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December 10, 2007

PUBLIC DOCUMENT

Total Pages: 8
Request for Comments
Office of Policy

VIA HAND DELIVERY

David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit
Room 1870
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Targeted Dumping in Antidumping Investigations; Request for Comment

Dear Mr. Spooner:

On behalf of the Korean Ministry of Commerce, Industry, & Energy ("MOCIE") we hereby submit comments in response to the request for comments that was published in the *Federal Register* on October 25, 2007. *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 Fed. Reg. 60,651 (Dep't Commerce Oct. 25, 2007) ("Request for Comments"). These comments are timely filed in accordance with the deadline set forth in the U.S. Department of Commerce's ("Department") Request for Comments, as subsequently extended by the Department. *Id.* MOCIE is the government ministry in Korea with regulatory responsibility for a number of major Korean industries that have significant exports to the United

States, and that are or have been the subject of U.S. antidumping investigations, including the steel, paper, chemical, and electronics industries.

In its Request for Comments, the Department indicated that it was seeking comments as to how to address three separate requirements under the "targeted dumping" provision of the statute – Section 777A(d)(1)(B) of the Tariff Act of 1930, *as amended*. The Department indicated that it was taking this step because "the Department's experience with regard to the use of {the targeted dumping} methodology has been very limited." Request for Comments, 72 Fed. Reg. 60,651. The Department goes on to state that it has only examined targeting dumping allegations in four previous cases, the most recent being the recently completed antidumping investigation of coated free sheet paper from the Republic of Korea. The Department goes on to note that while it rejected allegations of targeting dumping in the first three instances in which it investigated allegations of targeted dumping, in the coated free sheet paper case the Department "accepted this allegation, finding that petitioners had met the statutory requirement for showing that there was a pattern of prices that differ significantly among purchasers and regions, while also acknowledging that the Department had not yet established a general set of standards for analyzing an allegation of targeted dumping." *Id.*

What the Department omitted from this summary is that the coated free sheet investigation was the first antidumping investigation conducted since the Department announced its intention to abandon the use of "zeroing" in the calculation of weighted average dumping margins when using the average-to-average comparison methodology. This change in U.S. practice was adopted by the Department in order to bring the United States into compliance with its international obligations as determined in *United States-Laws, Regulations, and Methodology* *for Calculating Dumping Margins ("US-Zeroing")* WT/DS/294/AB/R (Apr. 18, 2006); *see Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006). The Department explained its new practice as follows: "the Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons." *Id.* Because the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, Vol. 1 at 842-843 (1994), reprinted in 1994 U.S.C.C.AN. 3773 ("SAA") and the Department's regulations, 19 C.F.R. § 351.414 (c), state a clear preference for the use of the average-to-average comparison methodology in antidumping investigations, the natural and expected consequence of the Department's change in policy is that the Department will not zero in the vast majority of antidumping investigations conducted by the Department.

In this context, it is disturbing that in the very first antidumping investigation conducted since the Department's official abandonment of zeroing in investigations, the Department in fact once again engaged in zeroing of negative dumping margins, ostensibly because the Department found targeted dumping. As discussed below, the Department's targeted dumping finding was based on the acceptance—with little meaningful review or independent analysis—of an extremely flimsy allegation of targeted dumping by the U.S. petitioner, an allegation which wholly failed to address the standards used by the Department in previous cases in which it has reviewed allegations of targeted dumping.

The targeted dumping provision of the antidumping law provides a narrow exception to the general preference for performing the dumping margin calculation on an average-to-average basis. Under that provision, the Department may calculate dumping margins by comparing weighted average normal value to individual export price (or constructed export price) transactions, but only 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 Department explains why such differences cannot be taken into account using the average-to-average methodology. 19 U.S.C. § 1677f-1(d)(1)(B). The Department's regulation implementing the targeted dumping provision requires the Department to base its analysis of whether there is a pattern of significant differences upon the use of "standard and appropriate statistical techniques." 19 C.F.R. § 351.414(f)(1)(i). In addition, the Department's regulation provides that the Department "normally" will limit application of the average-to-transaction methodology only to the targeted sales group. 19 C.F.R. § 351.414(f)(2).

In the only court case to substantively construe the targeted dumping provision, the U.S. Court of International Trade emphasized that the targeted dumping provision was to be a very limited exception to the general rule of making average-to-average comparisons:

> Despite the inclusion of this provision, the fact remains that antidumping law under the URAA instructs Commerce to be more concerned about amplification of dumping margins through the use of transaction-specific prices than about masking them with averaging.

Borden, Inv. v. United States, 4 F. Supp. 2d 1221, 1226 (Ct. Int'l Trade 1998). In response to the decision in *Borden*, the Department adopted a reasonable and statistically valid methodology for analyzing allegations of targeted dumping. As discussed in greater detail in the comments being submitted today by the Korea Iron & Steel Association, the approach adopted by the Department in that case (the so-called "Pasta Test") provides reasonable criteria for identifying a "pattern" of price differences and for defining what price differences should be considered "significant." In addition, the Pasta Test employed "standard and appropriate statistical techniques" in measuring these statutory criteria. The Department's methodology was affirmed by the Court of International Trade on Remand. *Borden, Inv. v. United States*, 23 CIT 372, 21 Int'l Trade Rep. (BNA) 1528 (1999).

In the coated free sheet case, however, the Department abandoned the Pasta Test it had developed in the *Borden* litigation, and instead accepted the simplistic analysis presented by the petitioner in that case. The only stated reason for this decision was the Department's observation that "that test was developed within the context of a specific case" and the fact that the Department had "no further experience analyzing targeting." *Coated Free Sheet Paper from the Republic of Korea*, Issues and Decision Memorandum for the Final Determination of the Less-Than-Fair Value Investigation (Oct. 17, 2007)("IDM") at Comment 2. Remarkably, the Department's conclusion was therefore to "accept{} the petitioner's targeting allegation without endorsing the petitioner's test standards and procedures as a general practice." *Id.* Accordingly, the Department relied upon an analysis provided by the Petitioner that, among other things, used a 2 percent test for determining "significant" price differences. *See id.* at Comment 3. The Department then applied an average-to-transaction comparison methodology to the sales in the "targeted" group as defined by the petitioner.

The real significance of the targeted dumping finding in the coated free sheet case, of course, was not the use of average-to-transaction comparisons *per se*, but rather the Department's zeroing of negative dumping margins for those transactions. This is because the policy change adopted by the Department in response to *US-Zeroing* is limited only to cases in which the average-to-average comparison methodology is used.[1] Even worse, the Department did not limit zeroing solely to the sales in the targeted group, but rather also zeroed the combined dumping margin even for the non-targeted group at the step of weight averaging the dumping margins for the non-targeted group with the average dumping margin for the targeted group. *See* IDM at Comment 7. Thus, the result of the Department's targeted dumping methodology in the coated free sheet investigation was not to provide offsets for non-dumped sales even for non-targeted sales.

In short, in the coated free sheet investigation – the very first investigation subject to the Department's new policy of discontinuing zeroing for average-to-average comparisons – the Department refused to follow the targeted dumping analysis the Department itself had developed, and which was expressly approved by the Court of International Trade. Instead, it substituted an *ad hoc* and clearly result-oriented approach developed by the petitioner, and used that methodology as a basis to zero dumping margins when calculating the overall weighted average dumping margin. The Department's actions thus raise the question of whether the Department intends to use the targeted dumping provision as a means of circumventing the Department's stated policy of discontinuing zeroing. This is a matter of great concern to MOCIE.

MOCIE applauds the Department for its apparent intention to now develop standards of general application on the issue of targeted dumping. MOCIE strongly encourages the

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1 It should be noted that in observing this limitation in the Department's announced policy, MOCIE in no way endorses the United States' position that the WTO Antidumping Agreement permits zeroing in average-to-transaction or transaction-to-transaction comparisons any more than in average-to-average comparisons.

Department to return to the use of the Pasta Test, or some appropriate variant of that test, which, as noted above, was developed at a time when the targeted dumping issue was wholly unrelated to the question of zeroing, and which has been affirmed by the U.S. Court of International Trade. Whatever specific standards the Department adopts with respect to the analysis of allegations of targeted dumping, however, it is of paramount concern to MOCIE that the analysis be constructed so as to focus solely on the issue of whether foreign exporters have in fact targeted particular customers or regions, that the criteria used be objective and transparent, and that they meaningfully implement the statutory requirements that there be a "pattern" of transactions with "significant" price differences as measured by appropriate standard statistical techniques. It would be a grave mistake for the Department to attempt to use this narrow statutory exception to the use of average-to-average comparisons as a "loophole" to avoid the widespread application of the Department's announced policy to calculate dumping margins without zeroing of negative margins. Such a development would undermine the credibility of the United States' announced intention to comply with the WTO panel decision in *U.S.-Zeroing* and would certainly result in additional litigation before the WTO Dispute Settlement Body.

Please contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,

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