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Sunset Review
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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh *(mm)*
Deputy Assistant Secretary
for Enforcement and Compliance

SUBJECT: Preliminary Results Issues and Decision Memorandum for the Full
Sunset Review of the Antidumping Duty (AD) Order on
Lightweight Thermal Paper from Germany

Summary

We have analyzed the substantive responses and rebuttal comments of interested parties in the full sunset review of the AD order on lightweight thermal paper (LWTP) from Germany and recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the relevant issues upon which we received substantive responses and rebuttal comments from interested parties:

1. Likelihood of the Continuation of Dumping
2. Magnitude of the Margin Likely to Prevail
3. "Good Cause" to Examine "Other Factors"

Scope of the Order

The scope of the order includes certain lightweight thermal paper, which is thermal paper with a basis weight of 70 grams per square meter (g/m^2) (with a tolerance of $\pm 4.0 \text{ g/m}^2$) or less; irrespective of dimensions;¹ with or without a base coat² on one or both sides; with thermal active coating(s)³ on one or both sides that is a mixture of the dye and the developer that react

¹ LWTP is typically produced in jumbo rolls that are slit to the specifications of the converting equipment and then converted into finished slit rolls. Both jumbo and converted rolls (as well as LWTP in any other form, presentation, or dimension) are covered by the scope of the order.

² A base coat, when applied, is typically made of clay and/or latex and like materials and is intended to cover the rough surface of the paper substrate and to provide insulating value.

³ A thermal active coating is typically made of sensitizer, dye, and co-reactant.



and form an image when heat is applied; with or without a top coat;⁴ and without an adhesive backing. Certain LWTP is typically (but not exclusively) used in point-of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts. The merchandise subject to this order may be classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 3703.10.60, 4811.59.20, 4811.90.8000, 4811.90.8030, 4811.90.8040, 4811.90.8050, 4811.90.9000, 4811.90.9030, 4811.90.9035, 4811.90.9050, 4811.90.9080, 4811.90.9090, 4820.10.20, and 4823.40.00.⁵ Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

History of the Order

The Department published the final determination of the less-than-fair-value (LTFV) investigation of LWTP from Germany on October 2, 2008.⁶ On November 24, 2008, the Department published in the Federal Register the antidumping duty order on LWTP from Germany.⁷ In the AD Order, the Department listed the following margins, as also published in the LTFV Final:

<u>Exporter/producer</u>	<u>Weighted-average margin (percent)</u>
Papierfabrik August Koehler AG and Koehler America, Inc. ⁸	6.50
All Others	6.50

Since the issuance of the AD Order, the Department completed three administrative reviews involving one respondent, Papierfabrik August Koehler AG (Koehler).⁹ The results of these reviews are as follows:

⁴ A top coat, when applied, is typically made of polyvinyl acetone, polyvinyl alcohol, and/or like materials and is intended to provide environmental protection, an improved surface for press printing, and/or wear protection for the thermal print head.

⁵ HTSUS subheading 4811.90.8000 was a classification used for LWTP until January 1, 2007. Effective that date, subheading 4811.90.8000 was replaced with 4811.90.8020 (for gift wrap, a non-subject product) and 4811.90.8040 (for “other” including LWTP). HTSUS subheading 4811.90.9000 was a classification for LWTP until July 1, 2005. Effective that date, subheading 4811.90.9000 was replaced with 4811.90.9010 (for tissue paper, a non-subject product) and 4811.90.9090 (for “other,” including LWTP).

⁶ See Lightweight Thermal Paper from Germany: Notice of Final Determination of Sales at Less Than Fair Value, 73 FR 57326 (October 2, 2008) (LTFV Final).

⁷ See Antidumping Duty Orders: Lightweight Thermal Paper From Germany and the People’s Republic of China, 73 FR 70959 (November 24, 2008) (AD Order).

⁸ Koehler America, Inc. is a U.S. sales affiliate of Papierfabrik August Koehler AG and not an exporter or producer of the subject merchandise. However, this entity was identified in the AD Order.

⁹ In November 2012, the respondent changed its name to Papierfabrik August Koehler SE. On December 26, 2013, the Department preliminarily determined that Papierfabrik August Koehler SE is the successor-in-interest to Papierfabrik August Koehler AG. See Lightweight Thermal Paper from Germany: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 78335 (December 26, 2013) (AR4 Prelim), and accompanying Decision Memorandum. For purposes of this memorandum, we refer to this respondent entity as “Koehler.”

<u>Period of Review (POR)</u>	<u>Margin</u>
November 1, 2008 – October 31, 2009 (AR1):	3.77 ¹⁰
November 1, 2009 – October 31, 2010 (AR2):	4.33 ¹¹
November 1, 2010 – October 31, 2011 (AR3):	75.36 ¹²

The Department is currently conducting a fourth administrative review and published the preliminary results on December 26, 2013.¹³

The Department also initiated administrative reviews in each of the above-referenced review periods for the other known producers of the subject merchandise, Mitsubishi HiTec Paper Flensburg GmbH and Mitsubishi HiTec Paper Bielefeld GmbH (collectively, “Mitsubishi”),¹⁴ but each of these reviews was subsequently rescinded.¹⁵

There have been no findings of duty absorption by the Department, and no changed circumstances or scope determinations over the history of this order. However, the Department issued one scope ruling with respect to the order on LWTP from the People’s Republic of China (PRC), in which the Department stated that LWTP converted into smaller LWTP rolls in the PRC, from jumbo LWTP rolls produced in certain third countries, is not within the scope of the AD Order and companion countervailing duty order on LWTP from the PRC.¹⁶

Background

On October 1, 2013, the Department published the notice of initiation of the sunset review of the AD Order pursuant to section 751(c)(2) of the Tariff Act of 1930, as amended (the Act).¹⁷ On October 28, 2013, the Department received a notice of intent to participate from Appvion, Inc. (Appvion)¹⁸ within the 15-day deadline specified in 19 CFR 351.218(d)(1)(i).¹⁹ Appvion

¹⁰ See Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Administrative Review, 76 FR 22078, 22079 (April 20, 2011) (AR1 Final).

¹¹ See Lightweight Thermal Paper From Germany: Notice of Amended Final Results of the 2009-2010 Antidumping Duty Administrative Review, 77 FR 28851, 28852 (May 16, 2012) (AR2 Amended Final).

¹² See Lightweight Thermal Paper From Germany: Final Results of Antidumping Duty Administrative Review: 2010-2011, 78 FR 23220, 23221 (April 18, 2013) (AR3 Final).

¹³ See AR4 Prelim, 78 FR 78335.

¹⁴ Mitsubishi HiTec Paper Europe GmbH has filed a Notice of Appearance and Administrative Protection Order in this sunset review.

¹⁵ See Lightweight Thermal Paper from Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review, 75 FR 11135 (March 10, 2010); Lightweight Thermal Paper from Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review, 76 FR 20951 (April 14, 2011); and Lightweight Thermal Paper From Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review, 77 FR 22560 (April 16, 2012).

¹⁶ See Notice of Scope Rulings, 77 FR 50084 (August 20, 2012).

¹⁷ See Initiation of Five-Year (“Sunset”) Review, 78 FR 60253 (October 1, 2013).

¹⁸ Appvion was formerly known as Appleton Papers Inc., which was the petitioner in the underlying LTFV investigation of LWTP from Germany.

¹⁹ As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1 through October 16, 2013. See Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, “Deadlines Affected by the Shutdown of the Federal Government” (October 18, 2013). Therefore, all deadlines in this sunset review have been extended by 16 days.

claimed interested party status under section 771(9)(C) of the Act as a manufacturer of the domestic like product in the United States.

On November 18, 2013, we received complete substantive responses from Appvion²⁰ and Koehler²¹ within the 30-day deadline applicable under 19 CFR 351.218(d)(3)(i). Appvion and Koehler submitted rebuttals to the substantive responses on November 25, 2013, in accordance with 19 CFR 351.218(d)(4).²²

The Department issued its adequacy determination memorandum on December 4, 2013, finding that Appvion and Koehler submitted adequate substantive responses pursuant to 19 CFR 351.218(e)(1)(i) and (ii). The Department, therefore, is conducting a full sunset review of the AD Order.²³ The Department did not receive comments on the Adequacy Determination Memorandum from any party to this review.

Discussion of the Issues

Legal Framework

In accordance with section 751(c)(1) of the Act, the Department is conducting this sunset review to determine whether revocation of the AD Order would be likely to lead to continuation or recurrence of dumping. Sections 752(c)(1)(A) and (B) of the Act provide that, in making this determination, the Department shall consider both the weighted-average dumping margins determined in the investigation and subsequent reviews, and the volume of imports of the subject merchandise for the periods before, and the periods after, the issuance of the AD Order.

In accordance with the guidance provided in the legislative history accompanying the Uruguay Round Agreements Act, specifically the Statement of Administrative Action, H.R. Doc. 103-316, vol. 1 (1994) (SAA), the House Report, H. Rep. No. 103-826, pt. 1 (1994) (House Report), and the Senate Report, S. Rep. No. 103-412 (1994) (Senate Report), the Department's determinations of likelihood will be made on an order-wide, rather than company-specific, basis.²⁴ In addition, the Department normally determines that revocation of an antidumping duty order is likely to lead to continuation or recurrence of dumping when, among other scenarios: (a) dumping continued at any level above de minimis after the issuance of the order; (b) imports of the subject merchandise ceased after issuance of the order; or (c) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.²⁵

²⁰ See Appvion's November 18, 2013, substantive response (Appvion Response).

²¹ See Koehler's November 18, 2013, substantive response (Koehler Response).

²² See Appvion's November 25, 2013, rebuttal (Appvion Rebuttal), and Koehler's November 25, 2013, rebuttal (Koehler Rebuttal).

²³ See Memorandum to James Maeder, Director, Office II, ADCVD Operations, entitled "Adequacy Determination in Five-Year "Sunset" Review of the Antidumping Duty Order on Lightweight Thermal Paper from Germany (2008 – 2012)," dated December 4, 2013 (Adequacy Determination Memo).

²⁴ See SAA at 879 and House Report at 56.

²⁵ See SAA at 889-90, House Report at 63-64, and Senate Report at 52. See also Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin 98.3, 63 FR 18871, 18872 (April 16, 1998) ("Sunset Policy Bulletin").

Alternatively, the Department normally will determine that revocation of an AD order is not likely to lead to continuation or recurrence of dumping where dumping margins declined or were eliminated and import volumes remained steady or increased after issuance of the order.²⁶ In addition, as a base period of import volume comparison, it is the Department's practice to use the one-year period immediately preceding the initiation of the investigation, rather than the level of pre-order import volumes, as the initiation of an investigation may dampen import volumes and, thus, skew comparison.²⁷

Further, section 752(c)(3) of the Act states that the Department shall provide to the International Trade Commission (ITC) the magnitude of the margin of dumping likely to prevail if the order were revoked. Generally, the Department selects the AD margins from the final determination in the original investigation, as these rates are the only calculated rates that reflect the behavior of exporters without the discipline of an order in place.²⁸

In February 2012, the Department announced it was modifying its practice in sunset reviews such that it will not rely on weighted-average dumping margins that were calculated using the methodology found to be World Trade Organization (WTO)-inconsistent, i.e., zeroing/the denial of offsets.²⁹ In the Final Modification for Reviews, the Department stated that “only in the most extraordinary circumstances” would it rely on margins other than those calculated and published in prior determinations.³⁰ The Department further stated that apart from the “most extraordinary circumstances,” it would “limit its reliance to margins determined or applied during the five-year sunset period that were not determined in a manner found to be WTO-inconsistent” and that it “may also rely on past dumping margins that were not affected by the WTO-inconsistent methodology, such as dumping margins recalculated pursuant to Section 129 proceedings, dumping margins determined based on the use of total adverse facts available, and dumping margins where no offsets were denied because all comparison results were positive.”³¹

Pursuant to section 752(c)(4)(A) of the Act, a dumping margin of zero or de minimis shall not by itself require the Department to determine that revocation of an AD order would not be likely to lead to a continuation or recurrence of sales at LTFV.³²

Finally, section 752(c)(2) of the Act provides that after considering the weighted-average dumping margins determined in the investigation and subsequent reviews, and the volume of imports of the subject merchandise for the periods before and after the issuance the AD order,

²⁶ See SAA at 889-90, House Report at 63, and Senate Report at 52.

²⁷ See, e.g., Stainless Steel Bar from Germany: Final Results of the Sunset Review of the Antidumping Duty Order, 72 FR 56985 (October 5, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

²⁸ See SAA at 890; see also Persulfates from the People's Republic of China: Notice of Final Results of Expedited Second Sunset Review of Antidumping Duty Order, 73 FR 11868 (March 5, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

²⁹ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Final Modification, 77 FR 8101, 8103 (February 14, 2012) (Final Modification for Reviews).

³⁰ Id.

³¹ Id.

³² See Folding Gift Boxes from the People's Republic of China: Final Results of the Expedited Sunset Review of the Antidumping Duty Order, 72 FR 16765 (April 5, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

the Department “shall also consider such other price, cost, market or economic factors as it deems relevant” “if good cause is shown.” The SAA provides a list of factors and states that the Department would analyze information “on a case-by-case basis.”³³ Our analysis of the comments submitted by Appvion and Koehler follows.

1. Likelihood of Continuation of Dumping

Appvion

Appvion asserts that, based on the policy articulated in the Sunset Policy Bulletin, revocation of the order would be likely to lead to continuation or recurrence of dumping because: (1) exporters continued to dump at rates above de minimis after the issuance of the AD Order, and (2) imports of LWTP from Germany have declined significantly after the issuance of the 75.36 percent rate in the AR3 Final when, according to Appvion, Koehler came under the discipline of the AD Order.³⁴

Appvion estimates that pre-AD Order imports from Germany totaled at least 75,500 metric tons, based on the information on the public record provided by the LTFV respondents.³⁵ While Appvion acknowledges that the volume of Koehler’s imports of subject merchandise did not decline immediately following the issuance of the AD Order, Appvion contends that Koehler was able to maintain its import volume only through engaging in fraudulent schemes which prevented the Department from calculating an accurate dumping margin for Koehler’s U.S. sales of subject merchandise. Thus, according to Appvion, Koehler was able to import subject merchandise into the United States without the pricing discipline that is typically associated with issuance of an AD order.³⁶ Appvion points out that after the Department found that Koehler had engaged in the fraudulent practice of concealing its home market sales through transshipments and assigned Koehler a margin of 75.36 percent as total adverse facts available (AFA) in the AR3 Final, Koehler’s imports declined substantially or ceased. Furthermore, Appvion states that, since the issuance of the AD Order, Mitsubishi continued to sell the subject merchandise in the United States at LTFV under the “all others” rate of 6.50 percent established in the LTFV Final.³⁷

Koehler

Koehler contends that it has imported LWTP in the United States in volumes equal to, or in excess of, its pre-AD Order import volumes, without dumping or dumping at low rates, since the issuance of the AD Order; and therefore, it has demonstrated that it would not engage in dumping if the AD Order were revoked.³⁸ Koehler states that its dumping margins calculated in the AR1 Final and the AR2 Amended Final were lower than the 6.50 percent margin calculated in LTFV Final. Further, Koehler notes that it has appealed the Department’s calculated margins to the Court of International Trade (CIT), and Koehler asserts that a successful appeal will show

³³ See SAA at 890.

³⁴ See Appvion Response at 4-8 (citing Sunset Policy Bulletin, 63 FR at 18872).

³⁵ Id. at 6.

³⁶ Id. at 6-7.

³⁷ Id. at 5.

that its margins should have been zero.³⁹ Koehler also claims that the AR3 Final AFA margin is unjustly punitive and unrepresentative of its actual dumping rate and, after a successful appeal at the CIT, Koehler should receive a low or de minimis rate.⁴⁰ In addition, Koehler notes that it expects its dumping margins resulting from the fourth and fifth administrative reviews to be zero.⁴¹

Appvion's Rebuttal

Appvion argues that, regardless of Koehler's speculation concerning the results of its appeals of the results of the past administrative reviews, Koehler, as well as Mitsubishi, continued to engage in dumping after the issuance of the AD Order, as Appvion explained in its substantive response.⁴² Even if Koehler were to have received a zero or de minimis margin, Appvion maintains that the Department has held that a de minimis margin obtained in an administrative review should not be considered conclusive in determining that revocation of an AD order would not lead to a continuance of dumping.⁴³ Appvion adds that, although Koehler claims it continued to import LWTP into the United States in volumes higher than before the issuance of the AD Order, Koehler did so while receiving dumping margins above de minimis.⁴⁴

Koehler's Rebuttal

Koehler reiterates its argument that it will be found not to have been dumping during the periods of AR1 and AR2 if it is successful in its CIT appeals, and that its AFA rate in AR3 will be reduced to between zero and five percent if its appeal is successful. Thus, Koehler contends it did not engage in dumping subsequent to the issuance of the AD Order.⁴⁵ Koehler also claims that its exit from the U.S. market after the Department assigned it the AFA margin of 75.36 percent in the AR3 Final is not indicative of its sales behavior in the absence of the AD Order because that margin is not tied to Koehler's commercial behavior. Koehler emphasizes that, prior to receiving this AFA rate, it imported LWTP at higher volumes than it did prior the issuance of the AD Order.⁴⁶

In addition, Koehler disputes Appvion's assertion that Mitsubishi continued to engage in dumping since the issuance of the AD Order because the Department never calculated a rate for Mitsubishi but rather merely assigned the all-others rate to Mitsubishi. As such, Koehler asserts that the all-others rate is not representative of whether Mitsubishi has engaged in dumping.⁴⁷

³⁸ See Koehler Response at 5-6.

³⁹ Id.

⁴⁰ Id. at 6.

⁴¹ Id.

⁴² See Appvion Rebuttal at 2.

⁴³ See Cold-Rolled Carbon Steel Flat Products From the Netherlands; Preliminary Results of Full Sunset Review of Antidumping Duty Order, 65 FR 16168 (March 27, 2000) (CRCS Prelim), and accompanying Issues and Decision Memo at Issue 1, unchanged in Cold-Rolled Carbon Steel Flat Products From the Netherlands; Final Results of Full Sunset Review of Antidumping Duty Order, 65 FR 47377 (August 2, 2000) (CRCS Final), cited in Appvion Rebuttal at 2-3.

⁴⁴ See Appvion Rebuttal at 4.

⁴⁵ See Koehler Rebuttal at 3-4.

⁴⁶ Id. at 5.

⁴⁷ Id. at 4-5.

Department's Position:

As explained in the Legal Framework section above, when determining whether revocation of the order would be likely to lead to continuation of dumping, sections 752(c)(1)(A) and (B) of the Act instruct the Department to consider: (1) the weighted-average dumping margins determined in the investigation and subsequent reviews; and (2) the volume of imports of the subject merchandise for the period before and after the issuance of the AD order. According to the SAA, existence of dumping margins after the order “is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to reenter the U.S. market, they would have to resume dumping.”⁴⁸ In addition, “declining import volumes accompanied by the continued existence of dumping margins after the issuance of the order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes.”⁴⁹

Alternatively, the legislative history provides that declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.⁵⁰

We consider whether revocation of the order is likely to lead to continuation or recurrence of dumping where “dumping continued at any level above de minimis after issuance of the order.”⁵¹ As noted above, the Department determined rates above de minimis for Koehler, the sole respondent in the LTFV investigation and all completed administrative reviews to date. In addition, the all-others rate of 6.50 percent continues to be applied to all other imports, including those from Mitsubishi. Thus, since the imposition of the AD Order in 2008, the Department found that dumping continued at levels above de minimis in each completed administrative review. This fact alone has been found sufficient to determine that revocation of an AD order would lead to continuation or recurrence of dumping.⁵² Koehler does not dispute that the Department determined above de minimis dumping margins in the completed administrative reviews. Rather, Koehler’s argument rests on the alternate margins envisioned by Koehler were courts to resolve all pending litigation in Koehler’s favor. However, the Department does not consider Koehler’s speculation about the results of ongoing litigation for purposes of this sunset review determination.

In conducting our analysis, we also examined the import data provided by Appvion and Koehler.⁵³ As described above, both parties show that imports were at approximately the same

⁴⁸ See SAA at 890.

⁴⁹ Id. at 889, the House Report at 63, and the Senate Report at 52.

⁵⁰ See SAA at 889-90, House Report at 63, and Senate Report at 52.

⁵¹ See Sunset Policy Bulletin, 63 FR at 18872.

⁵² See, e.g., SAA at 890, and CRCS Prelim at Issue 1, unchanged in CRCS Final.

⁵³ See Appvion Response at 6–8 and Koehler Response at 8-9.

or higher levels after the issuance of the AD Order in 2008 relative to the pre-investigation level until April 2013, when the AR3 Final was published. Thereafter, imports declined substantially. Koehler argues that the increasing and steady import volumes and declining dumping margins from the first few reviews indicates that dumping would be unlikely to continue or recur if the AD Order were revoked. However, we must consider the entirety of the sunset review period in making our determination. Although there were declining margins in the first two administrative reviews and increasing imports, there was also an increase in the margin for, and a substantial decrease in, the level of imports following the third review. Thus, we find that this period of declining import volumes, accompanied by the continued existence of dumping margins, indicates that dumping would be likely to continue or recur if the AD Order were revoked.

Further, as our determination of likelihood is made on an order-wide basis, Koehler attempts to dismiss the assumption that the other known producer/exporter of the subject merchandise, Mitsubishi, engaged in dumping since the imposition of the AD Order because the Department has not completed any review of Mitsubishi's sales to the United States. This argument is without merit. When the Department has not conducted any administrative review with respect to imports of the subject merchandise from a producer/exporter, the Department considers the above de minimis deposit rates determined in the investigation to remain in effect for U.S. imports from that producer/exporter.⁵⁴ Accordingly, it is not relevant to this determination that the Department did not complete an administrative review of Mitsubishi's sales to the United States.

Therefore, because dumping continued at levels above de minimis after the issuance of the AD Order, and because imports of the subject merchandise declined during a portion of the sunset review period in conjunction with the continued existence of dumping margins, we preliminarily find that revocation of the AD Order would likely result in the continuation of dumping in the United States.

2. Magnitude of the Margin Likely to Prevail

Appvion

Appvion acknowledges that the Department's normal practice when reporting a margin to the ITC that is likely to prevail if an order is revoked is to select the margin from the LTFV investigation because that margin is reflective of the behavior of exporters without the discipline of an order in place.⁵⁵ However, Appvion notes that an exception to this practice is to report a more recently calculated margin when a particular company's margin has increased after the issuance of an order.⁵⁶ Appvion argues that the above-mentioned exception is applicable to Koehler because Koehler's imports of LWTP increased during AR3 and, at the same time, Koehler increased dumping (based on the AR3 Final rate of 75.36 percent) in order to maintain

⁵⁴ See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from Argentina, the People's Republic of China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine; Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders, 71 FR 70506 (December 5, 2006) (Hot-Rolled Steel), and accompanying Issues and Decision Memorandum at Comments 1 and 2.

⁵⁵ See SAA at 889, cited at Appvion Response at 8.

⁵⁶ See Appvion Response at 8-9; see also Sunset Policy Bulletin, 63 FR at 18873.

or increase market share.⁵⁷ Moreover, Appvion contends that the 6.50 percent margin calculated for Koehler in the LTFV investigation may have been understated because the Department found that Koehler had been granting retroactive rebates which the Department disallowed in the AR1 Final.⁵⁸

Koehler's Rebuttal

Koehler asserts that the 75.36 rate advocated by Appvion as the margin likely to prevail is an AFA rate which is not tied to its sales behavior. Accordingly, Koehler contends that this rate is not the rate that would prevail in the absence of the AD Order.⁵⁹

Department's Position

Normally, the Department will provide to the ITC the company-specific, weighted-average AD margin from the investigation.⁶⁰ The Department's preference for selecting a rate from the investigation is based on the fact that it is the only calculated rate that reflects the behavior of exporters without the discipline of an order or suspension agreement in place.⁶¹ For companies not investigated individually, or for companies that did not begin shipping until after the order was issued, the Department will normally provide a rate based on the all-others rate from the investigation.⁶²

However, the Department may provide to the ITC a more recently calculated margin for a particular company where, for that particular company, dumping margins declined or dumping was eliminated after the issuance of the order and import volumes remained steady or increased. Additionally, if a company chooses to increase dumping in order to increase or maintain market share, the Department may provide the ITC with a more recently calculated margin for that company.⁶³

We do not believe that the facts on the record of this review support reporting a more recently calculated margin for Koehler. As discussed above, Koehler's margins calculated in the three completed administrative reviews do not show a consistent pattern of declining margins, nor has Koehler increased or maintained its market share after it received a higher dumping margin in the AR3 Final. Accordingly, the Department preliminarily determines that the weighted-average AD margin established in the LTFV Final of 6.50 percent represents the magnitude of the margin of dumping most likely to prevail for Koehler if the AD Order were revoked. This rate was not affected by the denial of offsets in accordance with the Final Modification for Reviews because the final determination of the investigation was made after the Department ceased zeroing in its investigations.

Therefore, we preliminarily intend to provide the ITC with the final determination rates from the

⁵⁷ See Appvion Response at 9.

⁵⁸ Id. at 9-10; AR1 Final at Comment 3.

⁵⁹ See Koehler Rebuttal at 5-6.

⁶⁰ See Eveready Battery Co., Inc. v. United States, 77 F. Supp. 2d 1327, 1333 (CIT 1999).

⁶¹ Id.; see also SAA at 890.

⁶² See Hot-Rolled Steel at Comment 2.

⁶³ See SAA at 890-891; Sunset Policy Bulletin, 63 FR at 18873.

LTFV Final because these rates bests reflect the behavior of exporters without the discipline of an order in place.

3. “Good Cause” to Examine “Other Factors”

Koehler

Koehler contends that the Department should consider that its capacity to manufacture paper products including LWTP remained constant since the initiation of the LTFV investigation. According to Koehler, it has been able to create new markets for its production even when faced with the 75.36 percent margin after the AR3 Final, and thus, it does not maintain excess inventory available for shipment to the United States at low prices if the AD Order were revoked.⁶⁴ In addition, Koehler states that the Department should consider that its sales of the subject merchandise have not been found to have been sold at below the cost of production in any of the completed administrative reviews, thus demonstrating that Koehler is able to sell its products profitably.⁶⁵

Appvion Rebuttal

Appvion responds that Koehler failed to demonstrate adequately that “good cause” exists for the Department to consider Koehler’s manufacturing capacity and sales profitability in making its determination whether dumping would continue in the absence of the AD Order. According to Appvion, Koehler does not explain why the statutory factors of dumping margins and volume trends are insufficient for purposes of making a “likelihood of continuation of dumping” determination and, therefore, there is no basis for the Department to consider these additional factors in its determination.⁶⁶

Department’s Position

As explained in the Legal Framework section above, pursuant to section 752(c)(2) of the Act, the Department “shall also consider other such price, cost, market or economic factors as it deems relevant” “if good cause is shown.” Consistent with the language of the Act and SAA, the Department will only review additional data if it concludes “good cause is shown” to look beyond the standard criteria listed in section 752(c)(1) of the Act (dumping margins and import volumes).⁶⁷ When an interested party advocates consideration of additional factors, it must, therefore, first show the Department that “good cause” exists to do so. If the Department determines that good cause exists, it then analyzes the information provided concerning the other factors in making its likelihood determination.⁶⁸

⁶⁴ See Koehler Response at 10.

⁶⁵ Id.

⁶⁶ See Appvion Rebuttal at 5-6.

⁶⁷ See SAA at 890.

⁶⁸ See Fresh and Chilled Atlantic Salmon From Norway: Preliminary Results of Full Third Sunset Review of Antidumping Duty Order, 76 FR 45513 (July 29, 2011), and accompanying Issues and Decision Memorandum at Issue 3: unchanged in Fresh and Chilled Atlantic Salmon From Norway: Final Results of Full Third Sunset Review of Antidumping Duty Order, 76 FR 70409 (November 14, 2011).

We agree with Appvion that Koehler failed to demonstrate that “good cause” exists for the Department to consider either the status of its manufacturing capacity or its profitability in making a likelihood determination. Koehler’s arguments appear to suggest that these factors indicate it has less motivation to sell the subject merchandise at LTFV if the AD Order were revoked. The arguments Koehler presents for the consideration of “other such price, cost, market or economic factors” contemplated under section 752(c)(2) of the Act, however, are speculative.

Furthermore, Koehler has not demonstrated that the Department’s normal, statutorily-mandated criteria are not, by themselves, appropriate factors for purposes of making the likelihood determination.⁶⁹ The burden is on the respondent to demonstrate this through record evidence. In this case, Koehler failed to meet this burden. Additionally, even if Koehler had demonstrated good cause to consider “other factors,” Koehler failed to provide any quantitative information concerning its manufacturing capacity or its profitability, nor explained how this information supports the conclusion that Koehler is not likely to continue to make sales of LWTP at LTFV if the AD Order were revoked. Koehler failed to identify and explain in detail any causal link between either of these factors and their impact on Koehler’s pricing behavior of its sales of LWTP in the United States. Moreover, as noted above, the Department’s likelihood determination is made on an order-wide basis, and no information has been provided for any other exporter of LWTP from Germany regarding the impact of other factors on the Department’s determination.

Therefore, the additional information supplied by Koehler does not give the Department “good cause” to consider further information in its analysis, pursuant to section 752(c)(2) of the Act. The record evidence of previous dumping margins and import volumes is sufficient for the Department to make its likelihood determination. Accordingly, the Department has not considered the “other factors” advocated by Koehler in the preliminary results of this sunset review.

⁶⁹ Id.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the preliminary results of review in the Federal Register.

✓
Agree

Disagree

Paul Piquado
Paul Piquado
Assistant Secretary
for Enforcement and Compliance

4 FEBRUARY 2014
Date