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PUBLIC DOCUMENT

The Honorable Carlos M. Gutierrez
Secretary of Commerce
Attn: Import Administration,
Office of Accounting
APO/Dockets Unit, Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

ATTENTION: David M. Spooner

Re: Comments on Proposed Methodology for Identifying and
Analyzing Targeted Dumping

Dear Secretary Gutierrez:

On behalf of DuPont Teijin Films, Mitsubishi Polyester Film Inc., SKC Inc. and Toray Plastics (America), Inc. (collectively “U.S. PET Film Producers”), we hereby submit comments on the Department’s proposed targeted dumping methodology.^{1/} Based on their own experience with targeted dumping and the recent decisions in *Certain Steel Nails*,^{2/} which was published subsequent to the request for comments, U.S. PET Film Producers respectfully offer the following comments and suggestions.

^{1/} Fed. Reg. 26372 (May 9, 2008). See also Extension of Comments Period, available at <http://ia.ita.doc.gov/download/cost-avg-comments/cost-avg-cmt-ext.pdf>.

^{2/} See *Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, and *Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Not Less than Fair Value* (“*Certain Steel Nails*”).

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First and foremost, we stress the importance for the Department to maintain both flexibility and fidelity to the discretion granted to it by Congress in developing a methodology for targeted dumping determinations. The purpose of the targeted provision of the antidumping statute is to allow Petitioners to proceed against dumping targeted at specific customers, at regions, or in specific periods that might otherwise be masked by the averaging provisions of the Department's margin calculation methodologies. The Department must avoid a rule of rigid application that fails to address demonstrable instances of targeted dumping. U.S. PET Film Producers fear that the methodology in *Certain Nails* fails this test.

In the post-preliminary targeted dumping decision in *Certain Steel Nails*, the Department moved away from its previous use of the so-called "P/2 test" to determine targeted dumping margins.^{3/} In its place, the Department proposed a two-part test, composed of a pattern or

^{3/} Under the P/2 test, which the Department used in *Coated Free Sheet* from Korea and China, and in the preliminary determination of the *Certain Nails* case, affirmative targeting was found when the sales prices to alleged targeted customers were at least 2% lower than prices to other customers, and the targeted sales accounted for 50% of the sales. See Memorandum to David M. Spooner from Stephen J. Claeys entitled "Issues and Decision Memorandum for the Final Determination of the Less-Than-Fair-Value Investigation of Coated Free Sheet Paper from the Republic of Korea," October 17, 2007 at 8-10; *Certain Steel Nails from the People's Republic of China: Preliminary Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances and Postponement of Final Determination*, 73 F.R. 3928, 3939 (finding a pattern suggesting targeted dumping based on application of P/2 test). U.S. PET Film Producers believe that there are situations where the P/2 test is applicable. For example, in the PET film investigations from Thailand and UAE, we argue that the P2 test is appropriate for determining if there is a pattern of sales. In the case of PET film, which is a commodity product where small differences in price are important, it is appropriate to establish a pattern of low priced sales to specific customers.

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“standard deviation test” and a price gap or “significant difference test.”^{4/} In its preliminary determination, the Department applied the test in the following way:

- *Pattern Test:* First, the Department determined the share of the alleged targeted customer’s purchases of identical merchandise, by sales value, that was at prices more than one standard deviation below the average price of that identical merchandise to all customers. The standard deviation and average price were calculated using a POI-wide average price (that included both the targeted and non-targeted sales) weighted by sales value to each distinct non-targeted entity of identical merchandise. If the total sales value that met the standard deviation test exceeded 33 percent of the sales value to the alleged target, the pattern requirement was met.^{5/}
- *Significant Price Difference (Price Gap) Test:* Second, the Department examined all sales of identical merchandise that passed the pattern test to determine the sales value for which the price gap (the difference between the average price to the alleged target, and the lowest non-targeted average price) exceeded the average price gap (weighted by sales value) found in the non-targeted group. Where the share of these sales exceeded five percent of the sales value to the alleged target, the significant difference requirement was met and the Department determined that targeted dumping had occurred.^{6/}

After the preliminary decision in *Certain Nails*, the Department issued U.S. PET Film Producers supplemental questionnaires in the PET film case asking for a revised allegation taking into account the decision in *Coated Free Sheet Paper* (where the P/2 test was used) and the *Certain Nails* preliminary decision.^{7/} U.S. PET Film Producers continued to use the P/2 test

^{4/} Memorandum to David M. Spooner from Stephen J. Claeys entitled “Post-Preliminary Determinations on Targeted Dumping,” April 21, 2008, at 8.

^{5/} *Id.*

^{6/} *Id.*

^{7/} See May 16, 2008 Letter from Department of Commerce to WilmerHale; see also U.S. PET Film Producers’ May 23, 2008 Supplemental Response; U.S. PET Film Producers’ June 9, 2008 Supplemental Targeted Dumping Allegation.

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to establish the pattern test arguing that there were a number of ministerial and methodological flaws in the *Certain Nails* pattern test, but added a price gap test to the P/2 test to determine if the price differences were significant. While the Department has since corrected some of the flaws in the pattern test, as discussed below, it did not correct one of the more serious flaws – the inclusion of the targeted price in the weighted-average price against which the targeted price is measured. This is, in our view a major problem with the final test adopted in *Certain Nails*. Moreover, U.S. PET Film Producers continue to believe that in a commodity product such as PET film, the existence of consistently lower prices to one customer in relation to another customer is more than sufficient evidence to demonstrate that there is a pattern of targeted sales.

In its final determinations in *Certain Steel Nails*, which was after our revised allegations in PET film were submitted, the Department stayed with the two step test, but changed the methodology used in the preliminary decision in some respects. In particular, the Department changed the aggregation in the pattern test results on the basis of volume, rather than value, across different products. The Department noted that a volume-based aggregation method is less likely to be skewed by potentially dumped sales values.^{8/} Similarly, the Department applied the volume-based method in calculating the weighted-average prices and standard deviations for the pattern test, as well as the derivation of the weighted-average price gaps and the aggregation of

^{8/} Memorandum to David M. Spooner from Stephen J. Claeys entitled “Investigation of Certain Steel Nails from the People’s Republic of China: Issues and Decision Memorandum,” June 6, 2008, at 20.

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the price gap test results.^{9/} Again recognizing the need for flexibility, the Department noted that, despite its use of volume in this determination, “there may be certain cases where aggregating the pattern test result on the basis of value may be appropriate.”^{10/}

The Department’s revised methodology, however, still raises a number of problems that must be addressed in subsequent cases. *First*, in the pattern test, the Department calculates a weighted-average price against which it compares the targeted price. This weighted-average price continues to be based on both targeted and untargeted sales. By including the targeted sales in the calculation of the weighted-average price, the Department is assuring that alleged targeted sales sold in large quantities to a given customer will be eliminated at the first stage of the test because the alleged targeted price in effect is being compared to itself (as the weighted-average price is skewed towards the targeted customer). This makes no sense. The same price to an alleged targeted customer can be found to be targeted in some situations (where the quantity of the targeted customer does not skew the weighted-average price) but not targeted in other situations (where the alleged targeted customer accounts for a majority of the sales). We urge the Department to correct for this obvious flaw.

Second, Under the *Certain Nails* test, the analysis is conducted only on identical merchandise. Products that are sold only to one customer by definition are not in the pool of alleged targeted sales. Moreover, products that are sold to only two customers automatically fall

^{9/} *Id.* at n.14.

^{10/} *Id.* at 20.

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out of the significant price difference test (even if they somehow passed the pattern test) because it is necessary to have three price points -- (the alleged targeted sales) and two non-targeted customers to establish the pattern against which the targeted customer's sales are measured. Only by including similar merchandise in such situations can the Department examine a sufficient number of sales to determine whether targeting exists or not. A negative finding of targeted dumping should not result solely because there was an insufficient pool of sales of identical merchandise.

In the *Certain Nails* decision, the Department left open the possibility of incorporating similar merchandise into the targeted dumping analysis in some situations. U.S. PET Film Producers believe that it is incumbent on the Department to use similar merchandise when there are insufficient sales of identical merchandise. Otherwise, products are exempt not because they are not targeted but because there is no basis on which to measure targeting. At a minimum, the Department should continue the approach followed in the P/2 test by using the results of the analysis of identical merchandise to determine if the sales to a specific customer or region were targeted. This is a prime example where the flexibility provided in the statute should be applied.

Congress granted the Department the discretion to apply a different methodology in cases where targeted dumping might be occurring in order to ensure that unfair trade practices are identified and addressed where they exist.^{11/} Recognizing that the average-to-average price comparisons might obscure the presence of unfair trade practices, Congress allowed Commerce

^{11/} See generally S. Rep. 103-412 (1994); H. Rep. 103-826 (1994).

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to use the average-to-transaction method where there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time. Congress recognized that this discretion was necessary for the Department to properly identify patterns of dumping “which might otherwise be masked by the use of weighted average export prices (or constructed export prices).”^{12/}

Since the Department of Commerce promulgated 19 C.F.R. §351.414 in 1997, it has recognized that while guidance is necessary with regard to the methodology used to determine targeted dumping, flexibility is also important. To date, the Department has specifically avoided the adoption of any *per se* rules on targeted dumping based on its recognition of its limited experience administering the relevant provisions of the Uruguay Round Agreements Act.^{13/} Recognizing that different contexts would require somewhat different methodology, the Department noted in its Final Rule publication that it “plan[ned] 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.”^{14/}

^{12/} S. Rep. 103-412 (1994) at 79.

^{13/} 62 C.F.R. 27296, 27374 (discussing preamble to proposed regulations).

^{14/} *Id.*

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U.S. PET Film Producers emphasize the need for continued flexibility and context-specific analysis going forward.^{15/} The Department must avoid committing itself to a mechanical formula for calculating targeted dumping margins that runs the risk of either masking the problem of targeted dumping where it exists, or suggesting targeted dumping where it does not. Instead, the Department must try to capture and put into effect Congressional intent -- the discretion to use different methodology where targeted dumping may be occurring in order to ensure that unfair trade practices are discovered and addressed where they exist -- by maintaining the flexibility to assess targeted dumping margins in varying contexts.

Respectfully submitted,

John Greenwald

^{15/} U.S. PET Film Producers, for example, combined the P2 test with the price gap test in its revised targeted dumping allegation in the ongoing investigations on PET film from Thailand and the UAE. *See* Polyethylene Terephthalate Film, Sheet, and Strip (“PET Film”) from the United Arab Emirates: Supplemental Targeted Dumping Allegation, June 9, 2008, at 3, 10-14. For the reasons set forth in those letters, we continue to believe that the P2 test is sufficient to establish if there is a pattern of sales.