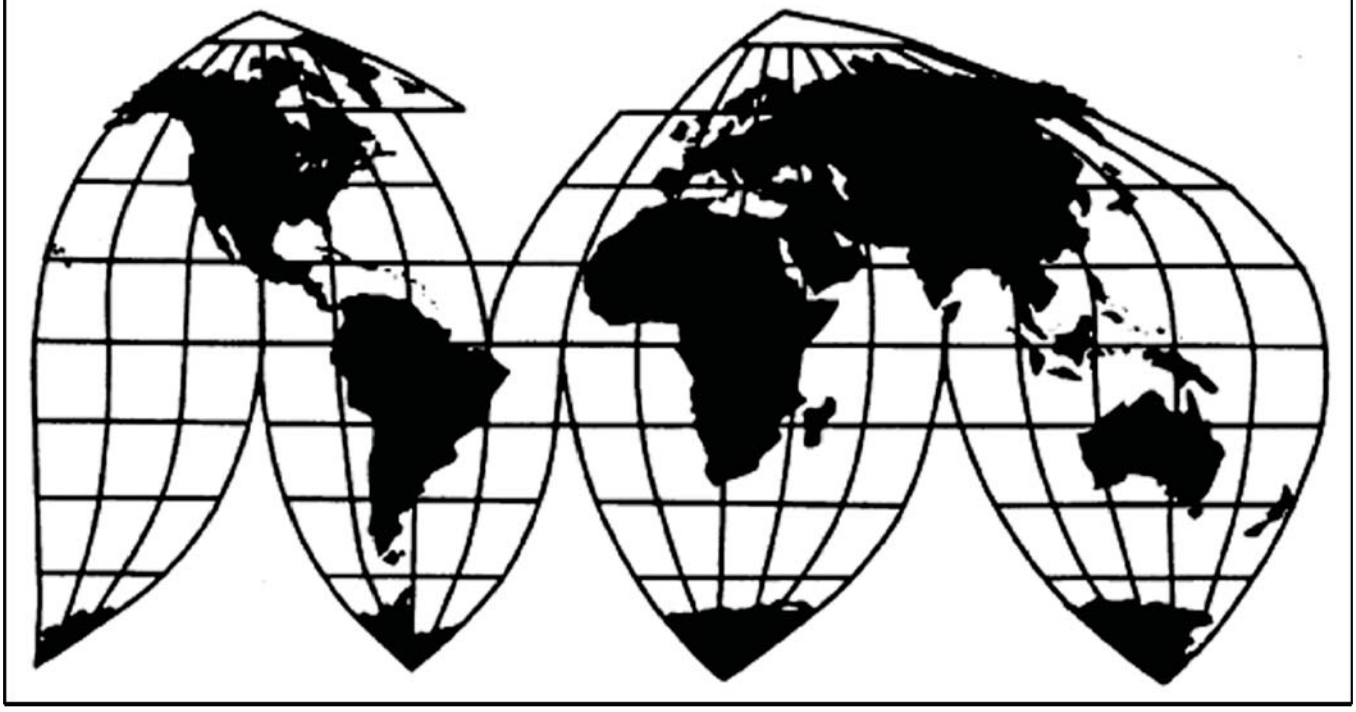
Certain Lightweight Thermal Paper from China and Germany

Investigation Nos. 701-TA-451 and 731-TA-1126-1127 (Remand)

Publication 4334 **September 2011**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

Deanna Tanner Okun, Chairman
Irving A. Williamson, Vice Chairman
Daniel R. Pearson
Shara L. Aranoff
Dean A. Pinkert
David S. Johanson

Robert B. Koopman
Director of Operations

Staff assigned

Marc Bernstein, Attorney

Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

Washington, DC 20436
www.usitc.gov

Certain Lightweight Thermal Paper from China and Germany

Investigation Nos. 701-TA-451 and 731-TA-1126-1127 (Remand)

Publication 4334

September 2011

VIEWS OF THE COMMISSION

In November 2008 the Commission determined that a domestic industry was threatened with material injury by reason of imports of certain lightweight thermal paper ("LWTP") from Germany that the Department of Commerce ("Commerce") determined were sold at less than fair value ("LTFV").[1] Papierfabrik August Koehler AG and Koehler America, Inc. (collectively "Koehler"), respectively an exporter and importer of subject merchandise from Germany, sought judicial review of the Commission's determination from the U.S. Court of International Trade ("CIT"). The CIT affirmed the Commission's determination.[2] On appeal, the United States Court of Appeals for the Federal Circuit vacated the judgment of the CIT.[3] On June 15, 2011, the CIT remanded this matter to the Commission.[4]

The Commission accordingly instituted remand proceedings effective July 1, 2011.[5] When it instituted remand proceedings, it reopened the record for the limited purpose of obtaining additional materials from the record of the Commerce dumping investigation. The Commission permitted the parties that participated in the Federal Circuit litigation to file comments. Appleton Papers, Inc., ("Appleton") petitioner in the investigation, and Koehler submitted comments.

Based on the record, as augmented in these remand proceedings, the Commission again determines that a domestic industry is threatened with material injury by reason of LTFV imports from Germany.[6]

I. SCOPE OF THE REMAND PROCEEDING

One pertinent condition of competition that the Commission found in the original investigation is that LWTP is sold in a variety of basis weights. During the period of investigation, the bulk of LWTP sold in the United States was sold in basis weights of 48 grams per square meter ("48 gram LWTP") or 55 grams per square meter ("55 gram LWTP").[7] During the period examined by the Commission, U.S. coaters' shipments of 55 gram LWTP far exceeded their shipments of 48 gram LWTP.[8] All six Commissioners agreed, however, that domestic production of the 48 gram product was likely to increase

---

[1] Certain Lightweight Thermal Paper from China and Germany, Inv. Nos. 701-TA-451, 731-TA-1126-1127 (Final), USITC Pub. 4043 (Nov. 2008) ("Final Determination"). Commissioners Aranoff, Okun, and Pearson reached negative determinations with respect to subject imports from Germany. The Commission's unanimous affirmative threat determination concerning subject imports from China, which was decided on a non-cumulated basis, was not litigated and is not at issue in this remand.

[2] Papierfabrik August Koehler AG v. United States, 675 F. Supp.2d 1172 (Ct. Int'l Trade 2009).

[3] Papierfabrik August Koehler AG v. United States, App. No. 2010-1147 (Fed. Cir. January 11, 2011) (non-precedential opinion) ("CAFC Slip Op."). The Federal Circuit decision is described in section I below.

[4] Papierfabrik August Koehler AG v. United States, 774 F. Supp.2d 1356 (Ct. Int'l Trade 2011).

[5] 76 Fed. Reg. 42137 (July 18, 2011).

[6] Chairman Okun, Commissioner Pearson, and Commissioner Aranoff determine that a domestic industry is neither materially injured nor threatened with material injury by reason of LTFV imports from Germany for the reasons stated in the original determination. See Original Determination, USITC Pub. 4043 at 3-21, 29-36, 41-44. They observe that their determinations do not rely on any underlying findings made or purportedly made in the Commerce investigation other than those stated by the agency in its notice of final determination published in the Federal Register. Although they did not need to address the issue in their analysis, the dissenting Commissioners agree with the legal interpretations set forth and join Sections I, II, III.A., and III.B.1. of this opinion as these sections relate to the framework of Commission injury determinations.

[7] Original Determination, USITC Pub. 4043 at 16.

[8] Original Determination, USITC Pub. 4043 at 16.

in importance in the imminent future – the period on which the threat analysis focused.[9] Although the quantity of shipments of 55 gram LWTP from Germany exceeded the quantity of 48 gram LWTP in 2005, 2006, and 2007, 48 gram shipments exceeded 55 gram shipments in the first half of ("interim") 2008.[10] Koehler, the predominant exporter, discontinued exports of its principal 55 gram product to the United States in March 2008 and both it and the other German exporter, Mitsubishi, indicated that their future exports would focus on the 48 gram product.[11]

In the original proceedings, Koehler submitted to the Commission a series of worksheets from the Commerce dumping investigation purporting to show that 48 gram product was not dumped during the Commerce period of investigation from July 1, 2006 through June 30, 2007. Koehler argued to the Commission that, in light of the information in the worksheets, the Commission should disregard the increase in shipments of 48 gram LWTP from Germany during the period of investigation.[12] All six Commissioners – including the three who made negative determinations – rejected Koehler's argument on two grounds: (1) the Federal Circuit's decision in Algoma Steel Corp. v. United States,[13] "did not compel or even authorize the Commission to examine individual sales or model transactions considered by Commerce;" and (2) it was undisputed that Commerce had not in its final determination published a separate dumping margin for 48 gram LWTP, and, under the statute, the Commission was authorized only to consider Commerce's published dumping margins.[14]

The sole issue in the litigation before the Federal Circuit was the Commission's action declining specifically to discuss the Commerce worksheets in its opinion.[15] In the proceedings before the Federal Circuit, Koehler did not pursue the theory it argued before the Commission that the Commission should have disregarded the volume of the 48 gram product. Instead, it changed its theory to argue that the material in the Commerce worksheets was pertinent to the issue of whether there was a sufficient causal link between the dumped imports and the threat of material injury that the Commission found.

In a non-precedential, per curiam opinion, the Federal Circuit concluded that the Commission relied on a divergent reading of Algoma and misunderstood Koehler's request. The Court stated that Algoma specifically allows the agency to consider raw data in computer printouts, for reasons specific to the particular case, for purposes of considering arguments why sales at more than fair value were not relevant to the injury determination.[16] It characterized Koehler's request not as one to recalculate dumping margins, but instead as asking "the Commission to make decisions based on the price, measured as a dumping margin, of a subset of dumped goods. . . .[and] to analyze data that is statutorily required to be available to the Commission."[17] The Court emphasized that, under 19 U.S.C. § 1673d(c)(1)(A), the Commission had the right to request access to the full Commerce record, including the materials Koehler submitted.[18] It stated that "[w]hen the threat determination is based almost exclusively on one product within the subject merchandise, and that product is not being sold at LTFV, the Commission should be

---

[9] Original Determination, USITC Pub. 4043 at 38, 42 (dissenting opinion).

[10] Original Determination, USITC Pub. 4043 at 17.

[11] Hearing Tr. at 222 (Swadish), 234 (Greene), 238-39 (Jahns).

[12] See German Respondents Prehearing Brief at 53.

[13] 865 F.2d 240 (Fed. Cir. 1989).

[14] Original Determination, USITC Pub. 4043 at 31 n.201.

[15] The CIT had concluded that the Commission's decision not to accord weight to the worksheets was reasonable in light of the Federal Circuit's Algoma decision. See 675 F. Supp. 2d at 1184.

[16] CAFC Slip Op. at 8.

[17] CAFC Slip Op. at 8-9.

[18] CAFC Slip Op. at 9.

able to use all materials at its disposal to make an equitable determination."[19] The Federal Circuit consequently concluded that "the Commission incorrectly denied Koehler's request, and incorrectly interpreted this court's holding in Algoma, when refusing to consider the potentially dispositive intermediate data."[20] It vacated the judgment of the CIT affirming the Commission's affirmative determination and directed the CIT to remand the matter to the Commission.

In remanding proceedings to the Commission, the CIT ordered the Commission to take action that is consistent with the Federal Circuit's decision.[21] It further directed on remand that:

> the Commission shall revise its final determination with regard to the threat of material injury from subject merchandise from Germany, in accordance with the decision [of the Federal Circuit]. The Commission shall specifically explain how its decision to deny Koehler's request to exclude a subset of Koehler's subject merchandise from the Commission's threat of material injury determination complies with the Court of Appeals' interpretation of 19 U.S.C. § 1673d(c)(1)(A) and the decision in Algoma Steel Corp. v. United States, 865 F.2d 240.[22]

We observe as an initial matter that the opinion of the Federal Circuit and the order of the CIT address only the issue of the Commerce worksheets and contain one requirement: that the Commission examine the worksheets Koehler submitted and ascertain whether the material on these worksheets warrants any adjustment to its prior analysis of threat of material injury by reason of subject imports.[23] The Federal Circuit opinion and the CIT remand order do not call into question the Commission's findings or conclusions concerning domestic like product, domestic industry, cumulation, or conditions of competition. They also do not call into question the Commission's determination that the domestic industry was not experiencing current material injury by reason of subject imports. This opinion will focus on whether the information from the Commerce dumping investigation warrants modification of the prior analysis that there is a threat of material injury by reason of the subject imports. Consequently, it will address below whether the material in the worksheets demonstrates that there is not a causal link between any threat of material injury and the imports under investigation.[24]

---

[19] CAFC Slip Op. at 9.

[20] CAFC Slip Op. at 9.

[21] 774 F. Supp.2d at 1357.

[22] 774 F. Supp.2d at 1357.

[23] We disagree with Koehler that the Federal Circuit opinion should be read more broadly or that it compels the Commission to engage in any specific analysis on remand. Koehler's contrary arguments stem from selectively quoting the opinion out of context. For example, Koehler juxtaposes two distinct portions of the Federal Circuit opinion when it asserts that the Court concluded the Commission "erred" by denying Koehler's request to disregard increased shipments of 48 gram LWTP. See Koehler Remand Comments at 6. The Court's statement describing the Commission's denial of Koehler's request to disregard increased volumes of 48 gram LWTP is part of its statement of facts, in which the Court did not purport to evaluate the legality of the Commission's actions. See CAFC Slip Op. at 5. By contrast, in a subsequent section of the opinion containing its evaluation of the merits, the sole error the Court found the Commission to have committed is "refusing to consider potentially dispositive intermediate data" in the form of the information on the worksheets. Id. at 9 (emphasis added).

[24] The CIT's decision that all contested factual findings in the threat analysis were supported by substantial evidence was not appealed to the Federal Circuit. See 675 F. Supp. 2d at 1180-83, 1187-91. Consequently, there is no reason for the Commission to revisit these findings unless such re-examination is appropriate in light of its analysis of the worksheets. The Commission explains below why the materials in the worksheets do not require such a re-examination.

The Federal Circuit's opinion emphasized the Commission's statutory authority under 19 U.S.C. § 1673d(c)(1)(A) to obtain materials from the record of the Commerce dumping investigation.[25] As previously stated, in this remand proceeding the Commission exercised this authority to seek such materials. Section II of this opinion describes the additional materials we have received from Commerce.

Section III discusses the legal framework for the Commission's injury determinations and the implications of these materials to the analysis of threat of material injury by reason of subject imports. The original Commission opinion in this investigation stated the Commission's position that it was not obliged to examine worksheets from the Commerce record.[26] It did not purport to discuss what constraints the statute might place on the Commission's use of data from such materials. The Federal Circuit's opinion similarly does not provide any detailed examination concerning whether the statute provides guidance for or constraints upon the Commission's ability to use raw data from the Commerce record. In its comments on remand, Koehler argues that the worksheets establish that 48 gram LWTP was sold at normal value, and that therefore the Commission should "remove" this product from its threat analysis.[27] In section III.A., we explain why, even assuming arguendo that Koehler's characterization of the worksheets is correct, "removing" 48 gram LWTP from the injury analysis is contrary to the provisions of our governing statute. We also rebut the theory that the Commission must establish that any threat of material injury is the result of dumping or dumped transactions.

The Federal Circuit's opinion strongly suggested the Commission on remand should carefully consider materials from the Commerce record. It stated that consideration of the worksheets is authorized by Algoma and is particularly warranted "[w]hen the threat determination is based almost exclusively on one product within the subject merchandise and that one product is not being sold at LTFV."[28] By the same token, the CIT has instructed us to address how our decision is consistent with the Federal Circuit's interpretation of Algoma.[29] Consequently, section III.B.1. of this opinion engages in a detailed examination of the worksheets to ascertain what they do – and do not – say. Section III.B.2. of the opinion further addresses the concern underlying the Federal Circuit opinion that the lack of an overlap between imports found to be sold in dumped sales in the Commerce investigation and the imports that the Commission found to be threatening material injury is a "relevant economic factor" under 19 U.S.C. § 1677(7)(F)(i) that would militate against any conclusion that the threat of material injury is by reason of subject imports. The Commission finds, however, that careful consideration of materials in both Commerce's record and its own rebuts the proposition that there is a disconnect between dumped and injurious transactions in the circumstances of this investigation.

II. MATERIALS FROM THE COMMERCE RECORD

As previously stated, the material that the Federal Circuit and the CIT have directed the Commission to consider in this proceeding consists of worksheets from the Commerce dumping investigation. These are computer printouts, titled "Final Determination (01 Jul 2006 - 30 Jun 2007) Price to Price: Highest 5 and Lowest 5 Margins With Zeroing, If Applicable." The title is the only

---

[25] CAFC Slip Op. at 9.

[26] We agree with the Federal Circuit that Algoma provides the Commission the discretion to examine raw data from the Commerce investigation in appropriate situations. See 865 F.2d at 242. We believe that situations where examination of such data would be appropriate are extremely rare. As the discussion in section III.B.1. below indicates, the factual and legal implications of the raw data in the Commerce record in this investigation are extremely limited, particularly in light of the substantially more comprehensive and directly relevant data collected by the Commission in its investigation.

[27] Koehler Remand Comments at 3.

[28] CAFC Slip Op. at 9.

[29] 774 F. Supp.2d at 1357.

narrative information on the worksheets. Most of the worksheets consist of matrices with a series of legends, whose meaning is not obvious (such as "ICOMMDOL"), and numbers, which are proprietary.[30] Koehler points to a single line on one worksheet which it characterizes as a Commerce calculation of a "dumping margin" for 48 gram product at ***.[31]

Commerce's worksheets are not and do not purport to be self-explanatory. In the original investigations, Koehler counsel furnished the only explanation of the worksheets.[32] Koehler did not present any materials prepared by Commerce that indicated the context in which Commerce prepared its worksheets or how Commerce used the worksheets. Moreover, the public materials that Commerce issued in conjunction with its final dumping determination on LWTP on Germany shed no light on the matter. The final determination contains no reference specifically to 48 gram LWTP or any dumping calculations that Commerce made with respect to that product. In fact, the only reference that the final determination contains concerning intermediate dumping calculations refers to petitioner Appleton's allegation that Koehler was involved in targeted dumping; Commerce's final determination explains why Commerce did not use a targeted dumping analysis.[33]

Commerce's final dumping determination additionally references and expressly adopts the agency's Issues and Decisions Memorandum ("Commerce Issues Memo"), another public document. As with the final determination, the Commerce Issues Memo contains no specific reference to 48 gram LWTP or any dumping calculations that the agency made with respect to that product. It does contain a more detailed explanation than the final determination concerning the agency's position on the targeted dumping issue. It also contains an explanation of the agency's decision to offset what it references as "non-dumped sales" against dumped sales for purposes of determining the margin.[34]

Because the public materials Commerce issued to explain its decision neither referenced the worksheets Koehler introduced to the Commission nor contained any discussion of 48 gram LWTP, we reopened the record in the remand proceeding to obtain further information from the Commerce record. This was consistent with the passage of the Federal Circuit opinion citing 19 U.S.C. § 1673d(c)(1)(A), a provision granting the Commission access to relevant information in the Commerce record.[35] In particular, Commission investigative staff requested that Commerce provide it with any non-privileged narrative materials that explained the calculation of Koehler's dumping margin in the final determination. This included, but was not limited to, two memoranda expressly referenced in Commerce's final determination and narrative materials Commerce disclosed to Koehler pursuant to 19 C.F.R. § 351.224.[36]

Commerce responded by providing the Commission with two memoranda.[37] The first, titled "Final Analysis Memorandum for Sales – Koehler," is dated September 25, 2008. The memorandum

---

[30] Koehler Posthearing Brief, ex. H.

[31] Koehler Remand Comments at 6.

[32] See German Respondents Prehearing Brief, ex. 13. This explanation actually pertained to worksheets Commerce prepared in conjunction with its preliminary dumping determination.

[33] 73 Fed. Reg. 57326, 57328 (Oct. 2, 2008).

[34] Commerce Issues Memo, EDIS Doc. 454288, at 12-13. The discussion in the Issues Memo concerned an issue commonly known as "zeroing." Commerce's treatment of non-dumped sales transactions of LWTP from Germany reflected a fairly recently adopted practice. Under the prior "zeroing" practice, Commerce treated non-dumped sales transactions – which are commonly found in dumping investigations – as having a zero margin. Under the more recent practice Commerce followed in its investigation of LWTP from Germany, the negative margins in non-dumped sales transactions are used to offset positive margins in dumped sales transactions. Thus the more recent practice typically results in lower weighted-average dumping margins than did the prior practice.

[35] See CAFC Slip Op. at 9.

[36] Letter from Catherine DeFilippo to Christian Marsh (July 8, 2011), EDIS Doc. 454286.

[37] Materials that Commerce provided to the Commission may be found in the record in EDIS Doc. 454291.

expressly reflects the 6.50 percent final dumping margin for Koehler published in the final agency determination, but does not provide any intermediate margin calculations. Nor does it contain any reference to 48 gram LWTP. The memorandum is accompanied by several appendices containing computer printouts. There are over 150 pages containing programming instructions, followed by about 20 pages of output containing cost calculations. The second memorandum, titled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination," also dated September 25, 2008, is a two-page document that does not provide any intermediate margin calculations or reference 48 gram LWTP. It contains an appendix containing 84 pages of output reflecting the database Commerce used to calculate the margin. The material Koehler submitted in the original investigations begins at the 79th page of the printout.[38]

III. IMPLICATIONS OF MATERIALS IN COMMERCE RECORD CONCERNING 48 GRAM LWTP

A. Legal Framework of Commission Injury Determinations

For purposes of this section, we assume arguendo that Koehler is correct in asserting that the worksheets it submitted are tantamount to a legal determination by Commerce that the 48 gram LWTP transactions in question were priced at normal value. We nevertheless conclude, as a matter of law, that the statute directs us to examine whether there is material injury or threat of material injury by reason of the subject imports on which Commerce reached an affirmative determination. The record indicates that 48 gram LWTP was included within the class or kind of subject merchandise on which Commerce reached an affirmative determination. Because the Commission has no legal authority to exclude from its analysis subject merchandise encompassed within the Commerce affirmative determination, we conclude that the Commission's original determinations properly evaluated all merchandise determined by Commerce to be subject to investigation, including 48 gram LWTP.

Koehler's arguments to the contrary stem from two premises, one expressly stated in its remand comments and the second implied by its submissions in the preceding litigation. Koehler again asserts to the Commission on remand the same argument that it made in the original investigation but did not pursue in the subsequent litigation – that the Commission should simply exclude 48 gram LWTP from its injury analysis because it is not dumped. Even assuming that Commerce has found that the 48 gram LWTP transactions in question were priced at normal value, we decline to take such action because it is contrary to the express provisions of the statute.

The principal statutory provision governing Commission determinations in final antidumping investigations states as follows:

> The Commission shall make a final determination of whether--
>
> (A) an industry in the United States--
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section. If the Commission determines that imports of the subject merchandise are negligible, the investigation shall be terminated.[39]

---

[38] The page is numbered 73 in the materials Commerce furnished.

[39] 19 U.S.C. § 1673d(b)(1).

This provision unambiguously directs the Commission to address in its injury determination all "merchandise with respect to which [Commerce] has made an affirmative determination." As the record in this investigation indicates, the merchandise with respect to which Commerce has made an affirmative determination may contain transactions, or a series of transactions, sold at non-dumped prices. Nevertheless, as long as the imports associated with these transactions are included within the "merchandise" encompassed by the Commerce affirmative determination, the statute by its plain terms directs the Commission to include such merchandise in the subject imports as to which the Commission makes its determination of material injury or threat of material injury by reason of subject imports.[40]

The materials in the record unambiguously indicate that 48 gram LWTP was encompassed within the merchandise covered by Commerce's affirmative determination. Even if the Federal Register notice containing Commerce's final determination may not set forth every finding the agency may have made, by law it does contain the agency's determination.[41] It is indisputable that the affirmative determination described in the Federal Register notice encompassed all LWTP within the scope and thus Commerce made an affirmative LTFV determination on the class or kind of subject merchandise that included 48 gram LWTP.[42] Moreover, the Commerce worksheets in the remand record indicate that Commerce included non-dumped transactions of 48 gram LWTP in the subject merchandise it used to calculate the dumping margin and the inclusion of such merchandise served to reduce the margin from what it would have been had 48 gram LWTP been excluded.[43]

We next address Koehler's second premise, which it did not assert in its remand comments but did suggest in its prior litigation briefs. This is that the Commission must find a causal nexus between the threatened material injury and the act of dumping, rather than the statutory requirement of "by reason of subject imports." The statute does not require the Commission to find that the threatened material injury is by reason of dumping or by dumped transactions alone. Instead, the statute requires that the threat of material injury to a domestic industry be by reason of the corresponding class or kind of imports covered by the Commerce affirmative determination.

The statute further elaborates upon the requirement that Commerce ascertain and define the class of merchandise within its investigation. Under the statute, Commerce must identify in its final dumping

---

[40] 19 U.S.C. § 1673d(b)(1). Indeed, the Commission has had a consistent practice of considering the volume of all subject merchandise in determinations, including threat determinations, since enactment of the current statutory scheme in 1979. See, e.g., Choline Chloride from Canada, Inv. No. 731-TA-155 (Final), USITC Pub. 1595 at 7, 9, A-5, A-23 (Oct. 1984); Strontium Nitrate from Italy, Inv. No. 731-TA-33 (Final), USITC Pub. 1155 at 4, A-5, A-10 (June 1981). See also Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan, Inv. Nos. 731-TA-736-737 (Final), USITC Pub. 2988 at 32 n.211 (Aug. 1996).

[41] See 19 U.S.C. § 1673d(d).

[42] See 73 Fed. Reg. 57326, 57327-28 (Oct. 2, 2008) (indicating that pertinent basis weight for LWTP is "70 grams per square meter . . . or less;" directing U.S. Customs and Border Protection (CBP) to "suspend liquidation on all entries of subject merchandise from Germany entered, or withdrawn from warehouse, for consumption on or after May 13, 2008;" stating that if the Commission reached an affirmative determination "the Department will issue an antidumping order directing CBP to assess antidumping duties on all imports of the subject merchandise"). By contrast, in those cases Koehler cites involving exporters with de minimis margins, such imports are not within the scope of Commerce's published affirmative determination and therefore are not subject merchandise. Consequently, pursuant to the statute, the Commission excludes such imports from its analysis of injury or threat of material injury by reason of imports of the subject merchandise.

[43] Commerce materials, EDIS Doc. 454291, pages 82 and 88 of 89. This fact also distinguishes this situation from cases involving exporters with de minimis margins. When an exporter is found to have a de minimis margin, its sales are not included to calculate the dumping margins for the subject merchandise on which Commerce has made an affirmative dumping determination. Cf. 19 U.S.C. § 1673d(c)(5)(A) (rates from exporters who received zero or de minimis margins excluded in calculating "all others" rate).

determination the imported articles constituting the "subject merchandise,"[44] which the statute defines as "the class or kind of merchandise that is within the scope of an investigation."[45] As previously stated, to satisfy the statutory directive that it address "the merchandise with respect to which the administering authority has made an affirmative determination,"[46] the Commission's injury determinations address all imports within Commerce's scope of investigation. The Commission separately defines the domestic like product.[47] Its longstanding practice is to subdivide the articles encompassed by Commerce's class or kind determination only when it defines multiple domestic like products that together encompass the entire scope definition, in which case the Commission's analysis of subject import volume and pricing will concern that portion of the subject merchandise corresponding to each domestic like product the Commission has defined. Conversely, the Commission may define a single domestic like product encompassing several different "classes or kinds" of subject merchandise, in which case it may properly aggregate the volumes and prices of the different classes or kinds in its injury analysis.[48] The Commission has no practice of subdividing a Commerce "class or kind" definition when it has not defined multiple domestic like products, and there is no statutory provision requiring such action. We certainly perceive no discretionary rationale for doing so in this investigation, where no party contested treatment of all LWTP within the scope definition as a single domestic like product in the Commission final phase investigation.[49] Moreover, nothing in the Commerce record indicates that Commerce was ever asked to consider 48 gram LWTP as a distinct class or kind of subject merchandise.

Nevertheless, as the Federal Circuit recognized,[50] a single class or kind or a domestic like product definition does not preclude the Commission from considering the competitive effects of subsets of the subject merchandise or domestic industry in its analysis. In order to assess fully the effects of subject imports on the domestic industry, the Commission may examine discrete products within the range of products encompassed by the subject merchandise or domestic like product. For example, the Commission customarily collects data on numerous pricing products.[51] Engaging in such examination is

---

[44] 19 U.S.C. § 1673d(a)(1)

[45] 19 U.S.C. § 1677(25).

[46] 19 U.S.C. § 1673d(b)(1).

[47] 19 U.S.C. § 1677(10) defines the "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle."; see Cleo, Inc. v. United States, 501 F.3d 1291, 1299 (Fed. Cir. 2007).

[48] Accord CAFC Slip Op. at 7 ("Commerce's designation of the class or kind of merchandise sold at LTFV does not necessarily control the group of products used by the Commission in its material injury analysis."). See generally Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568-69 (Fed. Cir. 1996). Even in such cases, the Commission's longstanding practice has been to use the dumping margins Commerce publishes for each "class or kind" of subject merchandise.

[49] In the original determination, the Commission was not asked to define separate domestic like products based on distinctions in basis weight and did not do so. Final Determination, USITC Pub. 4043 at 5-6. To the contrary, it found that, despite several non-price differences, "48 gram and 55 gram jumbo rolls [are] at least moderate substitutes." Id. at 35 n. 212.

[50] CAFC Slip Op. at 7.

[51] The pricing data that the Commission collects pertain only to prices charged in the United States, and include competitive data series – generally for three or more years – for prices charged for both domestically produced and imported products. The Commission's pricing database does not duplicate or even resemble the type of pricing data that Commerce collects and analyzes in its dumping investigation. Instead, it concerns a broader range of transactions and is more directly relevant to the Commission's analysis.

In all instances, we follow the statutory directive that we make our injury determinations with respect to "an industry in the United States," 19 U.S.C. § 1673d(b)(1)(A), which is further defined as "producers as a [w]hole of a

(continued...)

not the equivalent of defining multiple domestic like products. It is one of several techniques that we may use in analyzing whether a class or kind of subject merchandise is causing or threatening to cause material injury to a single domestic industry.

The statute further makes clear that the "subject merchandise" is the focus of the Commission's examination of threat of material injury. Indeed, the statute uses the term "subject merchandise" in no fewer than seven instances in the context of threat analysis. In particular, the opening paragraph of the statutory provision on threat directs the Commission to consider specified factors "[i]n determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise. . . ."[52] Similarly, the provision on likely price effects directs the Commission to examine whether "imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports."[53] Significantly, that section requires that the Commission ascertain whether likely price effects be attributable to the "subject merchandise" – not to dumping or to the effects of dumping. The threat provision of the statute contains five additional references to "subject merchandise."[54]

It is true, as Koehler emphasized in the prior litigation before the CIT, that the statute also contains a passage stating that "[t]he Commission shall consider the factors set forth in clause (i) as a whole in making a determination on whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted under this subtitle."[55] As demonstrated, the repeated focus of the threat provision is on the analysis of likely effects of the "subject merchandise." In particular, clause (i) of the threat provision, to which the passage of "dumped and subsidized imports" refers, concerns solely the subject merchandise as opposed to any narrower category of imports. In light of this, we also interpret the term "dumped or subsidized imports" in 19 U.S.C. § 1677(7)(F)(ii) simply to mean "subject merchandise" rather than to refer to a different, narrower category of imports. This interpretation is fully supported by the pertinent legislative history.[56]

---

[51](...continued)
domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A). We do not make injury determinations on a market segment or pricing product basis.

[52] 19 U.S.C. § 1677(7)(F)(i).

[53] 19 U.S.C. § 1677(7)(F)(i)(IV).

[54] 19 U.S.C. §§ 1677(7)(F)(i)(II) (Commission should consider unused or increased production capacity "indicating the likelihood of substantially increased imports of the subject merchandise. . . ."); 1677(7)(F)(i)(III) (Commission should consider "a significant rate of increase of the volume or market penetration of the imports of the subject merchandise. . ."); 1677(7)(F)(i)(V) (Commission should consider "inventories of the subject merchandise"); 1677(7)(F)(i)(VI) (Commission should consider potential for product shifting with respect to "the subject merchandise"); 19 U.S.C. 1677(7)(F)(i)(IX) (Commission should consider "any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports . . . of the subject merchandise").

[55] 19 U.S.C. § 1677(7)(F)(II).

[56] The Uruguay Round Agreements Act (URAA) amended 19 U.S.C. § 1677(7)(F)(ii) to reflect its current form. The Statement of Administrative Action (SAA) to the URAA states that the revision of 19 U.S.C. § 1677(7)(F)(ii) – which added to the statute the "further dumped or subsidized imports" language "is fully consistent with the Commission's practice in making threat determinations." SAA, H.R. Rep. 103-316 at 854 (1994). Because, as previously stated, that practice was to consider all "subject merchandise" as defined in 19 U.S.C. § 1677(25) in its threat analysis, requiring the Commission to analyze a narrower category of imports than "subject merchandise" in its threat analysis would have entailed a major change in Commission practice, a prospect clearly not envisioned in
(continued...)

The Commission's interpretation of the statute to require a showing of threat of material injury by reason of the subject merchandise defined by Commerce, and not by reason of dumping, is also consistent with longstanding jurisprudence of the CIT.[57] In the CIT's Algoma Steel Corp. v. United States opinion,[58] the court expressly rejected the notion that the Commission must find that injury, to be remediable, is attributable to particular sales found at less than fair value:

> The statute refers instead to imports which are sold at LTFV. ITC is basing its decision on the effects of relevant imports from companies determined to have sold the subject merchandise at LTFV. Obviously, it is unlikely that every sale is at LTFV, and Congress may be presumed to have perceived this.
>
> Whatever the ideal embodied in GATT, Congress has not simply directed ITC to determine if dumping itself is causing injury. [Citations omitted]. Perhaps Congress believed that such a standard was not sufficiently specific or that it involved a type of analysis that is unworkable. In any case, Congress opted to direct ITC to determine if imports of a specific class of merchandise, determined by ITA to have been sold at LTFV, are causing injury.[59]

Other CIT cases have taken the same approach.[60] Moreover, those cases emphasize that the unambiguous statutory language does not require the Commission to find material injury by reason of dumping.[61]

---

[56](...continued)
the SAA.

[57] We recognize that the Federal Circuit's non-precedential opinion appears to take the position that Algoma dealt primarily with the issue of when the Commission may decline to examine Commerce worksheets. Nevertheless, we continue to maintain that our statutory interpretation is fully consistent with the Court's statement in that case, referring to 19 U.S.C. § 1673, that "[t]he statute seems to us to speak in plain language and to be unambiguous." 865 F.2d at 242.

[58] 688 F. Supp. 639 (Ct. Int'l Trade 1988), aff'd, 865 F.2d 240 (Fed. Cir. 1989).

[59] Algoma, 688 F. Supp. at 645.

[60] Goss Graphic System, Inc. v. United States, 33 F. Supp.2d 1082, 1093 (Ct. Int'l Trade 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000) (Commission properly relied in its injury analysis on transaction unexamined by Commerce in dumping investigation, inasmuch as transaction was within class or kind of merchandise found to be sold at LTFV); United Eng'g & Forging v. United States, 779 F. Supp. 1375, 1391 (Ct. Int'l Trade 1991), aff'd, 996 F.2d 1236 (Fed. Cir. 1993) (same); Encon Indus. v. United States, 16 CIT 840, 843 (Ct. Int'l Trade 1992) (statute does not require analysis of transaction-specific dumping margins).

[61] That the statute either precludes or at a minimum does not contemplate that the Commission find material injury by reason of dumping, as opposed to by reason of subject imports (a class or kind of merchandise Commerce has found to be sold at LTFV), is relevant to the Federal Circuit's concern that the Commission reach an "equitable determination" in this investigation. CAFC Slip Op. at 9. Congress, by specifying statutory criteria that the Commission is to consider in making determinations in antidumping and countervailing duty determinations, has indicated the legal parameters of an "equitable determination." The Commission is an agency established by Congress whose authority is limited by statute, except in areas where Congress has delegated authority to the agency. Koehler has not argued, and we cannot identify, any statutory authority delegating to the Commission the authority to base injury determinations on considerations other than those specified in 19 U.S.C. § 1677(7).

Furthermore, what Koehler now claims is an unfair or inequitable result of this proceeding is solely the function of strategic decisions made by its experienced trade counsel and the structure of a statute this agency and Commerce are obliged to apply as written. Koehler made a strategic decision not to argue before Commerce that LWTP constituted more than one "class or kind" of subject merchandise. In so doing, it assumed a risk that

(continued...)

Consequently, even treating the Commerce worksheets as constituting an agency legal determination that the 48 gram LWTP transactions in question were priced at normal value does not warrant any change in the causation analysis in the original determination. As a matter of law, the Commission's causation analysis does not concern whether dumping has caused material injury or threat of material injury. Instead, it concerns whether imports on which Commerce has made an affirmative determination are causing material injury or threat of material injury to a domestic industry. 48 gram LWTP is unquestionably within the class or kind of subject merchandise that Commerce found to be sold at LTFV, whether or not sales transactions concerning 48 gram LWTP were dumped.

B. Factual Implications of Material from Commerce Record

1. Significance of Materials from Commerce Record

We next consider whether the material in the Commerce record provides a factual basis for reconsideration of the original determination, even if the Commission is legally barred from excluding volumes of subject merchandise within the class or kind of subject merchandise for which Commerce made an affirmative determination. As previously discussed, the threat statute requires the Commission to consider all "relevant economic factors."[62] The Federal Circuit's decision suggests that a lack of overlap between transactions Commerce has found to be dumped and transactions that the Commission has found are likely to cause material injury may be a pertinent factor for the Commission to consider in its analysis of threat of material injury by reason of subject imports.

In its opinion the Federal Circuit indicated that, pursuant to its decision in Algoma, the Commission should conduct a "[t]houghtful consideration" of the data in the Commerce record.[63] Algoma itself posits that Commerce worksheets might warrant scrutiny "if the raw data were supported by reasons specific to the particular case why sales at [more than fair value] were not relevant to the injury determination,"[64] although it did not suggest what such circumstances would be. In carefully examining the worksheets, we find they would be of limited utility in an analysis of threat of material injury by reason of subject imports. As explained below, this is because the data in the worksheets do not represent agency findings and are not probative with respect to the focus of our threat analysis, which concerns likely activities in the imminent future.[65]

---

[61](...continued)
Commerce would not exclude any merchandise from the scope definition and render it nonsubject, even if sales of a particular subgroup of merchandise were not dumped. In return, Koehler obtained a benefit: any non-dumped transactions from any subclass of the subject merchandise, or individual transactions, would reduce the overall weighted average dumping margin on the subject merchandise. (This is a result of relatively recent changes in practice where Commerce uses non-dumped sales as an offset against dumped transactions, instead of treating non-dumped transactions as having a zero margin.) In this proceeding, Koehler seeks simultaneously to retain the benefit and to escape the consequences of its strategic choices.

[62] 19 U.S.C. § 1677(7)(F)(i).

[63] CAFC Slip Op. at 9.

[64] 865 F.2d at 242.

[65] The Commission, on the other hand, collects substantial and comprehensive trade, pricing, and financial data directly relevant to the focus of its material injury and threat of material injury analysis and determinations.

We begin by considering the significance of the materials in the Commerce record.[66] The most the printouts Koehler submitted demonstrate is that the sales of 48 gram LWTP that Commerce examined were, in the terminology found in the Commerce Issues Memo, "non-dumped sales."[67] In our view, the format and content of the printouts indicate that they were designed to function as the raw data Commerce would use to make agency findings and were not intended to constitute findings themselves. In light of this and the absence of any narrative explanation from the agency concerning 48 gram LWTP in either its public documents or the proprietary documents it released to the parties under Administrative Protective Order, we cannot conclude that information on a single line of a computer printout stretching for 84 pages, which is part of over 200 pages of computer printouts, is tantamount to an agency finding.

Importantly, nothing in the Commerce record supports a finding that Commerce did not treat 48 gram LWTP as subject merchandise. Such a finding would contradict the express provisions of Commerce's scope definition, which encompasses, in pertinent part, "thermal paper with a basis weight of 70 grams per square meter (g/m_2) (with a tolerance of ± 4.0 g/m_2) or less."[68] Moreover, it is clear from Commerce worksheets that Koehler did not submit in the original investigation, but are in the record of this remand proceeding, that Commerce used the volume of all examined transactions, including non-dumped transactions of 48 gram LWTP, to compute Koehler's final dumping margin. Had Commerce not treated 48 gram LWTP as subject merchandise, Koehler's final dumping margin would have been appreciably higher than 6.50 percent.[69]

Additionally, there is no basis to find that Commerce made a legal conclusion under 19 U.S.C. § 1677b that 48 gram LWTP was sold at normal value. This provision of the statute articulates steps Commerce must take "[i]n determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value."[70] There is nothing in the Commerce record, however, indicating that Commerce made any finding, much less the elaborate set of findings required by the statute, that 48 gram LWTP was sold at normal value. As we have indicated, the narrative materials in the Commerce record are devoid of discussion concerning 48 gram LWTP. Moreover, there is nothing in the record suggesting that Commerce even conducted the requisite examination required to make a normal value determination with respect to a subset of the LWTP scope consisting of 48 gram LWTP. For example, there is no indication that Commerce found that the aggregate quantity of 48 gram LWTP from Germany was sufficient to

---

[66] Koehler suggests that the Federal Circuit has already determined that Commerce calculated a zero dumping margin for 48 gram paper and that we should not perform any further scrutiny of the record. Although we agree that it is not our function to attempt to calculate or recalculate dumping margins, see CAFC Slip Op. at 8, we appropriately exercise our fact-finding function in evaluating what the worksheets do and do not demonstrate. We do not perceive that the Federal Circuit intended to limit our fact-finding authority in this remand proceeding for three reasons. First, the Commission never made any findings concerning these materials in its original investigation, so the Federal Circuit could not have reviewed them, much less made its own findings. Second, the Federal Circuit has specifically stated that its characterization of factual issues that the Commission did not or could not consider in its original investigation cannot constrain the Commission, as a finder of fact, from performing such a function on a subsequent remand because "[a]ppellate courts do not make factual findings." Mittal Steel Point Lisas Ltd. v. United States, 542 F.3d 867, 875 (Fed. Cir. 2008). Third, because of the materials the Commission obtained in the remand proceedings, the material from the Commerce dumping investigation in this remand proceeding is more extensive than that available in the original investigation.

[67] "Non-dumped sales" is a term Commerce used repeatedly in its Issues Memorandum to describe generally any transaction with a negative dumping margin. See Issues Memorandum, EDIS Doc. 454288 at 12-13 (defending agency's decision to use non-dumped sales to offset dumped sales in calculating weighted average dumping margin).

[68] 73 Fed. Reg. at 57327.

[69] Commerce materials, EDIS Doc. 454291, page 82 and 88 of 89.

[70] 19 U.S.C. § 1677b(a).

permit the German price be used as the price establishing "normal value."[71] Thus, we cannot agree with Koehler that the worksheets demonstrate that Commerce found that 48 gram LWTP was sold at normal value.[72]

Koehler's argument, in essence, is that Commerce made a legal conclusion for which the only documentation is a single line of a computer printout. We do not find that this line should be elevated to the status of an agency determination.[73] Although we acknowledge that the information in the Commerce record indicates that the sales transactions of 48 gram LWTP examined were "non-dumped" transactions, we do not perceive this to be an agency conclusion that 48 gram LWTP was sold at normal value for purposes of 19 U.S.C. § 1677b(a). Instead, the worksheets Koehler has submitted show not agency conclusions, but rather agency calculations. The worksheets merely indicate intermediate calculations that Commerce performed prior to making its ultimate legal conclusion that the weighted average dumping margin for all subject merchandise imported by Koehler – including 48 gram LWTP – was 6.50 percent.

As discussed in section III.A., Commerce's definition of subject merchandise is binding on the Commission, because the statute directs the Commission to ascertain "whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise."[74] By contrast, Commerce's calculations concerning non-dumped transactions during its period of investigation for 48 gram LWTP, which are not tantamount to a legal conclusion, do not compel us to conclude that 48 gram LWTP will likely not be dumped in the imminent future. This by itself refutes the notion that there is a disconnect between dumped and injurious transactions, simply because there has been no agency determination that 48 gram LWTP is currently sold at less than normal value.

2. Implications for Commission Threat Analysis

In the circumstances of this investigation, viewing Commerce's calculations for 48 gram LWTP as conclusive of likely conduct during the imminent future is particularly inappropriate. We observe initially that the Commerce and Commission investigations focused on different periods. Commerce's investigation concerned the period July 1, 2006 through June 30, 2007.[75] By contrast, the Commission's analysis of threat of material injury focused on the imminent future after October 2008, when the record closed and the Commission made its determination. The Commission record indicates undisputed changes in conditions of competition between the time covered by Commerce's dumping investigation and the time period we have considered in analyzing threat of material injury.

---

[71] See 19 U.S.C. 1677b(a)(1)(B), (a)(1)(C)(ii). When home market sales are insufficient to be used as a basis for comparison, Commerce must instead use pricing data from a third-country market to make its normal value calculation. See 19 U.S.C. § 1677b(a)(1)(B)(ii). As Appleton observes, there is nothing in the Commerce record indicating that Commerce ***. *See* Appleton Remand Comments at 13-14.

[72] Koehler does not contend that the Commerce record supports such an inference. Instead, its argument is premised on the erroneous notion that the Federal Circuit has already decided the issue.

[73] In this respect, we emphasize that the statute requires that Commerce and the Commission notify all parties to the investigation – as well as the other agency – of the determination "and of the facts and conclusions of law upon which the determination is based, and it shall publish notice of its determination in the Federal Register." 19 U.S.C. § 1673d(d). This provision indicates to us that the Commission should neither need to speculate on the nature of Commerce's findings, nor perform its own analysis or interpretation to ascertain what that agency found. Instead, we continue to believe that a reasonable interpretation of the statutory scheme is one where the Commission relies exclusively on Commerce's published determination to ascertain that agency's findings.

[74] 19 U.S.C. § 1677(7)(F)(i).

[75] 73 Fed. Reg. at 37328.

As the Commission found, the quantity of 55 gram shipments from Germany exceeded the quantity of shipments of 48 gram products during both 2006 and 2007, the periods within Commerce's period of investigation.[76] Additionally, during this period, production of the domestic like product was overwhelmingly concentrated in 55 gram LWTP.[77] With respect to the transactions of 55 gram products it investigated, where competition was most concentrated during the periods both Commerce and the Commission investigated, Commerce calculated much higher rates of dumping than the 6.50 percent weighted average dumping margin it published in its final determination.[78] However, Koehler, the predominant exporter of LWTP from Germany, discontinued shipments of its principal 55 gram product in March 2008, and it was not disputed that imports entering in the imminent future would be heavily concentrated in the 48 gram product.[79] The Commission made further findings in the original investigation – which were not challenged in the Federal Circuit litigation – that in the imminent future competition between the subject imports and the domestic industry would focus on the 48 gram product for the first time.[80] This shift in competition would occur because: (1) future subject imports would focus on the 48 gram product; (2) market participants anticipated growing demand for that product; and (3) the opening of a new Appleton coating facility in August 2008 (which was after the period for which the Commission collected data but before the Commission record closed) would enhance that firm's ability to produce 48 gram LWTP.[81]

If anything, the Commerce worksheets suggest that, during that agency's period of investigation, Koehler was inclined to sell types of LWTP that competed directly with the domestic like product in dumped transactions, while non-dumped transactions tended to focus on a product type that was not at the time produced domestically in significant quantities. Because the focus of competition between LWTP from Germany and the domestic like product was not static, but in fact changed after Commerce's period of investigation, there is no basis to conclude that Koehler's choice of what product to sell in dumped transactions in the United States would be static.[82] There is consequently no basis for us to infer that because there were no dumped transactions when there was limited competition between domestically produced and German 48 gram LWTP, that there would also be no dumped transactions in the imminent future. This is particularly true when the imminent future would be characterized by more intense competition between domestically produced and German 48 gram LWTP that would more closely resemble the competition between domestically produced and German 55 gram LWTP sold in dumped transactions during the Commerce period of investigation.

---

[76] Final Determination, USITC Pub. 4043 at 17. In fact, 55 gram LWTP imports from Germany exceeded 48 gram LWTP imports by a factor of *** in 2006 and by a factor of *** in 2007. INV-FF-130, Table IV-3 (Oct. 20, 2008). Similarly, in the Commerce investigation, the value of the investigated sales of 48 gram LWTP only constituted approximately *** percent of the value of the total Koehler U.S. sales examined. Commerce materials, EDIS Doc. 454291, pages 83 and 88 of 89.

[77] Final Determination, USITC Pub. 4043 at 16, 30. U.S. shipments of domestically produced jumbo rolls of 55 gram LWTP exceeded 48 gram LWTP shipments by a factor of *** in 2006 and by a factor of *** in 2007. INV-FF-130, Table III-9.

[78] Commerce materials, EDIS Doc. 454291, page 84 of 89.

[79] Final Determination, USITC Pub. 4043 at 37.

[80] Final Determination, USITC Pub. 4043 at 37-38.

[81] See Final Determination, USITC Pub. 4043 at 15, 38.

[82] Additionally, the limited information available in the Commission record indicates that Koehler's product focus in European markets, including Germany, also was not static during the Commission's period of investigation. Koehler's shipments of 48 gram LWTP, as a percentage of its total LWTP shipments to European markets, including Germany, increased from *** percent in 2007 to approximately *** percent in the first half of 2008. See Koehler Posthearing Brief, Response to Commission Questions at 11; Koehler Foreign Producers' Questionnaire Response, EDIS Doc. 407654, response to question II-11b.

Indeed, Commerce, in its original determinations, is not directed to and does not purport to examine "threat of dumping." Information in its record about whether particular sets of transactions do or do not constitute dumped sales does not function as a proxy for conduct in the imminent future. This is because the United States uses a retrospective, rather than prospective, method for assessing antidumping duties. The weighted average dumping margin that Commerce publishes in its final determination establishes a duty deposit rate for future entries should the Commission make an affirmative injury determination.[83] That duty deposit rate is subject to periodic administrative reviews that Commerce is authorized to conduct to ascertain whether LTFV sales have continued after issuance of an antidumping duty order. When it conducts such a review, Commerce will calculate new retrospective dumping margins, modify the duty deposit rate, and, to the extent appropriate, assess under-payments or refund over-payments of estimated duties.[84] Consequently, the fact that Commerce calculated in its original investigation that certain product models within a class or kind of subject merchandise were, in the aggregate, sold in non-dumped transactions does not compel Commerce to conclude that future transactions concerning these product models would not be dumped. Instead, Commerce may examine these subgroups of the subject merchandise anew in a subsequent administrative review that will ascertain the effects of any changes in conditions of competition since the original investigation.[85] Because Commerce's calculations during its period of review do not compel that agency to conclude that subgroups of the subject merchandise sold in non-dumped transactions will likely not be dumped in the future, we do not believe there is any basis for compelling the Commission to conclude that such merchandise will likely not be dumped in the future.

Consequently, even assuming arguendo that a disconnect between dumped and injurious transactions would be a "relevant economic factor" for us to consider in a threat analysis, this factor does not require us to revise our conclusions in this investigation. The materials from the record of the Commerce dumping investigation, when viewed in the factual circumstances of a Commission record showing major changes in conditions of competition in the imminent future, simply fail to demonstrate that the likely future imports that we have found to threaten material injury to the domestic industry will likely be sold at normal value. Additionally, the fact that there were non-dumped sales of 48 gram LWTP from Germany during a period examined by Commerce when there was very limited competition between this product and domestically produced 48 gram LWTP cannot outweigh the other factors on which we relied in making an affirmative determination. These include findings concerning the likely increases in volume and the likely price effects of subject merchandise on which Commerce made an affirmative dumping determination, and the impact these imports would have on the vulnerable domestic industry in the imminent future.

CONCLUSION

For the foregoing reasons, after consideration of the Commerce worksheets that Koehler submitted and the other materials in the Commerce record, we conclude that there is no need to further modify our analysis of threat of material injury by reason of subject imports. We consequently conclude, for the reasons stated in our original determination as elaborated herein, that the domestic industry producing LWTP is threatened with material injury by reason of subject imports from Germany.

---

[83] See 19 U.S.C. § 1673e. See also 19 C.F.R. § 351.212(a).

[84] See 19 U.S.C. § 1675(a). See also 19 C.F.R. § 351.13.

[85] Appleton has urged us to take into account the results of Commerce's first administrative review, in which Commerce found that 48 gram LWTP from Germany was sold at LTFV. See Appleton Remand Comments at 14 (quoting dissent to Federal Circuit denial of motion for rehearing en banc). While Appleton is correct that these results indicate that Commerce found 48 gram LWTP to be sold at LTFV, in reopening the record in this proceeding we have considered only materials (other than court decisions) in existence at the time the record closed in our original investigation. We consequently have not considered the materials pertaining to Commerce's first administrative review that appear in exhibit 4 of the Appleton Remand Comments.