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International President

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By Hand Delivery

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Re: Comments in Response to Federal Register Notice, *Targeted Dumping in Antidumping Investigations*

Dear Assistant Secretary Spooner:

The members of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW") are filing these comments in response to the October 25, 2007, Federal Register Notice (72 Fed. Reg. 60651) of the U.S. Department of Commerce ("Department"). In that Notice, the Department seeks comment on the development of a methodology for determining whether targeted dumping is occurring in antidumping investigations, including input on standards and tests that may be appropriate in a targeted dumping analysis.

The USW has participated in a large number of trade remedy cases before the Commerce Department over the decades. We have a strong interest in seeing the rigorous enforcement of U.S. trade remedy laws. It is often USW members who are the casualties of unfairly-traded imports from our trading partners. It is they who lose jobs and see reductions in compensation and benefits. They see unfairly-traded imports erode

their employers' ability to compete as investment, research and development, training, and other corporate expenditures decline. These are the expenditures necessary to maintaining a strong U.S. manufacturing base and the jobs that base supports.

In the Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, the Administration stated, regarding changes in the Antidumping Agreement, that it "preserves the ability of U.S. industries to obtain meaningful relief from dumped imports into the U.S. market." Statement of Administrative Action, Uruguay Round Agreements Act, 103d Cong. 2d Sess., S. Rep. No. 103-316 (1994) at 137. The Department's recent change in the way that it computes dumping margins in antidumping investigations has seriously weakened the ability of any U.S. industry to challenge unfair pricing in the U.S. 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*").

Before this change, the Department did not allow the dumping found for one model of a product to be offset by the fair value sales of another product. With the change, the Department now allows these offsets. If the Department determines that there is targeted dumping, on the other hand, it may calculate dumping margins for the targeted sales without allowing any dumping of those sales to be offset. Thus, a reasonable and effective approach to targeted dumping can help partially address the reduction in protection due to Commerce's policy change allowing offsets in investigations.

We support a number of steps regarding targeted dumping already taken by the Department in at least one proceeding, and review the steps we support below. In addition, we also recommend that the Department increase the efficiency and predictability of its approach to targeting by adopting some standards to guide that approach. Recommended standards are also set out below.

(1) Department Positions That Should Be Maintained

Rejection of the *Pasta* methodology

In an older case, following litigation, the Commerce Department adopted an approach to targeting that has come to be referred to as the *Pasta* methodology. *See Borden, Inc. v. United States*, 23 Ct. Int'l Trade 372 (1999). In the South Korea Coated Free Sheet Paper case, the Department rejected the use of that methodology, but noted that it was considering how the *Pasta* Test standards could be modified in developing a standard practice for addressing targeting allegations. “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 6-7 (Dep’t Comm. Oct. 17, 2007)¹ (“*Korea Paper Decision*”).

We believe that the *Pasta* Test is so flawed that it should not be considered as the starting point for any standard approach. The most basic problem with the *Pasta* Test is that it precludes the Department from finding targeting even when there is a clear pattern of pricing differences. This is so because it imposes a number of arbitrary requirements.²

¹ Available online at <http://ia.ita.doc.gov/frn/summary/KOREA-SOUTH/E7-21035-1.pdf>

² 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

Moreover, the test was developed before the Department began to allow sales at fair value of one model to mask the dumping of another model.

Now that the need to address targeting has increased so significantly, we urge the Department to reject the *Pasta Test* for all future investigations and to develop a more flexible approach instead.

Rejection of any requirement for formal statistical analysis

In its targeting regulations, the Department 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). Because the regulation includes the reference to “other things,” it does not require that any formal statistical techniques be used to demonstrate targeting.

The Department has 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.

Korea Paper Decision at 6. We urge the Department to continue to be open to demonstrations of targeted dumping, however made, without imposing extraneous requirements for any particular kinds of analysis.

Rejection of any requirement to demonstrate motivation or intent

must exist over all relevant time periods and for all products sold by the exporter to the allegedly targeted customer. *See Borden*, 23 Ct. Int’l Trade at 373-74.

A foreign producer's intent when it dumps in the United States has never been relevant to the antidumping duty law or the Department's administration of it. Similarly, neither motivation nor intent should be relevant to the Department's administration of the targeting provisions of that law. In the South Korea Coated Free Sheet Paper case, a respondent asserted that targeted dumping of sales to a particular region could only be addressed if the Department found that the importer's practice was to sell by region. *Id.* The Department properly rejected the assertion, 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.* We urge the Department to continue to reject any requirement for the showing of motivation or intent in its administration of the targeting provisions of the law.

(2) Recommended Standards

The targeting provisions of U.S. law specify that the Department may use an alternate method³ for computing dumping margins when: (1) there is a pattern of prices that differ significantly among purchasers, regions, or periods of time; and (2) the Department explains why it cannot take such differences into account using a normal method of calculating margins. 19 U.S.C. § 1677f-1(d)(1)(B).⁴ Below we outline

³ Under U.S. law, the "normal" methods for calculating dumping margins ordinarily used by the Department in an investigation are by comparing weighted-average-to-weighted-average or transaction-to-transaction. 19 U.S.C. § 1677f-1(d)(1)(A). The "alternate" method used by the Department to address targeted dumping is by comparing weighted-average normal values to the export (or constructed export) prices of individual transactions.

⁴ Implicit in the use of the alternate methodology is that it be employed without allowing fair value sales to offset dumped sales and that, if it is applied to less than all U.S. sales of a foreign producer or exporter, the results of its application be combined with the results of the application of a normal methodology without offsets. Otherwise, the use of the alternate methodology would produce results no different than if it had not been used,

recommended standards for these statutory elements that will ensure that the Department's administration of the law is an effective response to targeted dumping.

First, in order to employ targeting, the statute requires that there be "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly." 19 U.S.C. § 1677f-1(d)(1)(B)(i). We suggest that for most situations a pricing difference of 2% or greater is significant enough to meet this test. The Department already finds that prices differ significantly when they differ by more than 2% in a couple of different circumstances. When it calculates a weighted average dumping margin for an investigation, it relies on margins 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 Department use pricing differences of 2% or more as a *per se* standard for identifying prices that need to be addressed as targeted.

Second, the Department must decide how many targeted sales constitute a pattern. We are not recommending a specific percentage or quantity, but we urge the Department not to adopt any standard that will limit its ability to respond to targeted dumping.

contrary to norms of statutory interpretation. The Department has recognized the need to employ the alternate methodology without offsets. *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). All references to use of the alternate methodology herein should be read as references to that methodology without offsets.

Foreign producers and exporters may choose to target sales of different models of products for different periods of time at different customers during a given period of investigation. Thus any requirements that pricing differences be demonstrated for all, or some percentage of all, of the sales to a customer or region or during a particular time period in the period of investigation will limit the Department's ability to respond to targeted dumping. We urge the Department not to impose arbitrary limitations that will prevent it from being able to address any instances of targeted dumping.

Third, the Department must decide whether the masking of the targeted dumping can be addressed using a normal calculation methodology. In a recent case, the Department recognized that when it calculates dumping margins by comparing weighted-average U.S. prices to weighted average normal values, targeted dumping will necessarily be masked. It explained:

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. The Department's observations in that case are accurate, and we recommend that they should be the basis for the adoption of a *per se* rule: whenever the Department identifies targeted dumping and would otherwise be comparing weighted averages to weighted averages, the Department should presume that the

targeted dumping will be masked and employ the alternate method of calculating margins by comparing weighted averages to individual U.S. transactions.

Fourth, the Department must decide how to employ the alternate methodology once it has chosen to do so. We recommend as a minimum that it employ the methodology 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.* Moreover, the comparisons using the alternate methodology must be made without offsets and the results of those comparisons must be combined with any calculations using a normal methodology without offsets.⁵ As we have noted, if this is not done, then the alternate methodology is rendered useless as the resulting weighted-average dumping margin will be the same as if only a normal method had been used.

Finally, we have one further recommendation. When it issued its regulations implementing the Uruguay Round Agreements Act, the Department included comments on many of the provisions. It noted regarding targeted dumping 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.” *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,375 (Dep’t Commerce May 19, 1997) (final rule).

⁵ This appears to be the approach 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 using the alternate method without offsets. *See Korea Paper Decision* at 19.

Under the Department's recent change in the way that it computes dumping margins when comparing weighted averages to weighted averages in investigations, the effects of targeting are much broader than they were under its former practice. The dumping of one model can now be masked by the dumping of any other model. This means that the Department must apply the alternate approach in a way that is as responsive as possible to that targeted dumping, *i.e.* to as broad a range of U.S. sales as possible. In some cases, the foreign producer or exporter will have engaged in targeted dumping so extensively that the only way for the Department to respond is to use the alternative methodology for all U.S. sales. Thus, we recommend the Department adopt a standard for applying the alternate methodology to all sales of a foreign producer or exporter.

The statute includes a provision that allows the Department to disregard normal value sales that have been made below cost when: (1) their prices do not permit recovery of all costs within a reasonable period of time; and (2) they have been made within an extended period of time in substantial quantities. 19 U.S.C. § 1677b(b)(1). The statute also specifies that sales below cost have been made in substantial quantities when the volume of such sales equals 20 percent or more of the sales under consideration. 19 U.S.C. § 1677b(b)(2)(C).

Similarly, because the fair value sales of any model may offset the targeted dumping of another, the targeting of 20% or more of U.S. sales means that there are substantial quantities of targeted sales. Thus, we recommend that whenever the quantity of targeted sales is 20% or more of all of the U.S. sales of a foreign producer or exporter,

the Department employ the alternate method to determine dumping margins for all of its U.S. sales.

In sum, we recommend that the Department continue to reject: (1) the *Pasta* methodology, (2) any requirement for the use of formal statistical analysis, and (3) any requirement for a showing of intent or motivation. We further recommend that the Department: (1) adopt a 2% test to identify significant pricing differences, (2) investigate and respond to targeted dumping even when the targeted sales make up a subset of sales to a customer, region, or time period, (3) as a minimum, apply the alternate methodology to all of the sales to a customer, region, or time period whose sales include targeted sales, and (4) apply the alternate methodology to all U.S. sales of a foreign producer or exporter whenever the targeted quantity of that producer or exporter's sales is 20% or more of its total U.S. sales.

Together, we believe these steps will enable the Department to establish a reasonable and effective approach to targeting that provides effective relief from targeted dumping while offering predictability and transparency to parties.

Respectfully submitted,



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