

C-533-844
Sunset Review
Public Document
O3/MGS

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the Expedited Sunset Review of the Countervailing Duty Order on Certain Lined Paper Products from India

Summary

We have analyzed the substantive response of the interested parties in the sunset review of the countervailing duty (CVD) order covering certain lined paper products (CLPP) from India (the Order). We recommend that you approve the positions we have developed in the Discussion of Issues section of this memorandum. Below is the complete list of the issues in this sunset review for which we received a substantive response:

1. Likelihood of continuation or recurrence of a countervailable subsidy
2. Net countervailable subsidy likely to prevail
3. Nature of the subsidy

History of the Order

The Department of Commerce (the Department) published its final affirmative CVD determination on CLPP from India in the Federal Register on August 8, 2006. See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from India, 71 FR 45034 (August 8, 2006) (Final Determination). In the Final Determination the Department found the following six programs to confer countervailable subsidies:

Government of India Programs

- (1) Pre-shipment and Post-shipment Export Financing;

- (2) Export Promotion Capital Goods Scheme (EPCGS);
- (3) Duty Entitlement Passbook Scheme (DEPS);
- (4) Duty Free Replenishment Certificate (DFRC) Scheme
- (5) Advance License Program (ALP); and
- (6) Income Tax Exemption Scheme under 80 HHC (Section 80 HHC).

In the Final Determination the Department found estimated net subsidy rates based on usage of the above programs of 7.05 percent for Aero Exports, 10.24 percent for Navneet Publications India Ltd., and 9.42 percent for all other producers and exporters except for Kejriwal Exports, a division of Kejriwal Paper Limited (Kejriwal), of CLPP from India. The Department found a *de minimis* rate for Kejriwal. On September 28, 2006, the Department issued the CVD order, utilizing the subsidy rates found in the original investigation. See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined Paper Products from India and Indonesia, 71 FR 56949 (September 28, 2006) (Order).

Since the issuance of the Order, the Department has completed one administrative review. In the review covering the period February 15, 2006, through December 31, 2006, the Department found that the sole respondent, Navneet, had received a net subsidy of 8.76 percent from the following three programs:

- (1) Export Promotion Capital Goods Scheme (EPCGS) (1.36%);
- (2) Duty Entitlement Passbook Scheme (DEPS) (6.93%); and
- (3) Income Deduction Program (80IB Tax Program) (0.47%).

See Certain Lined Paper Products from India: Final Results of Countervailing Duty Administrative Review, 74 FR 6572 (February 10, 2009) (First Review of Lined Paper from India) and accompanying Issues and Decision Memorandum (First Review of Lined Paper from India Decision Memorandum).

Discussion of Issues

In accordance with section 751(c)(1) of the Tariff Act of 1930, as amended (the Act), the Department is conducting this review to determine whether revocation of the Order would be likely to lead to continuation or recurrence of a countervailable subsidy. Section 752(b) of the Act provides that, in making this determination, the Department shall consider the net countervailable subsidy determined in the investigation and subsequent reviews, and whether any change in the programs which gave rise to the net countervailable subsidy in those segments of the CLPP proceeding has occurred that is likely to affect that net countervailable subsidy. Pursuant to section 752(b)(3) of the Act, the Department shall provide to the International Trade Commission (the ITC) the net countervailable subsidy likely to prevail if the order were revoked. In addition, consistent with section 752(a)(6) of the Act, the Department shall provide to the ITC information concerning the nature of the subsidy and whether it is a subsidy described in Article

3 or Article 6.1 of the 1994 WTO Agreement on Subsidies and Countervailing Measures (SCM).

Below we address the substantive response of the interested parties.

1. Continuation or Recurrence of a Countervailable Subsidy

Interested Parties' Comments

In its substantive response, the Association of American School Paper Suppliers (AASPS) and its individual members – MeadWestvaco Corporation (MWV), Norcom Inc., and TopFlight Inc. (collectively, petitioners or AASPS), argue that revocation of the Order would result in the continuation or recurrence of a countervailable subsidy. The petitioners note that since the issuance of the order, the Department continued to find that Indian producers of CLPP benefit from countervailable subsidies in the one completed administrative review of the order. AASPS asserts that the continued existence of subsidies coupled with the decrease in subject import volumes after the order was imposed, demonstrate that Indian producers and exporters of subject merchandise are unable to sell LPP in the U.S. market without the benefit of countervailable subsidies. Therefore, the petitioners conclude that countervailable subsidies to Indian LPP producers are likely to continue or recur in the event of revocation. See petitioners' August 31, 2011, submission at 6-8.

Department's Position

Consistent with the Department's practice, the continued use of a program is highly probative of the likelihood of continuation or recurrence of countervailable subsidies if the order were revoked. See, e.g., Final Results of Expedited Sunset Review of Countervailing Duty Order: Sulfanilic Acid from India, 70 FR 53168 (September 7, 2005) (Sulfanilic Acid from India) and accompanying Issues and Decision Memorandum (Sulfanilic Acid from India Decision Memorandum) at Comment 1. Additionally, the presence of programs that have not been used, but also have not been terminated without residual benefits or replacement programs, is also probative of the likelihood of continuation or recurrence of a countervailable subsidy. See, e.g., Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil: Final Results of Full Sunset Review of Countervailing Duty Order, 75 FR 75455 (December 3, 2010), and accompanying Issues and Decision Memorandum at Comment 2, in which the Department determined that where a subsidy program is found to exist, the Department will normally determine that revocation of the CVD order is likely to lead to continuation or recurrence of a countervailable subsidy regardless of the level of subsidization.

In the instant review, the Department did not receive a response from the foreign government or from any other respondent interested party. Consistent with the Department's practice, absent argument or evidence to the contrary, we find that countervailable programs continue to exist and be used. See, e.g., Sulfanilic Acid from India Decision Memorandum at Comment 1. Furthermore, there is no information on the record that the programs at issue in the instant sunset review have been terminated or found non-countervailable. Therefore, because we find the countervailable programs continue to exist and be used, and because the foreign

government and other respondent interested parties did not participate in this review before the Department, and absent argument or evidence to the contrary, the Department determines that revocation of the order would likely lead to a continuation or recurrence of a countervailable subsidy for all respondent interested parties. Our finding in this regard does not apply to Kejriwal, a company the Department excluded from the Order by virtue of the de minimis net subsidy rate it received in the underlying investigation.

2. Net Countervailable Subsidy Likely to Prevail

Interested Parties' Comments

The petitioners assert that the Department normally will select the rate from the investigation as the net countervailable subsidy likely to prevail if the order were revoked because that is the only calculated rate that reflects the behavior of exporters and foreign governments without the discipline of an order in place. In this case, petitioners argue that the Department should select the rates from the investigation as the rates which would likely result from revocation of the order. Specifically, the petitioners argue the estimated subsidy rates likely to prevail are 7.05 percent for Aero Exports, 10.24 percent for Navneet, and 9.42 percent for all other Indian manufacturers, producers, and exporters. See petitioners' August 31, 2011, submission at 9.

Department's Position

When determining the net countervailable subsidy rate likely to prevail, the Department normally will select a rate from the investigation, because that is the only calculated rate which reflects the behavior of exporters and foreign governments without the discipline of an order in place. See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1 (1994) at 890 and Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871, 18875 (April 16, 1998) (Policy Bulletin). However, the rate from the investigation may not be the most appropriate rate if, for example, the rate was derived from subsidy programs which were found in subsequent reviews to be terminated, there has been a program-wide change, or the rate ignores a program found to be countervailable in a subsequent administrative review. Policy Bulletin at 18876.

As noted in the "History of the Order" section above, the Department has completed one administrative review since the issuance of the Order. During that administrative review, the Department did not find any program-wide changes or that any subsidy programs were terminated. However, the Department did identify an additional program - Income Deduction Program (80IB Tax Program) - providing countervailable benefits to the respondent. Therefore, consistent with the Department's established practice for computing company-specific rates in sunset reviews, we have included in the rates likely to prevail, the rate from the additional program. See Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, South Africa, and Thailand: Final Results of Expedited Five-Year (Sunset) Reviews of the Countervailing Duty Orders, 71 FR 70960 (December 7, 2006) (Hot-Rolled Sunset Final), and

accompanying Issues and Decision Memorandum at “Net Countervailable Subsidy Likely to Prevail.”

Absent any argument or evidence to the contrary and consistent with its practice, the Department determines that the net countervailable subsidy rates that would likely prevail in the event of revocation of the order would be the rates from the underlying investigation combined with the rate from the 80IB Tax Program from the first review: 7.52 percent for Aero Exports, 10.71 percent for Navneet, and 9.89 percent for all other Indian producers and exporters of the subject merchandise other than Kejriwal.¹

3. Nature of the Subsidy

Consistent with section 752(a)(6) of the Act, the Department is providing the following information to the ITC concerning the nature of the subsidy, and whether the subsidy is a subsidy as described in Article 3 or Article 6.1 of the Agreement on Subsidies and Countervailing Measures (SCM). We note that Article 6.1 of the SCM expired, effective January 1, 2000.

The petitioners did not address this issue in its substantive response of August 31, 2011.

Consistent with our findings in the Final Determination, in the instant review there were six programs that fall within the meaning of Article 3.1 of the SCM which states that the following subsidies shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, and (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. Below are descriptions of these six programs:

1. *Preferential Pre-Shipment Export Financing Through Packing Credits*: The Reserve Bank of India (RBI), through commercial banks, provides “packing” credits or pre-shipment loans to exporters. With these pre-shipment loans, exporters may purchase raw materials to produce goods for export based on the presentation of a confirmed purchase order. In general, the pre-shipment loans are granted for a period of up to 180 days. The commercial banks extending export credit to Indian companies must charge interest at rates determined by the RBI. Because only exporters are eligible for these pre-shipment loans, they are countervailable to the extent that they are provided at preferential rates.

2. *Preferential Post-Shipment Financing*: The RBI, through commercial banks, provides post-shipment financing loans to exporters. The purpose of post-shipment financing is to enable exporters to extend favorable payment terms such as deferred payment to the foreign purchaser. Post-shipment financing loans may not exceed a period of 180 days. The commercial banks extending export credit to Indian companies must charge interest at rates determined by the RBI. Because only exporters are eligible for the post-shipment loans, they are countervailable to the extent that they are provided at preferential interest rates.

¹ Kejriwal was excluded from the order on the basis of *de minimis* subsidies during the period of investigation.

3. *Import Tax Deduction for Exporters (Section 80HHC)*: For tax returns filed during the period of investigation, the GOI allowed exporters to claim a tax deduction related to their export sales. This tax deduction was calculated by dividing export sales by total sales and then multiplying the resulting figure by the exporter's profit as shown in the tax return. This amount is then deducted from taxable profits. Because this program is only available to exporters, we determined it to be countervailable.

4. *Import Duty Exemptions Available through the Advance License Program*: Advance licenses are available to exporters, to enable them to import raw material inputs used in the production of exports duty-free. Recipients of advance licenses are obligated under the terms of the license to export the products produced with the duty-free imports. The amount of imports allowed under an advance license is closely linked to the amount of exports to be produced. We considered the use of the advance licenses to be equivalent to a duty drawback program insofar as customs duties are not paid on physically incorporated, imported products used in the production of exports. However, where imported inputs are not physically incorporated into the exported product, we considered the duty savings afforded by the advance license to be a countervailable export subsidy.

5. *Import Duty Exemptions Available through EPCGS*: The EPCGS provides for a reduction or exemption of customs duties and an exemption from excise taxes on imports of capital goods. Under this program, exporters may import capital equipment at reduced rates of duty by undertaking to earn convertible foreign exchange equal to a multiple of the value of the capital goods, as determined by the GOI, within a period of time, as set by the GOI. For failure to meet the export obligation, a company is subject to payment of all or part of the duty reduction, depending on the extent of the export shortfall, plus penalty interest. The Department considered duty and excise tax exemptions on imported capital goods that are contingent on export activities to be countervailable.

6. *Import Duty Exemptions Available through DEPS*: The DEPS enables exporting companies to earn import duty exemptions in the form of passbook credits rather than cash. All exporters are eligible to earn DEPS credits on a post-export basis, provided that the exported product is listed in the GOI's Standard Input/Output Norms (SIONs). Post-export DEPS credits can be used for any subsequent imports, regardless of whether they are consumed in the production of an export product. Post-export DEPS credits are valid for 12 months and are transferable. Exporters are eligible to earn credits equal to a certain percentage, as designated by the GOI, of the free-on-board value of their export shipments. The Department found that the GOI could not adequately track the extent to which inputs imported duty free under the DEPS were re-exported. See First Review of Lined Paper from India Decision Memorandum at "Duty Entitlement Passbook Scheme (DEPS)." Therefore, the Department considered such duty exemptions to be countervailable.

7. *Duty Free Replenishment Certificate (DFRC) Scheme*: The DFRC scheme was introduced by the GOI in 2001 and is administered by the Director-General for Foreign Trade (DGFT). The DFRC is a duty replenishment scheme that is available to exporters for the subsequent import of

inputs used in the manufacture of goods without payment of basic customs duty. We determined the sale of DFRC licenses to be a countervailable export subsidy.

The following program does not fall within the meaning of Article 3.1 of the SCM. However, it could be a subsidy described in Article 6.1 of the SCM if the amount of the subsidy exceeds five percent, as measured in accordance with Annex IV of the SCM. It also could fall within the meaning of Article 6.1 if it constitutes debt forgiveness or is a subsidy to cover operating losses sustained by an industry or enterprise. However, there is insufficient information on the record of this review in order for the Department to make such a determination. We, however, are providing the ITC with the following program description.

8. *Income Deduction Program (80IB Tax Program)*: Pursuant to the Income Tax Act of 1961, as amended by the Finance Act 2007, Chapter VIA, 80IB(4) (India) (2007), the GOI has implemented a tax policy to foster economic development of certain “industrially backward” regions in India. The tax exemptions allowed under the 80IB Tax Program are only available to companies located in designated geographical areas (referred to as “backward areas” by the GOI) within India.² Under the 80IB Tax Program, the GOI allows domestic companies that invest in economically less developed areas of India to reduce their corporate taxable income by up to 100 percent of profit gained at production facilities located in designated geographical areas for a period of five years and by up to 30 percent for the next five years. The benefit is applied to the gross total income of the tax payer and is claimed when a company files its income tax return at the end of every financial year.

Final Results of Review

We determine that revocation of the CVD order would likely lead to continuation or recurrence of a countervailable subsidy at the rates listed below:

| <u>Producers/Exporter</u> | <u>Margin (percent)</u> |
|--|-------------------------|
| Aero Exports | 7.52 |
| Navneet Publications | 10.71 |
| All Other Producers/Exporters ³ | 9.89 |

² “Industrially backward” states are states and union territories specified in the Eight Schedule of the Indian tax code.

³ Kejriwal was excluded from the order on the basis of *de minimis* subsidies during the period of investigation.

Recommendation

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

AGREE: _____

DISAGREE: _____

Paul Piquado
Assistant Secretary
for Import Administration

(Date)