded to Commerce the determination of what rate to use as facts available for De Cecco. Commerce is to consider its decision to use "adverse inference" for De Cecco. Moreover, even if Commerce determines that an adverse inference is warranted, Commerce may use a rate of no more than 21.34%.

(3) The Court remanded to Commerce to articulate the standards by which it evaluates a domestic industry's targeted dumping allegation, in general or for only this case, or to conduct its own analysis to determine whether there is targeted dumping based on the data submitted by the respondent

REMAND RESULTS

I. LEVEL OF TRADE

In the original investigation, we determined the level of trade of the Constructed Export Price (CEP) after removing from the first resale to an unaffiliated U.S. customer, i.e.,

calculated margins for cooperating respondents, as well as the margins accepted at the time of initiation, and determined that use of a weight-averaged calculated margin would not be sufficiently adverse as to induce full compliance with the Department's requests for information. The Department, therefore, turned to a petition-based facts available margin (using an average rate of 46.67% rather than the highest rate accepted at the time of initiation). The Department found that this margin provided the necessary incentive to respondents and had been corroborated at the time of initiation. In the meantime, however, the Department has changed its practice with respect to the corroboration of assigned antidumping rates. For example, in the recent case of Stainless Steel Wire Rod from Korea, "for purposes of corroboration with regard to facts available, the Department re-examined the price information provided in the petition in light of information developed during the investigation." Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Stainless Steel Wire Rod from Korea, 63 FR 10825, 10827, March 5, 1998.

For purposes of this remand, we have compared our original facts available margin with the range of transaction margins we found for cooperative respondents that we used to calculated the weighted-average antidumping duty rate for the final determination. These margins are listed in the computer output developed for our final determination. We found that the original facts available percentage is within the range of the margins calculated on transactions for cooperative respondents and, therefore, should be considered as corroborated.

Nevertheless, as indicated above, the Court has instructed us to select a margin no higher than the highest calculated and verified weighted-average margin for a cooperative respondent in the investigation: 21.34 percent. Because we have been so instructed, we have applied this rate as adverse facts available. However, as indicated above, we believe that use of this rate thwarts the purpose of the adverse inference provision of the Statute by failing to provide the necessary incentive for cooperation. We believe it is contrary to the purpose of this provision to encourage exporters to base their level of cooperation in an investigation upon a comparison of their likely margins with the likely margins of other exporters who have chosen to cooperate.

Comments

On July 10, 1998, the Department released a draft of this redetermination to counsel for the petitioners and to counsel for De Cecco. Neither party submitted any comments.

III. TARGETED DUMPING

By letter dated June 12, 1998, the Department requested comments on a targeted dumping methodology developed specifically for this case (i.e., for Delverde); the Department reserved the discretion to alter this methodology in future cases. The approach was intended

to develop two key concepts in section 777A(d)(1)(B) of the Act: 1) significant price differences, and 2) pattern. While the specific criteria proposed by the Department concerned customer targeting, they could be modified to cover regional or time period targeting.

We explained that we had reviewed the pricing data which Delverde submitted during the antidumping investigation and that, because of the nature of the pricing for this product, we could not utilize a "difference-in-means" test, i.e., a test by which the data is divided into two groups and the group averages are compared.

The Department then discussed "significant price differences." A price difference was defined as a separation in price, with price being defined as gross unit prices less adjustments for movement charges, discounts, rebates, and post-sale price adjustments. There is a separation in price where each alleged targeted customer receives a lower average price than each alleged non-targeted customer. In addition, differences in average prices must not be attributable to other factors, such as product type, levels of trade, time of sale, or terms/conditions of sale, which are not indicative of customer targeting.

The Department was concerned that price separation, as defined above, was not enough to establish "significant price differences." This led to two refinements. First, the Department pointed out that if one were to rank order the customer averages, one might find price separation near the top of the distribution. This could lead to the unacceptable result that the vast majority of the customers are found to be targeted. In order to preclude such a finding, the Department proposed that a targeted customer must be in the lowest 20 percent of all average transaction prices. Second, the Department pointed out that the amount of the price separation between targeted and non-targeted customers must be significant. The Department proposed that the separation be at least as great as the maximum separation in price averages found in the non-targeted group. This last standard would be applied unless a party could show that the exporter's data is not representative of the industry as a whole.

Turning to "pattern," the Department proposed that the significant price difference must exist, on average, over all relevant time periods and for all products sold by the exporter to the allegedly targeted customer(s). In addition, the Department proposed that average transaction prices must exhibit a downward skewness with respect to allegedly targeted customers.

After receiving comments from the parties, as detailed below, the Department recognized that the proposed criteria had been developed under the assumption that the group of allegedly targeted customers was not "well-defined," i.e., that these customers could not be meaningfully distinguished from the alleged non-targeted customers on a basis, other than price, which is indicative of a targeting strategy. One example of such a well-defined group might be customers who have recently changed their suppliers as a result of price-undercutting. Another example might be customers who buy for a "niche" market. After considering the possibility that evidence of well-defined groups might be developed by the

parties, the Department decided to reserve the discretion to relax its standards in such cases. The Department made other modifications in response to comments and released its final targeted dumping methodology by letter dated July 22, 1998.

Petitioners filed a targeted dumping allegation against Delverde on July 27, 1998. The Department determined that this allegation presented a sufficient basis for the Department to investigate targeted dumping by Delverde. On August 20, 1998, we issued to the parties a Draft Redetermination on Remand as to this issue. In this Draft Redetermination, we indicated that, prior to applying the targeted dumping criteria we identified in the July 22 letter, we made certain adjustments to the methodology used by petitioners. In order to account for certain differences in terms and conditions of sale, we separated Delverde's U.S. sales data base by reported customer categories of retailers, wholesalers and importers/distributors and defined net price for each sale as follows:

EP Net Price	=	Gross unit price - discounts - rebates - international movement expense - U.S. movement expenses.
CEP Net Price	=	Gross unit price - discounts - rebates - U.S. movement expenses.

These adjustments resulted in modifications to the group of customers "frequently at the bottom." In addition, they permitted us to identify four groups of customers: CEP wholesalers, CEP retailers, EP distributors and EP retailers.

In addition, for reasons which we explained in the Draft Redetermination, we decided to run our targeted dumping tests against two different groups of customers: first, all of the customers found to be "frequently at the bottom"; and second, a subset of those customers, i.e., those at the lower end of the customers "at the bottom" which are characterized by maximum price separation. Based upon the two sets of tests, we did not find targeted dumping by Delverde in the period of investigation. Petitioners and Delverde each filed comments on the Draft Redetermination by letters dated August 24, 1998. Delverde did not take issue with the methodology used in the Draft Redetermination. As detailed below, we have determined not to alter our August 20, 1998, Draft Redetermination.

Comments on the June 12, 1998, Proposed Standards

Petitioners' Comment #1: Petitioners argue that the Department must measure a central tendency of the non-targeted customers as a whole and compare that to the average prices received by targeted customers (either individually or as a group). At root, petitioners do not agree with the Department's assumption that standard statistical tests, such as the "difference in means" test, cannot be used in assessing targeted dumping in the case at hand. In their view, not only does a method which measures a central tendency of the non-targeted customers

allow relative volumes purchased by individual customers to be taken into account, but it is fundamentally a more valid means of assessing the characteristics of the database overall, rather than relying on arbitrary standards of individual price differences.

Delverde responds that the Department was correct in finding that a "difference in means" test cannot be used to assess the potential for targeted dumping in this case. In Delverde's view, there are no naturally occurring groups in this case for which differences in means can be compared. Delverde maintains that application of a "difference in means" test to compare two groups that are otherwise not naturally occurring creates a statistical canard: the only element defining the two groups is their ability to pass the "difference in means" test. Therefore, respondent contends the groups exist because of the analysis, not independent of it.

DOC Response: We agree with Delverde that the petitioners have identified no basis according to which customers may be grouped for purposes of a "difference in means" test. As we found in the Final Determination of Sales at Less Than Fair Value, 61 FR 30326, 30329 (June 14, 1996), a difference in means between two arbitrarily defined groups does not justify a finding of targeting. Moreover, where, as in this case, different customers receive different prices for the same product in the same month, simply separating customers into "high-price" and "low-price" groups and using a "difference in means" test will necessarily result in a finding of targeting.

Petitioners' Comment #2: Petitioners object to the requirement that the targeted customer's prices must **always** be below the non-targeted customer's prices. Petitioners suggest a modification of this requirement to reflect the assumption that the targeted customer's prices will generally or usually be below those of the non-targeted customers. In petitioners' view, one or two instances of higher prices should not derail a finding of targeting, as a "pattern" can include a limited number of "outlier" points. For similar reasons, petitioners object to two other requirements: that the average transaction price for a targeted customer be in the lowest 20 percent of averages and that a significant price difference be found for all time periods and for all products sold.

DOC Response: We agree that our original requirements were too stringent. We have adjusted the tests to which petitioners refer to provide that, for each allegedly targeted customer, the ratio of months in which the customer's average price is in the bottom 20 percent to months in which there are sales to this customer must be greater than 80 percent. (This test has been performed for the largest volume "connums" that account for 80% or more of the POI sales.) Thus, none of the requirements to which petitioners refer in the comment are absolute, and we may find that a customer is targeted on a product-specific basis. For further discussion of "significant price difference," see Petitioners' Comment #5.

Petitioners' Comment #3: Petitioners object to the assumption that targeted dumping can only occur among the lowest 20 percent of customers. Petitioners point out that in the case of a sales database incorporating just four customers, it would be impossible to meet the 20 percent

threshold. Moreover, even in a larger database, petitioners assert, there is no particular reason why targeted sales should necessarily fall within the lowest quintile of customer pricing.

DOC Response: We agree that there may be some circumstances, such as the hypothetical situation posed in the comment, in which the 20 percent threshold cannot be met. In such situations, the Department would consider adjusting the percentage. However, in response to petitioners' more global objection, the Department finds that it is necessary to set out a threshold that must generally be met by petitioners alleging targeted dumping. It would not be consistent with the purpose of section 777A(d)(1)(B) of the Act for normal variations in customer prices to become the standard basis for targeted dumping allegations.

Petitioners' Comment #4: Petitioners suggest that the Department incorporate relative volumes into the 20 percent threshold because the Department's proposed test would be unfair should customers at the top of the price spectrum purchase a disproportionately large share of the sales volume.

DOC Response: We disagree. We have not made any such adjustment because we find it unlikely that customers at the top end of the price spectrum would account for a disproportionately large share of total purchases -- typically, the opposite is true. Moreover, even if it were true, targeting would be insignificant, given that it would involve relatively small volumes.

Petitioners' Comment #5: Petitioners claim that the maximum pairwise difference test is unfair to petitioners where there are "outlier" high-price customers. (The maximum pairwise difference test is the test that measures the separation between the targeted and non-targeted groups.) Petitioners claim that "outlier" high-price customers, who may purchase small quantities of the merchandise, can generate an artificially high pairwise difference between non-targeted customers.

DOC Response: We have controlled for average sales volume in doing both the maximum pairwise difference test (the "gap test") and the skewness test. However, to the extent that petitioners are making the more general claim that we should treat high-end "outliers" as non-systematic phenomena, we disagree. We note that the same argument could be made about low-end "outliers," i.e., allegedly targeted customers.

Petitioners' Comment #6: Petitioners claim that the skewness test is unreasonable. In their opinion it would be more logical to compare the difference between the lowest average price in the targeted group and the median with the difference between the highest member of the non-targeted group and the median.

DOC Response: We disagree. Contrary to petitioners' proposal, a positive skewness test result should mean that all allegedly targeted customers pass the skewness test. In other

words, the average price to each allegedly targeted customer should be skewed *vis-a-vis* the median average price. Otherwise, there is no "pattern" of significant price differences between customers within the meaning of section 777A(d)(1)(B)(i) of the Act.

Petitioners' Comment #7: Petitioners claim that, if all of the requirements for targeted dumping have been met, there is no need to show that the pattern of significant price differences cannot be accounted for using a normal comparison methodology (average-to-average or transaction-to-transaction).

DOC Response: We disagree. Section 777A(d)(1)(B)(ii) of the Act requires that the Department, prior to using an average-to-transaction comparison methodology, explain why it cannot account for the targeted pricing pattern using a normal comparison methodology. We note that, while our new regulations, at § 351.414(f)(3), require that a domestic interested party make an allegation as to this last factor, this remand is not controlled by the new regulations. Moreover, the Court has recognized, for purposes of the targeted dumping analysis in this remand determination, the Department's discretion to allocate the burden of going forward on various elements of the analysis (see Slip Op. 98-36 at 22). As a result, we have indicated to the parties that in this case we would make a determination as to section 777A(d)(1)(B)(ii) without the benefit of a claim by the targeted dumping petitioner.

Respondent's Comment #1: Respondent Delverde argues that the proposed standard does not consider, in the context of analyzing "pattern," the volume of merchandise that is sold in allegedly targeted transactions. Thus, Delverde states, the proposed standard risks subjecting an exporter to a targeted dumping methodology based on minimal "outlier" sales.

DOC Response: We agree. As stated above, we have controlled for sales volume in making our targeted dumping price comparisons.

Respondent's Comment #2: Delverde argues that the proposed standard's recognition that price differences may result from factors other than targeted dumping should not be limited to the factors listed (differences in product type, levels of trade, time of sale, or terms and conditions of sale). Accordingly, respondent suggests the language addressing factors that may account for differences in average prices should be modified to include an express indication of its open-ended nature, for example "... or any other factors that reasonably account for such price differences."

DOC Response: We disagree. A finding that we can explain price differences should not, in itself, preclude a finding of targeted dumping. Nevertheless, were a responding party to attempt to explain the pattern of price differences as the result of something other than the factors mentioned above, the Department would consider whether the explanation both undermines a finding of targeting and is adequately supported by evidence on the record.

Comments on the August 20, 1998, Draft Redetermination

Petitioners' Comment #1: Petitioners argue that the August 20, 1998, Draft Redetermination does not explain how the Department identified the subset of customers "frequently at the bottom" which was used for further testing.

DOC Response: We disagree. As was noted in the August 20, 1998, Draft Redetermination, the Department ran all the tests set forth in its July 22, 1998, final targeted dumping criteria on both the entire group of customers "frequently at the bottom" and on a subset of that group (characterized by "maximum price separation"). The first series of tests was run because the petitioners alleged that all customers "frequently at the bottom" were targeted. The second series of tests was run because, due to the first-time application of these tests, we had concerns about whether the petitioners had inadvertently failed to look for a group of customers which might, in addition to satisfying our allegation standards, also satisfy the "gap test" and the "skewness test." Due to time constraints, we were unable to allow the petitioners an opportunity to revise their allegation. Therefore, to run this second series of tests, we looked for a smaller group of customers which was characterized by "maximum price separation." As noted in the DOC Response to Comment #2, the Department does not intend to perform the second series of tests in future cases.

The method by which the Department identified this subset of customers is clear from the computer program which was distributed to interested parties along with the August 20, 1998, Draft Redetermination. The Department selected for the second series of tests all customers, in each CONNUM/Month combination, with average transaction prices below the maximum gap for customers "at the bottom."

Petitioners' Comment #2: Petitioners argue that the July 22, 1998, final targeted dumping criteria indicated that the Department would investigate petitioners' allegation of targeted dumping on a customer-by-customer basis if it found that the allegedly targeted customers were "frequently at the bottom." Petitioners do not believe that the Department required petitioners to allege only those customers "characterized by maximum price separation." Indeed, according to petitioners, the only indication of such an additional test was that petitioners were offered the option of demonstrating that the group of targeted customers was "well-defined" (i.e., that the group had common characteristics other than price which were relevant to the targeted dumping inquiry). As this last step was only optional, petitioners assert that the Department was required by its own representations to the parties to determine whether any of the customers in the group of customers "frequently at the bottom" was targeted.

DOC Response: Petitioners' comment indicates a misunderstanding of the Department's targeted dumping testing procedures. The "gap test" and "skewness test" are done on an aggregated basis, across the months in which a "BF customer" is "at the bottom." These months will, of course, vary from customer to customer. Thus, there may be different test

results for different low-price customers. However, the price gaps and maximum pairwise price differences used in the "gap test," as well as the deviations from the median price used in the skewness test are NOT specific to each customer. These numbers are specific to each CONNUM/Month in combination. More precisely, the price gap in a given month (for a given CONNUM) is the difference between (i) the lowest average transaction price among the non-targeted customers that purchased that CONNUM in that month and (ii) the highest average transaction price among the customers in the group of allegedly targeted customers found frequently at the bottom that purchased that CONNUM in that month.

Thus, the price gaps result, in large part, from the specific group of customers that petitioners allege to be targeted. In short, testing is customer-specific, but test results are significantly dependent on where petitioners "draw the line" between targeted and non-targeted customers.

In addition, "maximum price separation" was not an additional test that petitioners were required to satisfy in order for the Department to find targeted dumping. Rather, as the petitioners alleged that all customers "frequently at the bottom" were targeted, we first ran all the tests indicated in the July 22, 1998, final targeted dumping criteria on all customers "frequently at the bottom." This first testing group was different from the group identified by the petitioners only because the Department had to make some adjustments to the price assumptions upon which petitioners relied. Even though we tested the first group to see whether there was targeted dumping, we were concerned that the petitioners apparently did not attempt to identify a group of customers which was likely to pass the "gap test." The Department therefore went further than it was required to by petitioners' allegation and attempted, on its own, to identify a group of customers characterized by maximum price separation. The Department does not intend to perform the second series of tests in future cases.

Finally, the implication of petitioners' comment is that, in the absence of evidence of a "well-defined" group, they were told to base their allegation on all customers "frequently at the bottom." This is not true. Petitioners were told in the July 22, 1998, final targeted dumping criteria to first identify the targeted group and then demonstrate that all of the customers in this group were "frequently at the bottom." The petitioners could have chosen to base their allegation on any group of customers, so long as each member of this group was "frequently at the bottom." There is thus no merit in petitioners' argument that the Department deprived them of something which had been promised in the July 22, 1998, final targeted dumping criteria.

Petitioners' Comment #3: Petitioners argue that the methodology employed in this remand makes it impossible for the Department to find targeted dumping.

DOC Response: We disagree. Petitioners have presented no evidence to support this argument.

IV Final Results of Redetermination on Remand

For the reasons stated above, no change in the amended sales at less than fair value margins for Delverde, published in the Federal Register by notice dated August 14, 1996, is warranted. However, in the event that this redetermination is finally and conclusively affirmed, the margin for DeCecco would change to 21.34%.

Joseph A. Spetrini
Acting Assistant Secretary for
Import Administration

August 28, 1998

ATTACHMENT 3

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-475-818
Remand (Invest.)
Proprietary Doc : Public Version
ATTACHMENT SUBJECT TO
JUDICIAL PROTECTIVE
ORDER
Public Version
I/2 : LOH
JUN 12 1998

Paul C. Rosenthal, Esquire
Collier, Shannon, Rill & Scott, PLLC
Suite 400
3050 K Street, NW
Washington, DC 20007

FOR PUBLIC FILE

Re: Certain Pasta from Italy - Remand

FILE COPY

Dear Mr. Rosenthal:

On March 26, 1998, the United States Court of International Trade ("CIT") in Borden, Inc., Gooch Foods, Inc. and Hershey Foods Corp. v. United States and United States Department of Commerce and Delverde, SrL and Delverde USA, Consol. Court No. 96-08-01970, Slip Op. 98-36, remanded to the Department of Commerce the Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy, 61 FR 30326 (June 14, 1996), as amended by Antidumping Order and Amendments to Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy, 61 FR 38547 (July 24, 1996).

In this remand, the CIT directed the Department, among other things, to articulate the general or case-specific standards for evaluating a targeted dumping allegation, or to analyze the data submitted during the investigation by the respondent, Delverde, SrL and determine whether an analysis based on transaction-specific prices is appropriate. As we stated in the preambles to our preliminary and final antidumping duty regulations, our experience with targeted dumping, to date, has been limited. We are reluctant to promulgate generally applicable policies on the basis of this limited experience. Accordingly, we have elected only to articulate the standards by which we would evaluate a targeted dumping allegation in this specific case. Those proposed standards are attached.

Please review this proposal carefully and submit any comments that you may have no later than close of business, June 17, 1998. If you have any questions concerning this proposed test or the reasoning underlying our assumption that standard statistical tests, such as the difference in means test, are not appropriate for complying with the CIT's remand order, please contact me at

(202) 482-1768. If you would like to meet with our staff to discuss these issues, I would be glad to arrange such a meeting.

We intend to take your comments into account prior to issuing our final instructions for an allegation of targeted dumping.

Sincerely,

for Richard W. Moreland
Deputy Assistant Secretary
Import Administration, Group I

cc: Lawrence J. Bogard, Esquire

PUBLIC VERSION

This document contains bracketed business proprietary information derived from proprietary submissions

PROPOSED STANDARDS FOR TARGETED DUMPING ANALYSIS
IN
PASTA FROM ITALY

The Tariff Act, its legislative history, and the Statement of Administrative Action do not prescribe methods for analyzing pricing for targeted dumping. Rather, it has been left to the Department to determine appropriate methods.

Section 777A(d)(1)(B) of the Tariff Act addresses targeted dumping in the following manner:

> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of all the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if --
>
> > (i) 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
> >
> > (ii) the administering authority explains why such differences cannot be taken into account [* * *] .... [* * *]

The methodology that we are proposing for this case focuses on the statutory concepts of: 1) significant price difference, 2) pattern, and 3) an inability to account for such differences using average-to-average or transaction-to-transaction comparisons. While the following discussion concerns customer targeting, it could be extended to regional or time period targeting.

We have reviewed the pricing data submitted to the Department by Delverde SrL during the antidumping duty investigation. [* * *] In such cases, standard statistical tests, such as the "difference-in-means" test, are not helpful.

Therefore, alternative testing methods are necessary. Below is an alternative testing method for this investigation that is consistent with the statutory provision on targeted dumping.

I. Significant Price Difference. A price difference means a separation in price, with price being defined as gross unit prices less adjustments for movement charges, discounts, rebates, credit and post-sale price adjustments. Although we would normally view price separations in terms of individual prices, [* * *], we are analyzing price separation in terms of separation between the average prices for different products (In this context product is defined in terms of the CONNUM). Price separation in this context means that the average price for each customer allegedly targeted must fall below the average CONNUM price for every "non-targeted" customer. In addition, differences in average prices must not be attributable to differences in product type, levels of trade, time of sale, or terms or conditions of sale.

To avoid arbitrary groupings of targeted and non-targeted customers and to reflect the fact that a targeting analysis is the exception and not the rule, the average transaction price for the customer(s) allegedly targeted must be in the lowest 20 percent of all average transaction prices.

Finally, the separation between the average CONNUM prices must be significant. We will treat a separation as significant if the difference between the highest average CONNUM price in the targeted group and the lowest average CONNUM price in the non-targeted group is greater than or equal to the maximum "pairwise" price difference within the non-targeted group; i.e., greater than the maximum difference between average CONNUM prices in the non targeted group, ranked from the highest to the lowest. This standard for significant price difference will be applied to the particular industry, unless a party can show that the exporter's data is not representative of the industry as a whole.

II. Pattern. For Commerce to find a pattern in this case, a significant price difference must exist on average, over all relevant time periods and for all products sold by the exporter to the allegedly targeted customer(s). Moreover, there must be evidence of skewness in the average prices charged to the alleged targeted customer(s), *i.e.*, the difference between the highest average CONNUM price for the alleged targeted group and the median average CONNUM price (for all customers) must exceed the difference between the median average CONNUM price to all customers and the highest average CONNUM price for the non-targeted group.

III. Inability to account for price differences using average-to-average or transaction-to-transaction prices. If there is little or no variation in the prices that the targeted customers are

charged, it would be reasonable to use a single average price to represent the targeted customers. If, however, there is some variation in the prices the targeted customers are paying, multiple average prices might be more appropriate, with the number of average prices increasing as price variation increased. In a case of extreme variations, it may be appropriate to use transaction-specific prices.

REQUIREMENTS FOR TARGETED DUMPING ALLEGATION

On the basis of the foregoing discussion, the petitioner in this proceeding must create a randomly selected sample of products and months. The sample should be based on at least half of the products sold and at least half of the number of months in which sales of those products were made to the targeted customer.

(1) For each sampled product/month combination, compute the average CONNUM price for each customer and rank them from high to low.

(2) Average transaction prices associated with the alleged targeted customer(s) must be in the lowest 20th percentile of all average CONNUM prices (for that product and month).

(3) For each sampled product/month combination, compute:

  (a) consecutive pair-wise differences between the non-targeted customer average CONNUM prices;

  (b) the difference between the lowest average transaction price for the non-targeted group and the highest average CONNUM price for the alleged targeted group;

  (c) the difference between the highest average CONNUM price for the targeted group and the median average CONNUM price for all customers; and

  (d) the difference between the median price in (c), above, and the highest average transaction price for the non-targeted group.

(4) (a) Average the maximum of the pair-wise differences in (3)(a) above over all sampled product/month combinations. Call this average "P."

  (b) Average (3)(b) over all sampled product/month combinations. Call this average "Q."

  (c) Average (3)(c) and (d) over all sampled product/month combinations. Call these averages "R" and "S," respectively.

(5) Q must exceed P; and R must exceed S.

(6) If the conditions in (5) are met, the petitioner's allegation of targeted dumping will be accepted and, because section 351.414 of the Department's final antidumping regulations, promulgated on May 19, 1997, do not apply to this proceeding, the Department will undertake to determine whether or not the average-to-average or transaction-to transaction method could take into account any price differences found.