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Investigation
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June 13, 2008

MEMORANDUM TO: David Spooner
Assistant Secretary
for Import Administration

FROM: Stephen Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from the Republic of Korea

SUMMARY:

We have analyzed the briefs and rebuttal briefs of interested parties in the less than fair value investigation of light-walled rectangular pipe and tube from the Republic of Korea. As a result of our analysis, we have made no changes in the method of calculation from the preliminary results. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Light-Walled Rectangular Pipe and Tube From the Republic of Korea*, 73 FR 5794 (January 31, 2008) (*Preliminary Determination*). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this investigation.

Comment 1: Initiation of Targeted Dumping Analysis

Comment 2: Use of Offsets in Calculating Dumping Margin

BACKGROUND:

The period of investigation (POI) is April 1, 2006, through March 31, 2007. The petitioners in this investigation are Allied Tube and Conduit, Atlas Tube, Bull Moose Tube Company, California Steel and Tube, EXLTUBE, Hannibal Industries, Leavitt Tube Company, Maruichi American Corporation, Searing Industries, Southland Tube, Vest Inc., Welded Tube, and Western Tube and Conduit (Petitioners). On December 26, 2007, Petitioners timely filed with the Department an allegation of targeted dumping for Nexteel. Nexteel filed comments regarding Petitioners' allegation on January 3, 2008. Upon review of Petitioners' allegation, the Department determined that further information was needed in order to adequately analyze Petitioners' allegation. The Department issued a supplemental questionnaire to Petitioners on

January 14, 2008, requesting that they address deficiencies identified by the Department. *See* Letter from Richard O. Weible, Director, Office 7, to Petitioners, dated January 14, 2008 (Petitioners Supplemental Questionnaire). Because there was a need for supplemental information regarding the allegation, we did not have sufficient bases for making a finding with respect to Petitioners' targeted dumping allegation prior to the preliminary determination.

On January 25, 2008, Petitioners submitted a response to the Department's supplemental targeted dumping questionnaire. On January 31, 2008, the Department published the preliminary determination in the *Federal Register* and invited interested parties to comment. *See Preliminary Determination*. We conducted a verification of Nexteel's cost of production responses on March 6-12, 2008. *See* Memorandum from Christopher J. Zimpo, Accountant, to the File entitled "Verification of the Cost Response of Nexteel Co., Ltd. Antidumping Investigation of Light-Walled Rectangular Pipe and Tube From the Republic of Korea," dated April 25, 2008 (Cost Verification Report). We conducted a verification of Nexteel's sales responses on March 13-18, 2008. *See* Memorandum from Mark Flessner to the file entitled "Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Verification of Nexteel Co., Ltd.," dated May1, 2008 (Sales Verification Report). On May 2, 2008, we placed on the record the memorandum from Mark Flessner, Case Analyst, to Richard O. Weible, Office Director, entitled "Antidumping Duty Investigation of Light-Walled Rectangular Pipe and Tube from Korea: Final Analysis on Targeting Dumping" (Targeted Dumping Memorandum).

We determined that Petitioners' allegations of targeted dumping failed to provide a reasonable basis to find a pattern of export prices for comparable merchandise that differ significantly among purchasers or regions. We determined further that Petitioners had not demonstrated that any such differences could not be taken into account using the average-to-average methodology, pursuant to section 777A(d)(1)(B) of the Tariff Act of 1930, as amended (the Tariff Act). We concluded that, for the final determination, we should continue to utilize the average-to-average methodology in calculating the final margins for Nexteel. (*See* Comment 1, below.) We received a case brief from Petitioners on May 9, 2008 (Petitioners' Case Brief), which dealt exclusively with issues related to their targeted dumping allegation. We received a rebuttal brief from Nexteel on May 16, 2008 (Nexteel Rebuttal Brief). We received no request for a public hearing, so no hearing was held.

DISCUSSION OF THE ISSUES:

Changes from the Preliminary Results

Based on the discussions below, we have made no changes in our calculations as set forth in the *Preliminary Determination*. We have used the sales and cost data submitted by Nexteel on March 24, 2008, to reflect minor corrections arising from verification. *See* Cost Verification Report and Sales Verification Report.

Comment 1: Initiation of Targeted Dumping Analysis

Petitioners aver their targeted dumping allegation fully satisfies the statutory requirements, as it shows "a pattern of export prices that differ significantly between purchasers of comparable

merchandise." *See* Petitioners' Case Brief at page 2. Petitioners defend their targeted dumping methodology by stating that it controls for several potential sources of statistical error. Petitioners state that their calculations control for (1) price fluctuations over the POI because they averaged sales prices over the entire POI and (2) price variations between sales because they averaged the prices of all sales made to a particular customer by control number (CONNUM) and then compared this average to the averaged prices of all sales made to all other customers for that CONNUM. *See* Petitioners' Case Brief at pages 4-6.

Petitioners state that the statutory requirement of section 777A(d)(1)(B)(i) of the Tariff Act is that comparison be made between "comparable merchandise." Petitioners contend that making the comparisons within a specific CONNUM, rather than across a range of CONNUMs, satisfies this requirement. *See* Petitioners' Case Brief at pages 6-7.

Petitioners argue that section 777A(d)(1)(B)(i) of the Tariff Act requires that this comparison demonstrate that prices "differ significantly among purchasers, regions, or periods of time." With regard to purchasers (Petitioners have abandoned their allegation with regard to regions and have made no allegation with regard to periods of time), Petitioners contend their methodology demonstrates that the prices for the "targeted" purchasers "differ significantly" from the prices for the "non-targeted" purchasers because they are more than two percent less. Petitioners rely upon *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 FR 60630 (October 25, 2007) (*Coated Free Sheet Paper*) and the accompanying Issues and Decisions Memorandum (Coated Free Sheet Paper Memorandum), stating that light-walled rectangular pipe and tube is a commodity comparable to that in *Coated Free Sheet Paper*. Petitioners therefore contend that the two-percent test of *Coated Free Sheet Paper* is valid for light-walled rectangular pipe and tube. *See* Petitioners' Case Brief at pages 7-9.

Petitioners claim their methodology controls for factors other than targeted dumping which could create price variations. Petitioners maintain that the CONNUM-specific nature of their comparisons eliminates the possibility that other factors could create price variations. Petitioners add that there is no evidence on the record that differences in channel of distribution or quantities purchased created price differences between the target and non-target groups. *See* Petitioners' Case Brief at pages 9-10.

Nexteel contends that Petitioners provided no reasonable basis for the Department to change its determination that there is not sufficient information to conduct a targeted dumping analysis. *See* Nexteel Rebuttal Brief at page 1. Nexteel argues that Petitioners' Case Brief does not address why their methodology is statistically valid as was required in the Petitioners Supplemental Questionnaire. Nexteel maintains that the Department was correct in its findings with regard to this methodology in the Targeted Dumping Memorandum, and that the Department should affirm these findings in the final determination. *See* Nexteel Rebuttal Brief at page 5.

Nexteel states that Petitioners do not address why a two percent threshold is significant specifically for light-walled rectangular pipe and tube, as was called for in the Petitioners Supplemental Questionnaire. Nexteel maintains that *Coated Free Sheet Paper* does not establish

a standard which is applicable to all commodity products. Nexteel also restates its contention that Petitioners do not address why their methodology is statistically valid. Nexteel adds that, even accepting this methodology, Petitioners have not established a pattern of targeting since they only allege less than 1/19th of one percent (approximately 0.05 percent) by volume as being "targeted." *See* Nexteel Rebuttal Brief at pages 2-3 and 5.

Nexteel states that Petitioners do not address factors other than targeted dumping which could create price variations. Nexteel also contends that Petitioners do not address why the average-to-average or transaction-to-transaction comparison methodology cannot take into account the observed price differences. *See* Nexteel Rebuttal Brief at pages 3-4.

Department's Position

In the Targeted Dumping Memorandum, we determined that, for purposes of this investigation, Petitioners' allegations of targeted dumping had failed to provide a reasonable basis to find a pattern of export prices for comparable merchandise that differ significantly among purchasers or regions. We further found that Petitioners' allegations of targeted dumping had failed to provide a reasonable basis to find any such differences cannot be taken into account using the average-to-average methodology, pursuant to section 777A(d)(1)(B) of the Tariff Act.

In accordance with section 777A(d)(1)(B)(i) of the Tariff Act, the Department must first examine whether the prices to the allegedly-targeted purchaser "differ significantly" from the prices to the non-targeted purchasers in this particular industry or type of product.

Pursuant to section 777A(d)(1) of the Tariff Act, in calculating dumping margins in investigations, the Department normally will compare U.S. prices and normal values using an average-to-average or transaction-to-transaction comparison methodology. However, section 777A(d)(1)(B) of the Tariff Act allows the Department to compare transaction-specific export or constructed export prices to weighted-average normal values if there is a pattern of export or constructed export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time and the Department explains why such differences cannot be taken into account using the weighted average-to-average or transaction-to-transaction methods. Section 777A(d) of the Tariff Act states, in its entirety:

> (d) Determination of Less Than Fair Value.
>
> (1) Investigations.
>
> (A) In general. In an investigation under subtitle B, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value
>
> (i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or

(ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(B) Exception. 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 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 using a method described in paragraph (1)(A)(i) or (ii).

Further, 19 CFR 351.414(f)(1)(i) requires that a determination of targeted dumping be made "through the use of, among other things, standard and appropriate statistical techniques." The regulations further elaborate that targeted dumping allegations "must include all supporting factual information, and an explanation as to why the average-to-average or transaction-to-transaction method could not take into account any alleged price differences." *See* 19 CFR 351.414(f)(3).

With regard to Petitioners' contention that light-weight rectangular pipe and tube is a commodity product, we agree. Nevertheless, we also agree with Nexteel's contention that there is no established two percent threshold that applies to all commodity products. We further agree with Nexteel that Petitioners have made no showing of why two percent might be a valid threshold for this particular commodity product or why the difference in price charged to the alleged target and other customers is otherwise significant relative to the light-walled rectangular pipe and tube market in the United States. We find Petitioners' reliance upon *Coated Free Sheet Paper* misplaced. In *Coated Free Sheet Paper*, the Department stated:

> We recognize the need to develop a standardized test for future cases. For this reason, the Department intends to issue a separate *Federal Register* notice inviting public comment on how a new, more standardized test could be developed and what it should include.

See Coated Free Sheet Paper Memorandum at page 8. In the same section, the Department also stated:

> We note that the Statement of Administrative Action for the Uruguay Round Agreements Act, See Statement of Administrative Action (SAA), H. R., Doc. No. 103-316, Vol. 1 (1994), provides direction to the Department as to how we should analyze significant differences in prices. The SAA states that "the Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another." As a general matter, the Department has not adopted any specific percentages suggested by parties in their

> contentions regarding the definition of significance. The percentages cited by both parties that were applied in other areas of our practice are specific to those circumstances and were developed over time. An appropriate percentage applicable to targeting is one of the factors we will ask parties to comment on as we go forward and attempt to develop more standardized rules.

See Coated Free Sheet Paper Memorandum at page 10. In the Targeted Dumping Memorandum, the Department stated:

> The Department finds the petitioners failed to adequately respond to the Department's concerns regarding their targeted dumping allegations. Specifically, other than asserting that light-walled pipe is a commodity product, the petitioners failed to explain how the market for light-walled pipe functions and did not adequately explain why a two-percent price difference should be considered significant for this merchandise, given the characteristics of the light-walled pipe market. We note the Statement of Administrative Action for the Uruguay Round Agreements Act, s*ee Statement of Administrative Action* (SAA), H. R., Doc. No. 103-316, Vol. 1 (1994), clarifies that the Department will analyze significant differences in prices on an industry-specific basis. The SAA states, "the Administration intends that in determining whether a pattern of significant price differences exist{s}, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another." *See* SAA at 843.

See Targeted Dumping Memorandum at page 4. We find nothing in Petitioners' Case Brief which further explains the characteristics of the light-walled rectangular pipe and tube market. As stated, we agree with Petitioners' contention that light-weight rectangular pipe and tube is a commodity. However, Petitioners made no showing of why two percent might be a valid threshold for the definition of prices which "differ significantly" specifically for the light-weight rectangular pipe and tube industry in the United States, or why the difference in price charged to the alleged target and other customers is otherwise significant relative to the light-walled rectangular pipe and tube market in the United States.

We need not at this time address Petitioners' arguments that their methodology controls for price fluctuations over the POI, price variations between sales, and for factors other than targeted dumping which could create price variations, or Petitioners' argument that making the comparisons within a specific CONNUM (rather than across a range of CONNUMs) satisfies the requirement that comparison be made between "comparable merchandise." We need not address them because we determine that, as an initial matter, Petitioners have not established that the observed prices "differ significantly" as required under section 777A(d)(1)(B)(i) of the Tariff Act.

For the reasons set forth above, we continue to find that Petitioners have not adequately established that there exists a pattern of export prices for comparable merchandise that differ significantly among purchasers.

Comment 2: Use of Offsets in Calculating Dumping Margin

Petitioners state that, given a finding of targeted dumping for particular sales, the margin for these sales ought to be calculated by comparing the average normal value to the individual export price without offset of negative margins from positive margins. Petitioners maintain that doing otherwise would significantly mask lower prices. *See* Petitioners' Case Brief at pages 10-11.

Petitioners assert that there is only one statutory definition of the dumping margin, which applies to both reviews and investigations. *See* Petitioners' Case Brief at pages 13-14. Petitioners contend that the Federal Circuit has rejected the distinction between reviews and investigations as to the meaning of the term "dumping margin." *See* Petitioners' Case Brief at page 14. Further, Petitioners maintain that the correspondence of the antidumping duty assessment to the dumping margin, which requires the results of comparisons where the normal value (NV) is less than the export price (EP) to be excluded from the dumping margin in reviews, also requires these results to be excluded in investigations because the statutory meaning of the dumping margin is the same in both reviews and investigations. For both reviews and investigations, Petitioners state that the result of the comparison where the NV exceeds the EP establishes a dumping margin, whereas the result of the comparison where the NV does not exceed the EP does not establish a dumping margin. Citing *Stainless Steel Bar from the United Kingdom: Final Results of Antidumping Duty Administrative Review*, 72 FR 43598 (August 6, 2007) (*Stainless Steel Bar*), Petitioners argue that the Department's most recent interpretation of the term dumping margin is inconsistent with the Department's findings in various Section 129 proceedings in 2007. As an example, Petitioners cite the Memorandum from Stephen Claeys to David Spooner entitled "Final Results for the Section 129 Determinations: *Certain Hot-Rolled Steel from the Netherlands, et al*," (April 9, 2007). Specifically, Petitioners assert that the Department in *Stainless Steel Bar* stated:

> Section 771(35)(A) of the Act defined 'dumping margin' as the 'amount by which the normal value exceeds the export price and constructed export price of the subject merchandise.' The Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export price or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export price or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales.

See Petitioners' Case Brief at pages 12-13.

Petitioners maintain that the Department, to the contrary, claimed it had the discretion to subtract results where NV is less than EP from comparisons where NV is greater than EP. Citing *Corus Staal BV v. Department of Commerce*, 395 F. 3d 1343, 1347 (Fed. Cir. 2005) (*Corus Staal*), Petitioners argue that the Federal Circuit specifically rejected any distinction in the meaning of the dumping margin under section 771(35)(A) of the Tariff Act between investigations and reviews. Citing *The Timken Company v. United States*, 354 F. 3d 1334, 1343 (Fed. Cir. 2005) (*Timken*), Petitioners claim that Congress intended the imposition of assessments only according

to the amount by which NV is greater than EP; Petitioners maintain that otherwise importers would be paid the amount by which NV is less than EP – an unreasonable result not contemplated by the statute. Petitioners urge the Department to use the same methodology for investigations as it uses for reviews. *See* Petitioners' Case Brief at pages 13-14.

With regard to calculating margins by comparing the average normal value to the individual export price without offset of negative margins from positive margins, Nexteel states that Petitioners provided no statistical demonstration of how offsetting negative margins from positive margins would significantly mask lower prices. Nexteel states that Petitioners' citations to *Stainless Bar* are invalid (*i.e.*, the language which Petitioners quoted cannot be found in either the cited *Federal Register* notice or the accompanying Issues and Decisions Memorandum). Nexteel states that, even if the reference is to some other case to which Petitioners have provided an erroneous citation, Petitioners' argument is in accordance with neither the current state of the law nor with the Department's current practice. Nexteel maintains that if the Department followed Petitioners' suggestion, we would be violating our current practice without any justifiable reason. *See* Nexteel Rebuttal Brief at pages 5-7.

Department's Position

We have not changed our calculation of the weighted average dumping margin as suggested by Petitioners for this investigation.

Petitioners' argument that, given a finding of targeted dumping for particular sales, offsetting of negative margins from positive margins would significantly mask lower prices rests upon the contingency of finding that targeted dumping has occurred. Since, as explained above in Comment 1, Petitioners have failed to support their allegation that targeted dumping has occurred with respect to this industry or type of product, the issue of offsets in the context of targeted dumping analysis is moot.

Furthermore, we do not agree with Petitioners' assertion that the Department's interpretation of section 771(35)(A) of the Tariff Act in the context of investigations must be identical to the Department's interpretation of the same provision in the context of administrative reviews such that, if offsets for negative margins are denied in administrative reviews, offsets must also be denied in investigations. An administering agency's authority to give an ambiguous statutory provision different meanings in different contexts is well established. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (EPA may adopt two different interpretations of the same statutory definition of the term "source" in two different contexts).

The calculation of a dumping margin in a less than fair value investigation and in an antidumping duty administrative review are different contexts in which the ambiguous language of section 771(35)(A) applies. In investigations, the statute specifies particular types of comparisons that may be used to calculate the dumping margin and the conditions under which those types of comparisons may be used. *See* section 777A(d)(1) of the Tariff Act. The statute also sets conditions for the type of comparison used in administrative reviews. *See* section 777A(d)(2) of the Tariff Act. The Department has further clarified the types of comparison that will be used

and under what conditions. *See* 19 CFR 351.414. In investigations, the Department generally uses average-to-average comparisons, whereas in administrative reviews the Department generally uses average-to-transaction comparisons. *See* 19 CFR 351.414(c).

The purpose of the dumping margin calculation varies significantly between investigations and administrative reviews. In investigations, the primary function of the dumping margin is to determine whether an antidumping duty order will be imposed on the subject imports. *See* section 735(a) and (c) and section 736(a) of the Tariff Act. In administrative reviews, in contrast, the dumping margin is the basis for the assessment of antidumping duties on entries of merchandise subject to the antidumping duty order. *See* section 751(a) of the Tariff Act. These differences support an interpretation of section 771(35)(A) of the Tariff Act that varies according to the context in which this provision is being applied. In *Timken*, the Federal Circuit found that section 771(35)(A) permitted but did not require zeroing in the context of administrative reviews. *Timken*, 354 F.3d at 1342. In *Corus Staal* the Federal Circuit agreed that "a distinction exists between administrative investigations and reviews," but found that the ambiguity in section 771(35)(A) was no less present in the context of investigations, such that the Department was permitted, but not required to zero in investigations. *See Corus Staal*, 395 F.3d at 1347.

Petitioners cite the Department's response to WTO dispute-settlement reports (WTO Reports) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. With respect to *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R (April 18, 2006) (*US-Zeroing (EC)*), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006) (*Zeroing Notice*). Pursuant to the WTO dispute settlement panel's findings in *US – Zeroing (EC)*, the Department published its final modification, adopting its March 6, 2006, proposal. In doing so, the department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. *See Zeroing Notice*, 71 FR at 77724.

The *Zeroing Notice* sets forth an interpretation of section 771(35)(A) of the Tariff Act that applies only in the context of investigations using average-to-average comparisons and determines that offsets will be granted in this context. Consistent with the terms of section 123 of the URAA, the *Zeroing Notice* applies prospectively to new and continuing investigations using average-to-average comparisons. Thus, pursuant to the explicit terms of the *Zeroing Notice*, this interpretation of section 771(35)(A) of the Tariff Act applies to investigations, including this proceeding, and not to administrative reviews. As the Federal Circuit recognized in *Corus Staal*, Congress has authorized the executive branch to determine "whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation." *See Corus Staal*, 395 F.3d. at 1349 (citing 19 U.S.C. § § 3533(f), 3538, and 3533(g)). In enacting the URAA, Congress contemplated that such implementation of an adverse WTO report could create different, but permissible, interpretations of the statute that may lawfully coexist. *See* Statement of Administrative Action (SAA) accompanying the URAA, H. Doc. No. 316, 103d Cong., 2d Session (1994) at 1027.

We therefore have not changed our calculation of the weighted-average dumping margin as suggested by Petitioners for this final determination, and continue to apply the offsets in accordance with the policy set forth in the *Zeroing Notice*.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions. If accepted, we will publish the final determination of the review in the *Federal Register*.

AGREE_____ DISAGREE_____

_____
David Spooner
Assistant Secretary
for Import Administration

_____
Date