

TELEPHONE (202) 785-4185

TELECOPIERS

(202) 466-1286/87/88

LAW OFFICES

STEWART AND STEWART

2100 M STREET, N.W.

WASHINGTON, D.C. 20037

E-MAIL

GENERAL@STEWARTLAW.COM

WWW.STEWARTLAW.COM

December 10, 2007

**By Hand Delivery**

Honorable David Spooner  
Ass't Secretary for Import Administration  
U.S. Department of Commerce  
Central Records Unit, Room 1870  
Pennsylvania Ave. and 14<sup>th</sup> St., N.W.  
Washington, DC 20230

**By E-mail**

Andrew Lee Beller  
Import Administration Webmaster  
U.S. Department of Commerce  
[webmaster-support@ita.doc.gov](mailto:webmaster-support@ita.doc.gov)  
Total pages: 14

Re: Comments in Response to Federal Register Notice, *Targeted Dumping in Antidumping Investigations* ("Targeted Comments"), 72 Fed. Reg. 60651 (Oct. 25, 2007)

Dear Assistant Secretary Spooner:

The Law Offices of Stewart and Stewart are responding to the U.S. Department of Commerce's request for comments on the development of a methodology for determining whether targeted dumping is occurring in antidumping duty investigations.

We strongly support the development by the Department of methods and procedures that will allow domestic interested parties to identify targeted dumping and the Department to respond so as to prevent its masking. We are encouraged by a number of the steps taken by the Department in its investigation of targeted dumping in the South Korea paper case. See "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" at 12 (Dep't Comm. Oct. 17, 2007) ("*Korea Paper Decision*"). We urge the Department to build on the steps taken in that investigation to develop a reasonable and practical approach to targeting for all investigations.

We propose the following to the Department:



Member International Society of Primerus Law Firms

(1) some standards for (a) finding a pattern of significant differences in export prices (or constructed export prices), (b) determining that the pricing differences of targeted sales cannot be taken into account using either a weighted-average-to-weighted-average or a transaction-to-transaction methodology, (c) computing a margin that captures the full extent of dumping, and (d) employing weighted-average to transaction comparisons for all of a foreign producer or exporter's U.S. sales; and

(2) continuation of the Department's rejection of (a) the *Pasta* Methodology, (b) a requirement to use formal statistical analysis, and (c) any requirement to demonstrate motivation, intent, or causation.

### 1. Some Standards

The Department's changed its calculation methodology for original investigations at the end of last year. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 77,722 (Dep't Commerce Dec. 27, 2006) (final modification) ("*Commerce Offset Methodology*").<sup>1</sup> Under its change, the Department now allows fair value sales of one product to offset the dumping found for another whenever the Department compares weighted averages to weighted averages to determine dumping. Formerly, the only masking that could occur was among the sales of a particular model. When the Department computed a weighted-average price for a model sold in the U.S., low-priced sales of the model could be masked by higher-priced sales of it. Because the Department did not offset dumping margins found for one model with fair values found for another, there was no masking between models.<sup>2</sup>

---

<sup>1</sup> We note that the United States is negotiating in Geneva to preserve U.S. rights to capture the full extent of dumping and that there are judicial challenges to the changes in the Department's margin calculation methodology described in this notice. The comments presented here are intended to address the implementation of a targeting methodology under existing practices, not to endorse the practices.

<sup>2</sup> As the Department explained in the notice changing this practice:

Prior to this modification, when aggregating the results of the averaging groups in order to determine the weighted-average dumping margin, the

This change makes the statutory provision that addresses targeted dumping much more important than it was under the Department's traditional method for calculating margins. Formerly, fair value sales of one model of a product did not offset the dumping of another and the full extent of the dumping of any model was reflected in the Department's calculation of a weighted-average dumping margin. Now, the fair value sales of one model may offset the dumping of another so that the Department no longer captures the full extent of dumping.

Given targeted dumping's new importance for the administration of the dumping law, we recommend that the Department increase the efficiency and predictability of its approach to targeting by adopting some standards. These would provide all parties with an objective understanding of one set of factual circumstances in which the Department will find (a) that targeting exists; (b) that it should be addressed by the alternate margin calculation method;<sup>3</sup> (c) how a weighted-average dumping margin will be calculated when the alternative method is used; and (d) when the Department will use the alternate methodology for all U.S. sales.

(a) Identifying a pattern of significant pricing differences

In order for the Department to respond to targeted dumping, there must be "a pattern of export prices (or constructed export prices) for comparable merchandise that differ

---

Department did not permit the results of the averaging groups for which the weighted-average export price or constructed export price exceeds the normal value to offset the results of the averaging groups for which the weighted-average export price or constructed export price is less than the weighted-average normal value.

*Commerce Offset Methodology*, 71 Fed. Reg. at 77,722.

<sup>3</sup> We use the adjective "normal" to describe the comparison methods for calculating dumping margins ordinarily used by the Department in an investigation: weighted-average-to-weighted-average or transaction-to-transaction. 19 U.S.C. § 1677f-1(d)(1)(A). We use the word "alternate" to describe the comparison methods for calculating dumping margins used by the Department to address targeted dumping: weighted-average normal values to the export (or constructed export) prices of individual transactions

significantly.” 19 U.S.C. § 1677f-1(d)(1)(B)(i). We suggest that the Department adopt a value taken from other situations where it has to decide whether prices differ significantly as a *per se* standard for making that determination for targeting.

In a couple of different situations, the Department finds that prices differ significantly when they differ by more than 2%. When the Department calculates a weighted-average dumping margin for an investigation, it relies on those that are 2% or greater while ignoring those of less than 2% as *de minimis*. 19 U.S.C. § 1673b(b)(3). When it applies its arm’s-length test to determine whether related-party sales should be excluded from dumping comparisons, the Department rejects as distorted sales with prices that are less or greater than the price to unrelated parties by more than 2%. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186 (Dep’t Commerce Nov. 15, 2002). Thus, we recommend the use of pricing differences of 2% or more as a *per se* standard for identifying prices that need to be addressed as targeted.<sup>4</sup>

In order for such pricing differences to be addressed under 19 U.S.C. § 1677f-1(d)(1)(B), they must constitute a pattern. One definition of a pattern is “{a}n arrangement or order

---

<sup>4</sup> Some of the respondents in the South Korea Coated Free Sheet Paper case argued that a more appropriate measure for what is “significant” would be a price difference of 25 percent, noting that under 19 C.F.R. § 351.224(g)(1), a “significant ministerial error” is defined as one that would change the margin by at least 25 percent. *Korea Paper Decision* at 9. We note that this test is applicable to preliminary determinations and is used to identify those ministerial errors that are significant enough to change via a revised preliminary determination in the middle of a proceeding where time is critical. The Department routinely amends its final determinations to correct dumping margins involving hundredths of a percentage point. *See, e.g. Ball Bearings and Parts Thereof from Japan and the United Kingdom*, 72 Fed. Reg. 64578, 64579 (Dep’t Commerce Nov. 16, 2007) (notice of amended final results of A/D admin. review) (margin changed from 0.68% to 0.72%).

discernible in objects, actions, ideas, situations, *etc.*”<sup>5</sup> A dumping foreign producer or exporter may price imports in many different ways. It may offer preferential prices to a particular customer, region, or during a specific period of time. These prices may be for one model, a group of models, or all models. The statutory requirement for a pattern should be interpreted broadly so as to encompass all possible patterns.

In a case involving subject merchandise that is made up of multiple models or CONNUMs, a foreign producer or exporter may choose to sell a single model or a group of models at low prices to a particular customer. This targeting may not only be to particular customers, but it may be of limited duration during the period of review. In other words, the targeting may not include all of the sales to a statutory group (customer, region, or during a particular time period). It may involve only a subset of the sales to such a group. For example, a

---

<sup>5</sup> The NEW SHORTER OXFORD ENGLISH DICTIONARY, definition 5(d). The full definition of a “pattern” is:

1. A design, plan, model, etc., from which a thing is to be made. b A paper plan used in making a garment. c a design on which an artificial fly is modeled. Also, a fly of a particular design. 2 An original to be imitated; an exemplar, a model. b An example, an instance, *esp.* a typical one. Now *rare*. 3 A copy of something; a likeness. *Rare*. 4 A matrix, a mould, Only in E16. b a model in wood, etc. of a casting, used to shape the mould in which the casting is to be made. 5 A precedent. 6. A (repeated) decorative design, *esp.* on or in china, carpets, cloth, wallpaper, etc., a style or type of decoration. b decorative figures or markings occurring naturally or by chance. c The arrangement of marks made on a target by the shot from a gun. d An arrangement or order discernible in objects, actions, ideas, situations, etc. e A set sequence of tactical movements in a game; a positional formation or style of play adapted. 7 A specimen, *esp.* one presented as a sample of a larger group; *spec.* a model of a proposed coin, not subsequently adopted for the currency. 8 A sufficient quantity of material for making a garment, *esp.* address; a dress-length. 9 In Ireland: (the festivities marking) the festival of a patron saint.

foreign producer may target the sales of only a couple of the many different models sold to a particular customer, and it may do so for only a single month.

Thus, the Department should not impose arbitrary limitations on the pattern that may be discerned. It should be open to allegations of targeting that involve less than all of the sales to a customer, region, or during a particular time period.

Once a particular group of sales has been identified, then the question becomes how many of the sales in the group must evince the pricing pattern in order for there to be a pattern? In the South Korea Coated Free Sheet Paper case, the petitioner advocated the use of a 50% test to determine whether a sufficient portion of sales were targeted to constitute a pattern. Letter filed in the Department's Investigation of Coated Free Sheet Paper from South Korea on Behalf of the NewPage Corporation at 10-12 (June 6, 2007). This recommendation likened the use of the 50% test to that employed by the Department to determine whether there was a "a pattern of consistent price differences between sales at different levels of trade" before making a level of trade adjustment under 19 U.S.C. § 1677b(a)(7)(A)(ii). *Id.* at 11.

A 50% test may be suitable, but the more important question is, 50% of what? Possibly, the Department may use a fixed percentage, but it should only apply its test to the sales in the targeted group, whatever that group may be. Regardless of how it determines the existence of a pattern, the Department must ensure that it preserves the flexibility to consider and respond to allegations of targeting that involve different sets of sales, including groups representing less than a specified percentage of the statutory categories (customer, region, or time period).

In sum, we suggest that as a *per se* rule the Department accept allegations of targeted dumping when a domestic interested party has demonstrated that prices differ by 2% or more for particular groups of sales whatever that group may be.<sup>6</sup>

(b) Determining that pricing differences cannot otherwise be taken into account

The Department has correctly recognized that because U.S. prices are averaged when weighted averages are compared to weighted averages, low prices to targeted groups will always be masked by high prices to non-targeted groups. As it said in the South Korea Paper case:

If the Department were to average prices to the non-targeted customers or regions with the prices to targeted customers or regions, those lower prices would be concealed because they would be offset by prices to the non-targeted group. Any pattern of low prices to a targeted group would be covered by averaging the higher prices of the non-targeted group with the lower prices. If that average of the targeted and non-targeted sales were then compared to an average of Korean home market prices, the significant differences that exist between the targeted and non-targeted U.S. prices could not be taken into account.

*Korea Paper Decision* at 12. We recommend that the Department adopt this *per se* rule for determining whether targeted dumping can be addressed by one of the normal methods of calculating margins.<sup>7</sup>

(c) Computing a margin when there is targeted dumping

---

<sup>6</sup> The prices to be compared should, of course, be adjusted so as to insure that any differences are reasonably attributable to targeting and not some other extraneous factor. *See*, for example, the South Korea Coated Free Sheet Paper case where the prices of identical merchandise sold at the same level of trade and were adjusted for all movement charges and selling expenses. *Korea Paper Decision* at 6. In addition, because all prices may vary over time, it may be necessary to limit comparisons to specific time periods such as months. *See e.g., id.*

<sup>7</sup> The Department rejected the use of transaction-to-transaction comparisons to determine margins in the South Korea Coated Free Sheet Paper case. Without addressing the merits of the decision in that case, we urge the Department to be more receptive to the transaction-to-transaction approach. The current state of computer technology is more than powerful enough to allow the Department to use this calculation method for many of its cases. The approach may be an effective tool for capturing a greater amount of the dumping of imports.

At a minimum, the Department should employ the alternate methodology to determine margins for all sales included in the group for which targeted dumping has been identified. If the sales to a particular customer have been targeted, margins should be computed for all sales to that customer, *etc.* This apparently is the position taken by the Department in the South Korea Coated Paper case where the Department appears to have computed dumping margins for all sales of all products to the targeted producers or region. *See Korea Paper Decision* at 19; *see also* “Antidumping Duty Investigation of Coated Free Sheet Paper from South Korea – Post-Preliminary Analysis on Targeting” at Attachments 1-3, at pages 2 (showing code used to flag all sales as targeted that were made to particular customers or a specific region).<sup>8</sup>

- d. employing weighted-average to transaction comparisons for all of a foreign producer or exporter’s U.S. sales

In its current targeting regulations, the Department indicates that where targeted dumping has been found, the “Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.”

19 C.F.R. § 351.414(f)(2). When it issued regulations implementing the Uruguay Round Agreements Act, the Department said:

The Department contemplates that in some instances it may be necessary to apply the average-to-transaction method to all sales to the targeted area, such as a region, or a customer, or even all sales of a particular respondent. For example, where the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company. Moreover, the Department recognizes that where a firm engages extensively in the practice of targeted dumping, the only adequate yardstick available to measure such pricing behavior may be the average-to-transaction methodology.

---

<sup>8</sup> No one in our firm participated in the case. All discussion of it in these comments is based solely on information from the public record.



*See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,375 (Dep't Commerce May 19, 1997) (final rule).

The Department's regulation and its comments on targeting demonstrate that it has contemplated a range of responses to targeted dumping. When the effects are limited, the use of weighted-average-to-transaction comparisons will be limited to the sales to a targeted customer, region, or during a time period. When the effects are broader, alternate comparisons may be used for all sales.

The recent change in Commerce practice to allow offsets between models has significantly increased the effect of any targeting. As we have reviewed, before this change, no offsets were allowed between models. Thus, the only masking that could occur was among sales of the same model. Under the Department's new approach, the effects of targeting are much broader. The dumping of one model can now be masked by the dumping of any other model.

This means that there is a much greater need for the Department to apply the alternate approach to the sales of all models. Thus, we recommend to the Department a standard for applying the alternate methodology to all sales of a foreign producer or exporter.

Under the statute, the Department may disregard normal value sales that have been made below cost when (a) their prices do not permit recovery of all costs within a reasonable period of time and (b) they have been made within an extended period of time in substantial quantities. 19 U.S.C. § 1677b(b)(1). Sales below cost have been made in substantial quantities when the volume of such sales represents 20 percent or more of the sales under consideration. 19 U.S.C. § 1677b(b)(2)(C). Thus, the standard for determining that the normal value data base is sufficiently affected by below cost sales to warrant disregarding them is 20%.

In a similar way, because the dumping of sales of one model may be offset by the fair value sales of any other model, the targeting of 20% or more of U.S. sales means that there are substantial quantities of targeted sales. Given the masking of dumping between models, the existence of substantial quantities of targeted sales means that the only way for the Department to prevent significant masking is to use the alternate method of margin calculation for all sales. Thus, we recommend that the Department adopt a 20% test to determine that there are sufficient targeted sales to warrant application of the alternate method to all sales.

**2. We support the Department's rejection of: (a) the *Pasta* Methodology, (b) any requirement to use formal statistical analysis and (c) any requirement to demonstrate motivation, intent, or causation.**

a. Rejection of the *Pasta* methodology

During the Department's investigation in the South Korea Coated Paper case, the respondents found to be targeting argued that the Department should have employed the methodology employed in the *Pasta* case. *Korea Paper Decision* at 6-7. In response, the Department stated that the methodology was developed for a particular case, that it had no further experience with the approach, and that it was considering how the *Pasta* Test standards could be modified in developing a standard practice for addressing targeting allegations. *Id.* at 8. It noted that it was accepting the petitioner's allegations without endorsing them for other cases and that it planned to develop a standardized test following public comment. *Id.*

We believe that it is important for the Department to reject the *Pasta* Test as the starting point for any standard approach because of its serious flaws. It imposes a number of arbitrary requirements which may not be met even where there is a clear and demonstrable pattern of

pricing differences.<sup>9</sup> More importantly, the test was devised at a time when the only masking that occurred under the Department's weighted-average-to-weighted-average comparison methodology was among the sales of a particular model. See discussion *supra* at 2. Since the Department's change in that methodology in *Commerce Offset Methodology*, the need to address targeting has increased significantly.

As it develops its new standard approach, the Department should continue to reject the *Pasta Test* and develop a more flexible approach that is best suited to Commerce's current method for calculating margins.

b. Rejection of any requirement for formal statistical analysis

The respondents in the South Korea Coated Paper case found to be targeting also challenged the method of analysis employed by the Department to make this finding. They asserted that the Department was required to employ "standard and appropriate statistical techniques" to make such a determination per its regulation (19 C.F.R. § 351.414(f)(1)(i)). *Korea Paper Decision* at 3.

The Department explained that that phrase was not defined in either the statute or any regulation. *Id.* at 5. It explained that the pattern observed by comparing the monthly-average prices for identical products sold to targeted and non-targeted customers showed a clear pattern of pricing differences. *Id.* In its view, this pattern was clear from this examination of the data, and because there was no systematic explanation that any other factors could explain the pattern, it reasonably found dumping. *Id.* at 6.

---

<sup>9</sup> These include: (a) that the price to the alleged targeted purchaser must be in the lowest 20 percent of all average transaction prices; (b) 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; and (c) that price differences must exist over all relevant time

The Department further explained:

The most important aspect of utilizing standard statistical analysis is to ensure that any finding of the existence of a pattern of export prices that differs significantly among purchasers, regions, or time periods is not in error because of misrepresentation or data problems. In these allegations the observed pattern is very clear, and there is no evidence that this pattern is somehow invalid due to misrepresentation or distortion.

*Id.*

The Department's regulation identifies "standard and appropriate statistical techniques" as one of the methods for demonstrating targeting "among other things." See 19 C.F.R. § 351.414(f)(1)(i). Thus, the actual regulation does not limit the methods for demonstrating a pattern to such techniques. In the Coated Free Sheet Paper case, the Department reasonably relied on a clear cut demonstration of pricing differences that was sufficient on its face to demonstrate the pattern so that it did not need to be demonstrated or confirmed by any other statistical analysis. The Department rightly relied on the record before it and rejected any requirements for any particular statistical analysis. We urge the Department to continue to be open to demonstrations of targeted dumping however made without imposing requirements for any particular kinds of analysis.

c. Rejection of any requirement to demonstrate motivation, intent, or causation

One of the respondents in the Coated Free Sheet Paper case also argued that the petitioner's targeted dumping allegations should be rejected, *inter alia*, because petitioner had failed to provide information showing that U.S. or foreign producers sold paper on a regional basis. See Letter filed on behalf of Hansol Paper Co., Ltd. at 6 (5/15/2007) (*Antidumping Duty investigation of Coated Free Sheet Paper from the Republic of Korea*, Commerce investigation

---

periods and for all products sold by the exporter to the allegedly targeted customer. See *Borden, Inc. v. United States*, 23 Ct. Int'l Trade 372, 373-74 (1999).

No. A-580-856); also, *Korea Paper Decision* at 4. The Department properly responded to Hansol's assertion by stating that "the statute does not require the Department to consider all the various reasons why targeting might occur, only the existence of targeting." *Id.* at 6.

This interpretation of the statute is relevant to all allegations of targeting. No determination of motivation, intent, or any factor other than the existence of the targeted dumping is required under the statute. As the court of one of our trading partners has observed, "the concept of intent is generally alien to the anti-dumping rules." Case T-274/02, *Ritek Corp. v. Council of the European Union* ¶ 58 (May 2, 2006). "A finding of dumping . . . is a purely objective comparison between the normal value and export prices . . . That comparison . . . is based on an examination of the economic and accounting data of the undertakings concerned and in no way extends to looking into the reasons for domestic and export price levels." *Id.* ¶ 59.

### **Conclusion**

Therefore, we recommend the following to the Department in connection with its treatment of targeted dumping:

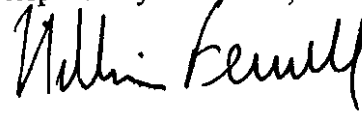
- (1) some standards (a) the use of a 2% or greater pricing difference as a significant pricing difference for whatever group of sales have been targeted, (b) an automatic finding that the dumping of low-priced targeted sales will be offset by high-priced sales to non-targeted groups under the weighted-average-to-weighted-average methodology, and (c) at the least, computation of a margin using weighted-average-to-transaction comparisons for all sales to the targeted group without offsets and merging the dumping margins for those sales without offsets with those found for non-targeted sales; and
- 2) continuation of the Department's rejection of (a) the *Pasta* Methodology, (b) a requirement to use formal statistical analysis, and (c) any requirement to demonstrate motivation, intent, or causation.

Thank you for your consideration of these comments.

Honorable David Spooner  
December 10, 2007

Page 14

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William A. Fennell". The signature is written in a cursive style with a large initial "W".

Terence P. Stewart  
William A. Fennell  
Geert De Prest  
Amy S. Dwyer  
STEWART AND STEWART  
2100 M Street, NW  
Washington, DC 20037

Carl P. Moyer, Trade Consultant