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December 11, 2007

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Total Pages: 15
Corrected 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; Corrected Request for Comment

Dear Mr. Spooner:

On behalf of the Korea Iron & Steel Association and its member companies (collectively "KOSA"), we hereby submit the attached corrected copy of KOSA's comments on targeted dumping in antidumping investigations. We inadvertently submitted our original comments on December 10, 2007 on behalf of the Government of Korea as well as KOSA. These revised comments reflect the fact that these comments are submitted only on behalf of KOSA and its member companies and do not contain any substantive revisions to our comments of December 10, 2007. We apologize for any inconvenience.

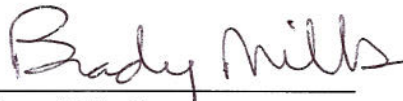
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Please contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,

A handwritten signature in cursive script that reads "Brady Mills". The signature is written in dark ink and is positioned above a horizontal line.

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Re: Targeted Dumping in Antidumping Investigations; Request for Comment

Dear Mr. Spooner:

On behalf of the Korea Iron & Steel Association and its member companies (collectively “KOSA”), 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 amended by the Department. *Id.* at 60,652.

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I. Introduction

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*. First, the requirement that there exist a “pattern” of price differences between allegedly targeted sales and non-targeted sales. Second, the requirement that the price differences between allegedly targeted and non-targeted sales be “significant.” Third, the requirement that the Department utilize “standard and appropriate statistical techniques” when analyzing allegations of targeting dumping. *See* Section 777A(d)(1)(B) of the Tariff Act of 1930, *as amended*.¹ As set forth herein, KOSA believes that the Department should continue to use the long-standing and judicially-approved “*Pasta Test*” as the basis for analyzing allegations of targeted dumping in antidumping duty investigations. Each of the three statutory requirements mentioned above are already incorporated into the *Pasta Test*.

II. The Department Should Continue to Use the “*Pasta Test*” as the Basis for Analyzing Allegations of Targeted Dumping.

In the antidumping duty investigation of certain pasta from Italy, the petitioners made an allegation of targeted dumping, but the Department did not accept the allegation on the grounds that it was unsubstantiated. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy*, 61 Fed. Reg. 30,326 (Dep’t Commerce June 14, 1996). On appeal, the U.S. Court of International Trade (“CIT”) found that the Department had improperly dismissed

¹ A valid targeted dumping allegation must: (1) demonstrate, through the use of standard and appropriate statistical techniques, a pattern of export prices that differ significantly among purchasers, regions, or periods of time; and (2) explain why such differences cannot be taken into account using an average-to-average comparison methodology. 19 U.S.C. § 1677f-1(d)(1)(B).

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petitioners' targeted dumping allegation even though it had not articulated a standard by which an allegation should be made. *Borden, Inc. v. United States*, 4 F. Supp.2d 1221, 1228-31 (Ct. Int'l Trade 1998). On remand, the Department created a test for analyzing the U.S. price data in that case, but found no targeted dumping when applying this test. Remand Determination, Ct. No. 96-08-01970 (Aug. 28, 1998) ("Pasta Remand"), *aff'd Borden, Inc. v. United States*, 23 CIT 372, 380 (1999). The test set forth in the Department's remand determination for reviewing allegations of targeting dumping has come to be known as the "*Pasta Test*."

The *Pasta Test* defines price differences as a separation in price, defining price as gross unit price less adjustments for movement charges, discounts, rebates, and post-sale price adjustments. Pasta Remand at 16. A separation in price occurs "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." *Id.* Since price separation defined simply by differences in average prices is "not enough to establish 'significant price differences'" because it "could lead to the unacceptable result that the vast majority of customers are found to be targeted," the Department proposed that "a targeted customer must be in the lowest 20 percent of all average transaction prices" and that "the separation {found among the targeted customers} be at least as great as the maximum separation in price averages found in the non-targeted group." *Id.* As to whether there is a pattern of price differences, the Department proposed that when a significant price difference exists, "for each allegedly targeted customer, the ratio of months in which the customer's

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average price is in the bottom 20 percent to months in which there are sales to this customer must be greater than 80 percent.” *Id.* at 16, 18.

Although the *Pasta Test* was created in response to the Court of International Trade’s remand and was applied to the specific facts of that case, there is no reason to disregard it completely in favor of a new test. This test has the benefit of having been in existence for almost ten years and has been applied in two cases besides the original pasta from Italy investigation.² Moreover, although the Department reserved the right to revisit in future cases the standards in the *Pasta Test*, it is clear that the standards in the *Pasta Test* were meant to be generally applicable in future cases even if subject to certain case-specific adjustments. In addition, the *Pasta Test* was devised by the Department at a time when nobody anticipated that the World Trade Organization would require the Department to abandon the practice of zeroing. The *Pasta Test* thus reflects an objective attempt to develop a targeted dumping standard and was not created to deal with the prohibition on zeroing in antidumping investigations. In short, it was designed to ferret out targeted dumping and not to re-introduce zeroing through the back door.

In the recently-completed investigation of coated free sheet paper from Korea, the Department claimed that the *Pasta Test* was case-specific and chose not to apply that analysis with respect to the allegations of targeted dumping in the instant case. Instead, the Department expressed an uncertainty as to the general applicability of the standards in the *Pasta Test*, its lack of case precedent, and the purported unique circumstances of the instant case, and then

² *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,608, 56,610 (Dep’t Commerce Nov. 1, 1996) (preliminary determination of sales at less than fair value); *Stainless Steel Wire Rod from Taiwan*, 63 Fed. Reg. 10,836, 10,837 (Dep’t Commerce Mar. 5, 1998) (preliminary determination of sales at less than fair value).

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“accept{ed} the petitioner’s targeting allegation without endorsing the petitioner’s test standards and procedures as a general practice.” *Coated Free Sheet Paper from the Republic of Korea*, 72 Fed. Reg. 60,630 (Dep’t Commerce Oct. 25, 2007) (final determination of sales at less than fair value) and accompanying Issues and Decision Memorandum (“IDM”) at Comment 2. In other words, for purposes of the coated free sheet paper case, the Department rejected the clearly-articulated standards of the *Pasta Test* and, rather than adapting that test (if necessary) to the specific facts of the coated free sheet paper case, the Department accepted an *ad hoc* analysis prepared by petitioner while refusing to endorse petitioner’s methodology – a methodology that cannot withstand serious scrutiny.

Despite its lapse in the coated free sheet paper case, the Department should “examin{e} how the *Pasta Test* standards and thresholds could be modified in developing a standard practice for addressing targeting allegations.” IDM at Comment 2. As discussed herein, the *Pasta Test* represents a well-reasoned and judicially-approved test for analyzing targeting dumping and properly identifies targeting dumping as opposed to identifying simple price variances that have nothing to do with targeting.

A. Targeted Dumping Is A Very Unusual Practice So Allegations Of Targeted Dumping Should Be Scrutinized Carefully.

It is important to put into context what targeting dumping is and what targeting dumping is not. After all, targeted dumping is a very unusual and uncommon form of dumping that has, for good reason, never been found by the Department to exist except in the recent coated free sheet paper investigation. By definition, targeted dumping has an element of strategy and intent that is not present in a normal dumping investigation. Any test for analyzing allegations of

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targeted dumping must, therefore, take the extraordinary nature of the behavior into account.

The test must carefully scrutinize allegations of targeted dumping so that simple price variances are not mistakenly treated as targeted dumping. The CIT's discussion of targeted dumping in *Borden*, which ultimately resulted in the promulgation of the *Pasta Test*, is instructive.

In discussing what targeting dumping is not, the CIT noted in *Borden* that the petitioner mistakenly thought that targeted dumping was simply “the practice of selling to selected customers or regions at different and preferential prices as compared to prices charged to other customers or regions.” 22 CIT at 239. Consistent with this understanding, petitioner sought to support its targeted dumping allegation in that case by searching for statistical evidence of price variance. *Id.* However, the CIT found that under this definition “most pricing would constitute targeted dumping, in that there is price variance along multiple dimensions in many markets. Certainly, not all price variation, not even statistically significant variation, results from targeted dumping.” 22 CIT at 239 (emphasis in original). The CIT thus recognized that targeted dumping is not based on a simplistic analysis of price variances to different customers or regions, but instead involved something more strategic and intentional.

The CIT also discussed what targeting dumping is under the statute:

The concept of targeted dumping is that a company might not be able to, or might choose not to, use a dumping strategy toward a whole market but might strategically focus on a more narrowly defined market . . . To ferret out this more complicated dumping, the statute instructs Commerce to look not only at the *magnitude* of the price variance but also for a *pattern* of significant price differences.

22 CIT at 239 (citing *The Administration of the Antidumping Duty Law by the Department of Commerce, in Down in the Dumps* (Richard Boltuck & Robert E. Litan eds., 1991), at 240

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(Comment of Michael Coursey). The Department's *Pasta Test* accounts for the complicated nature of targeted dumping and is designed to look at not only the magnitude of any price variances but also for a pattern of price differences.

Since targeting dumping is such an unusual and fact-specific concept, the petitioner is uniquely situated to provide the specific details that are necessary to substantiate an allegation of targeted dumping. After all, the petitioner is the one who is allegedly being adversely impacted by this targeting behavior and should thus be in a position to identify the specific customers (or groups) and regions that were impacted by the alleged targeted dumping. The Department properly recognizes this fact and has made clear that it is the petitioner that has the burden of providing the necessary specific information to substantiate a targeted dumping allegation:

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. . . . 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.

Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,374 (May 19, 1997) (final rule). Any new test that is adopted by the Department should continue to allocate this burden to the petitioner.

B. The *Pasta Test* Requires a Showing Of a “Pattern” of Price Differences.

In order to determine whether export price differences show a pattern indicative of targeted dumping, it is necessary to know the conditions in the U.S. market. Allegations of targeted dumping thus cannot be made in a vacuum as market conditions are central to an understanding of pricing in that market and whether targeting is occurring. For a perishable

product, there may be significant price differences depending on the season, or even the time of day, that are wholly explainable based on the product and the normal practices in the industry. For commodities, there could be significant swings in market prices over the course of the period of investigation that could affect export prices of that product or any product made using that commodity. For products where U.S. producers are widely separated or where there is considerable overlap among producers competing for customers in certain locations, freight equalization may be a factor in pricing decisions. There are numerous other possible examples that are indicative of market patterns, none of which would be the result of targeted dumping.

Accordingly, in making a claim of targeted dumping, the domestic industry should be required to provide as part of that claim substantial details regarding the operation of the U.S. market for the product at issue in order to substantiate a claim that the alleged targeted dumping is not typical of market conditions and, in fact, represents a pricing pattern that cannot be explained by normal market conditions and the circumstances of the purchasers, regions or time periods involved in such sales. An *ad hoc* analysis demonstrating price differences, such as the one offered by the petitioner in the coated free sheet paper investigation, without such a context, could be dressed up as targeted dumping when it represents nothing more than common practices and a common range of prices in the trade.

The *Pasta Test* recognizes the fact that even if there are examples of export prices that seem out of line with common market practices, there must be evidence that such sales are not simply low-priced outliers but rather are indicative of a pattern of targeted dumping. In the *Pasta Test*, after the Department identified the price basis by which customers could be considered targeted customers (*i.e.*, average price in the bottom 20 percent), it then adopted a

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threshold standard that the average price of sales to each allegedly targeted customer must be at this level for at least 80 percent of the months in which sales were made to that customer. In other words, the “targeting” of that customer must show a frequency and consistency that is demonstrably not random and not explainable by normal market factors. This method of analyzing whether a “pattern” of targeted dumping exists should continue to be applied by the Department as part of any final test that is adopted as a result of the notice and comment process.

C. The Pasta Test Defines What Price Differences are Considered “Significant.”

In all markets where there are competing suppliers and numerous factors that may affect prices, it should be expected that a range of prices would be found under normal market conditions. Prices may differ to the same customer for the same product in the same month, and prices to different customers may also vary due to the size and frequency of orders, reliability in making payment, quality and servicing demands, etc., such that there may naturally be “high-price” and “low-price” groups of customers. In such circumstances, any test for targeting must be designed so that it does not automatically find targeting of “low-price” customers. Price differences must be “significant” and not explainable by normal variations in the market.

In the recent case of coated free sheet paper from Korea, the U.S. industry argued that for targeted customers (or regions) any difference in the weighted-average price of more than 2 percent below the weighted-average price to non-targeted customers (or regions) for a given product was significant, using as a reference point the 2 percent *de minimis* standard for dumping margins. As an initial matter, a standard for determining whether a dumping margin that is so small that it is legally not cognizable, is not an appropriate point of reference for defining what level of price variation is significant. A difference greater than 2 percent from an average can

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still be small, and when a percentage difference from the average becomes significant is not an absolute standard but may vary considerably depending on the type of product (commodity versus specialized) and the normal variations in market conditions for that product.

In the *Pasta Test*, the Department did not adopt an absolute standard for what constitutes a significant price difference but instead wisely adopted a methodology that allowed for ranges in prices between targeted and non-targeted customers and based its analysis of targeting on whether the targeted customers were in the lowest 20 percent of all average transaction prices and experienced a price separation at least as great as the maximum separation in price averages found in the non-targeted group. *Pasta Remand* at 16. The attractiveness and reasonableness of such a methodology is that it recognizes that the targeting of a customer, a product, or a particular region, of necessity means that targeting consists of only a relatively small portion of sales. The concept of targeting in the midst of widespread dumping that involves a substantial volume of sales would be counterintuitive, as a claim of targeted dumping in these circumstances would be unnecessary.³

In addition, a test that is based on the lowest 20 percent of all average transaction prices establishes a relative standard, rather than a specific threshold percentage, for measuring a significant price difference, and can thus accommodate products that experience either large or small ranges in prices. While the Department recognized that the 20 percent threshold may not

³ It is worth noting that in the recent investigation of coated free sheet paper from Korea targeted dumping claims were made against the three companies that had (with or without the targeting allegation) *de minimis* margins. For the two companies with substantial dumping margins, no claim of targeted dumping was made as it would have been meaningless and would have had no impact on the dumping margins calculated.

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be appropriate in all circumstances, and that it would consider adjusting the percentage in certain circumstances, the Department was nonetheless clear that a more permissive standard was inappropriate. “[T]he 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 purposes of Section 777A(d)(1)(B) of the Act for normal variations in customer prices to become the standard basis for targeted dumping allegations.” *Pasta Remand* at 19.

Thus, although it is certainly within the Department’s discretion to consider possible further refinements to the *Pasta Test*, which the Department recognized at the time it articulated that test, it is worth noting that the standards in the *Pasta Test* were carefully considered, well reasoned, and judicially approved. While the Department may not yet be ready to adopt general standards for analyzing an allegation of targeted dumping, it should carefully consider any revisions to the *Pasta Test* in light of the concerns reflected in the *Pasta Remand*: price variations are normal conditions in all markets and any test for analyzing targeted dumping should carefully distinguish between normal price variation and targeted dumping, in the rare situations where targeted dumping may exist.

D. The Pasta Test Utilizes “Standard and Appropriate Statistical Techniques.”

In the *Pasta Test*, the Department adopted various tests to determine whether targeted dumping existed. The tests had to distinguish between the normal price variations that exist among customers and the alleged “pattern of significant price differences” that would be found if targeted dumping were taking place. Since, by definition, targeted dumping involves low prices that would be at the bottom of the range of prices found in the market, the Department proposed a “gap” test, that a targeted customer must be in the lowest 20 percent of all average transaction

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prices and that the amount of the price separation between targeted and non-targeted customers must be significant and at least as great as the maximum separation in price averages found in the non-targeted group. *Pasta Remand* at 16. In addition, the Department proposed a “skewness” test that measured the average price to each allegedly targeted customer *vis-a-vis* the median average price to determine whether the average transaction prices exhibited a downward skewness with respect to allegedly targeted customers, thus indicating a pattern of significant price differences. *Id.* at 16, 19-20.

Further, the Department found the “difference in means” test problematic. In the absence of naturally occurring groups, using the difference in means test on two arbitrarily defined groups that exist only in terms of differing results on the difference of means test could result in a finding of targeting solely on how the groups are defined, *e.g.*, “high-price” and “low-price” groups. *Id.* at 18. Similarly, as discussed above with respect to the case on coated free sheet paper from Korea, the petitioner in that case proposed a 2 percent test that simply conflates any finding of dumping with targeted dumping.

Any test adopted must avoid such obvious errors. Since the finding of targeted dumping results in the application of a different methodology for calculating dumping margins, substituting the weighted-average normal value to weighted-average export price comparison methodology with the weighted-average normal value to individual transaction comparison methodology, it is imperative that any test applied by the Department be rigorous to measure the difference between normal market price variations and targeted dumping. The tests applied in the *Pasta Remand* meet that standard. In addition, while other tests may be considered in the process of developing general standards for analyzing allegations of targeted dumping, the

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Department should recognize that *ad hoc* tests proffered by domestic industries when making allegations of targeted dumping must be evaluated in terms of their general applicability as standards for measuring targeted dumping. Tests of limited applicability to a particular case do not serve the interests of transparency and do not meet the statutory requirement of standard and appropriate statistical techniques.

III. Conclusion

Based on the foregoing, KOSA respectfully urges the Department to continue to adhere to the long-standing and judicially approved "Pasta Test" in analyzing allegations of targeting dumping.

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

Respectfully submitted,



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