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Investigation
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MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China

SUMMARY

The Department of Commerce ("Department") has analyzed the case and rebuttal briefs submitted by interested parties in the above-referenced investigation. As a result of our analysis, we have made changes in the margin calculation for the final determination. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a list of the issues in this investigation for which we received comments from interested parties:

Comment 1: Whether to retain Superpower's Business Proprietary Information ("BPI") data
Comment 2: Whether to assign the PRC-wide rate as total adverse facts available to both mandatory respondents
Comment 3: Whether to assign the PRC-wide rate to the separate rate respondents
Comment 4: Whether to clarify the scope language for hitches
Comment 5: Whether to amend the preliminary determination for Princeway

Background

On January 28, 2009, the Department published its preliminary determination in the investigation of Certain Tow Behind Lawn Groomers and Certain Parts Thereof ("lawn groomers") from the People's Republic of China ("PRC"). See Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 74 FR 4929 (January 28, 2009)

("Preliminary Determination"). We invited parties to comment on our Preliminary Determination. Agri-Fab, Inc. ("Petitioner") and Jiashan Superpower Tools Co., Ltd. ("Superpower"), a mandatory respondent in this investigation, submitted case briefs on March 12, 2009 and March 17, 2009, respectively. On March 18, 2009, Petitioner filed a rebuttal brief.

Discussion of the Issues

Comment 1: Whether to retain Superpower's BPI data

Superpower requested that all of its BPI data be removed from the record since it has withdrawn from the investigation. Thus, Superpower argues that the Department can only use the non-proprietary information remaining on the record to calculate the appropriate margins.

Petitioner did not comment.

Department's Position: We disagree with Superpower's contention. The Department has determined that it is necessary to retain Superpower's BPI data on the record of this proceeding in order (1) to prevent Superpower from obtaining a significantly more favorable result by failing to cooperate than if it had cooperated and (2) to prevent manipulation of the final margin under which most exports will be subject.

The submission of information within an antidumping proceeding is voluntary. See Section 777 of the Tariff Act of 1930, as amended ("the Act"). To administer the antidumping law, the Department depends heavily upon the willingness of the parties to provide extensive BPI. As a result, there is a public interest in preserving the trust of companies subject to its proceedings that such information will have limited use and will remain largely within the control of the companies submitting such information. However, while it is the Department's normal practice to allow parties to withdraw their BPI once it has been submitted, the courts have also recognized "the inherent power of an administrative agency to protect the integrity of its own proceedings." See Alberta Gas Chemicals, Ltd. v. Celanese Corp., 650 F.2d 9, 12 (1981).

If the Department were to grant the respondent's request for the return of its BPI data, then the Department might be unable to rely on either the published preliminary rates or the public summaries of the removed BPI data in calculating a final margin. See Smith Corona Corp. v. United States, 796 F. Supp. 1532, 1536 (C.I.T. 1992). As a result, the only remaining rate on the record of the proceeding on which to rely for the final determination would be the petition rate (as adjusted at initiation). However, the use of the initiation rate would result in a significantly lower margin for both Superpower and the PRC-wide entity (both non-cooperative entities). As a result, Superpower's desire to withdraw its questionnaire responses from the record would seriously undermine the effectiveness of the antidumping remedy in this case should the investigation result in an antidumping order. Substantially all exports will fall under the PRC-wide rate (see Comment 2) and Superpower's withdrawal of its BPI data would significantly distort this rate. Thus, the Department has examined whether it is appropriate to deny Superpower's request to withdraw its BPI data from the record of the proceeding.

In certain limited circumstances, the Department has departed from its normal practice and

retained BPI data on the record of a proceeding. In Live Cattle from Canada[1], we retained a respondent's BPI documents when removal of the respondent's information: (1) would significantly distort the all-others rate under which most exports were covered; and (2) the application of adverse facts available ("AFA") against the withdrawing respondent would not sufficiently preserve the integrity of the proceeding. Allegheny Ludlum held this decision to be "noteworthy" while finding the Department's general practice regarding BPI data to be reasonable.[2] Furthermore, it is the Department's practice to ensure "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, Vol.1 at 841 (1994) ("SAA") at 870. In the instant case, if the Department allowed Superpower to withdraw its BPI data from the record of this investigation, Superpower would obtain a significantly more favorable rate than it would otherwise by ceasing to participate and the PRC-wide rate to which most exports will be subject would be significantly distorted.

In contrast, the Department granted the request of respondent Princeway Furniture (Dong Guan) Co., Ltd. and its affiliate Princeway Limited (collectively "Princeway") to withdraw its BPI data from the record since Princeway's withdrawal of data would not distort the rate under which most exports will enter the U.S., and the Department therefore has no reason to retain its BPI in order to protect the integrity of the proceeding.[3] It has been the Department's normal practice to allow submitting parties to withdraw their BPI submissions from the administrative record. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the First Administrative Review, 71 FR 14170, 14171 (March 21, 2006); Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania, 71 FR 7008, 7009 (February 10, 2006); see also Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 66 FR 56272, 56273 (November 7, 2001). In such cases, the Department bases the company's margin on facts available, using an adverse inference where warranted. It is the Department's ability to use AFA that ensures that a company will not benefit by refusing to participate in a proceeding. Thus, the AFA rule normally enables the Department to permit withdrawal of BPI while protecting the integrity of the process, as is the case with Princeway.

In the instant case, however, the use of AFA against Superpower cannot serve that function. Substantially all future exports of lawn groomers, which will be subject to the PRC-wide rate if an antidumping duty order is issued, would inappropriately benefit from Superpower's refusal to participate. As a result, the Department finds it necessary to retain Superpower's BPI to protect the integrity of this proceeding in order to prevent it from obtaining a significantly more favorable result for itself and for the other respondents which account for nearly all exports of the subject merchandise.

[1] See Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle From Canada, 64 FR 56739, 56743 (October 21, 1999) ("Live Cattle From Canada").
[2] See Allegheny Ludlum Corp. v. United States, 27 C.I.T. 1461, 1467 (2003).
[3] See Department's April 9, 2009 letter to Princeway confirming the removal and destruction of all documents submitted by Princway containing BPI data.

Comment 2: Whether to assign the PRC-wide rate as total adverse facts available to both mandatory respondents

Petitioner argues that the Department should assign the PRC-wide rate of 324.43 percent as total AFA to Superpower and Princeway, mandatory respondents in this investigation, because both mandatory respondents withdrew from the investigation and refused to be verified.

Superpower did not comment.

Department's Position: We agree, in part, with Petitioner. Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to Section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act allows the Department, subject to Section 782(e) of the Act, to disregard all, or part, of deficient or untimely responses from a respondent. Pursuant to Section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties. Section 776(b) of the Act authorizes the Department to use an adverse inference with respect to an interested party if the Department finds that the party failed to cooperate by not acting to the best of its ability to comply with a request for information. See, e.g., Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808, 53819-20 (October 16, 1997); see also Crawfish Processors Alliance v. United States, 343 F. Supp. 2d 1242, 1270-71 (CIT 2004) (approving use of AFA when the respondent refused to participate in verification).

Both Princeway and Superpower withdrew from the investigation.[4] By ceasing to participate in the investigation, Princeway and Superpower prevented the Department from verifying the accuracy of their information as provided by Section 782(i) of the Act and thus failed to demonstrate eligibility for a separate rate. Thus, both entities are considered part of the PRC-wide entity. See Section 776(a)(2)(D) of the Act. Due to their failure to act to the best of their ability in responding to the Department's requests for information, we find that Princeway and Superpower, as part of the PRC-wide entity, significantly impeded the Department's proceeding. See Section 776(a)(2)(C) and (D) of the Act. See, e.g., Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 14514, 14516 (March 31, 2009) ("Welded Line Pipe"); Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 4913 (January 28, 2009) ("Austenitic Pipe"); see also Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality

[4] See Superpower's Notice of Withdrawal from Investigation (February 19, 2009); see also Princeway's Notice of Withdrawal (March 2, 2009).

Steel Pipe from the People's Republic of China, 73 FR 31970 (June 5, 2008) ("Standard Pipe") and accompanying Issues and Decision Memorandum at Comments 2 and 3. Accordingly, we have determined to base the PRC-wide entity's margin, which includes Princeway and Superpower, on facts otherwise available, pursuant to Section 776(a) of the Act. Further, because the PRC-wide entity, which includes Princeway and Superpower, refused to participate fully in the investigation, as discussed above, we find that the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with the Department's request for information. Accordingly, the Department determines that, when selecting from among the facts otherwise available, an adverse inference is warranted for the PRC-wide entity, pursuant to Section 776(b) of the Act.

The PRC-wide entity includes companies that failed to respond to the Department's request for quantity and value information (See Preliminary Determination at 4932 and 4933) and Princeway and Superpower, which prevented the Department from verifying their information, including information pertaining to their separate rate applications. Thus, pursuant to Section 776 (a)(2)(A), (C), and (D) of the Act, and consistent with our Preliminary Determination at 4933, we find it appropriate to base the PRC-wide entity's dumping margin on facts otherwise available on the record. Also as discussed above, because the PRC-wide entity did not respond to the Department's request for information and Princeway and Superpower decided not to allow the Department to verify its information, we find an adverse inference is appropriate, pursuant to Section 776(b) of the Act, for the PRC-wide entity.

In deciding which facts to use as AFA, Section 776(b) of the Act and 19 C.F.R. 351.308(c)(1) provide that the Department may rely on information derived from (1) the petition/initiation, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. In selecting a rate for AFA, the Department selects a rate that is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998). Further, it is the Department's practice to select a rate that ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870. See also Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review, 70 FR 69937, 69939 (November 18, 2005).

Therefore, in order to induce the respondents to provide the Department with complete and accurate information in a timely manner, the Department's practice is to select, as AFA, the higher of: (a) the highest margin alleged in the initiation; or (b) the highest calculated rate for any respondent in the investigation. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation, 65 FR 5510, 5518 (February 4, 2000) (the Department applied the initiation margin as AFA); Final Determination of Sales at Less Than Fair Value: Certain Artists Canvas from the People's Republic of China, 71 FR 16116, 16118-19 (March 30, 2006) (the Department corroborated the AFA margin with the highest calculated margin in the investigation).

In the instant case, the preliminary dumping margin calculated for Superpower is higher than the

highest margin from the initiation; however, Superpower's calculated rate was insufficient to induce cooperation given that Princeway and Superpower withdrew from the investigation after the Preliminary Determination. As a result, the Department has determined to use, as the AFA rate, a CONNUM-specific dumping margin, i.e., 386.28 percent, calculated for Superpower in the Preliminary Determination. Although the CONNUM-specific dumping margin calculated in the Preliminary Determination for Superpower would be based on unverified information, we note that there is no such limitation in the statute or the regulations with respect to the application of facts available using unverified information. Furthermore, the Department has, in other cases, selected a margin under similar circumstances as a total AFA rate. See Austenitic Pipe, 74 FR at 4915; see also Welded Line Pipe, 74 FR at 14516. Also, there is no need to corroborate the selected margin because it is based on, and calculated from, information submitted by Superpower in the course of this investigation, i.e., it is not secondary information. See 19 CFR 351.308(c) and Section 776(b) of the Act; see also Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: Light-Walled Rectangular Pipe and Tube from the People's Republic of China, 73 FR 35652, 35653 (June 24, 2008), and accompanying Issues and Decision Memorandum at 1. In selecting a facts-available margin, we sought a margin that is sufficiently adverse so as to effectuate the statutory purposes of the adverse facts-available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner. We also sought a margin that is indicative of the respondents' customary selling practices and is rationally related to the transactions to which the AFA are being applied. To that end, we selected the highest margin on an individual model which fell within the mainstream of Superpower's transactions (i.e., a model that reflects sales of products that are representative of the broader range of sales used to determine U.S. price).

Therefore, based on the above stated reasons, for the final determination, as AFA, we have assigned the PRC-wide entity a CONNUM-specific dumping margin calculated in the Preliminary Determination, i.e., 386.28 percent.

Comment 3: Whether to assign the PRC-wide rate to the separate rate respondents

Petitioner argues that the Department should assign the PRC-wide rate of 324.43 percent to the separate rate respondents because the aforementioned rate is based on Superpower's calculated rate which the Department determined to be independent of government control in its Preliminary Determination.

No other party commented.

Department's Position: In our Preliminary Determination, we found that Qingdao Huatian Truck Co., Ltd. ("Huatian") and Nantong D & B Machinery Co., Ltd. ("Nantong"), the two separate rate respondents, demonstrated that they operate free from de jure and de facto government control and therefore, are entitled to a separate rate. Since the publication of the Preliminary Determination, no party has commented on these separate rate determinations. We continue to find that the evidence placed on the record of this investigation by Huatian and Nantong demonstrates both a de jure and de facto absence of government control with respect to their exports of the merchandise under consideration. Thus, we continue to find that Huatian and Nantong are eligible for separate-rate status. In the Preliminary Determination, the Department

calculated company–specific dumping margins for the two mandatory respondents, Superpower and Princeway, and assigned to Huatian and Nantong a dumping margin equal to a simple average of the dumping margins calculated for the two mandatory respondents. See Preliminary Determination. In light of Princeway's and Superpower's withdrawal from the investigation and the subsequent application of total AFA (see comment 1 above) for both (as part of the PRC-wide entity), the simple average methodology is no longer appropriate. In cases where the estimated weighted-average margins for all individually investigated respondents are zero, de minimis, or based entirely on AFA, the Department may use any reasonable method to assign the separate rate. See Section 735(c)(5)(B) of the Act. In this case, where there are no mandatory respondents receiving a calculated rate and the PRC-wide entity's rate is based upon total AFA, we find that applying the rate alleged in the petition, incorporating revisions made in Petitioner's supplemental responses, is both reasonable and reliable for purposes of establishing a separate rate. See Austenitic Pipe; see also Standard Pipe; see also Final Determination of Sales at Less Than Fair Value: Sodium Hexametaphosphate From the People's Republic of China, 73 FR 6479 (February 4, 2008) and accompanying Issues and Decision Memorandum at Comment 2. Therefore, for the final determination, as the separate rate, the Department will assign the separate rate respondents the initiation rate of 154.72 percent.

Comment 4: Whether to clarify the scope language for hitches

Petitioner requested that the Department address the scope issue raised by Brinly-Hardy Company, a domestic producer of the subject merchandise, and clarify the scope language concerning the definition of hitches as Brinly-Hardy Company previously requested. See Preliminary Determination, 74 FR at 4931. Petitioner provided the following language to the scope language to clarify the description of a "hitch."

> 1) a hitch, defined as a complete hitch assembly comprising of at least the following two major hitch components, tubing and a hitch plate regardless of the absence of minor components such as pin or fasteners. Individual hitch component parts, such as tubing, hitch plates, pins or fasteners are not covered by the scope.

No other party commented.

Department's Position: We agree with Petitioner and Brinly-Hardy Company that a clarification to the scope language concerning the definition of hitch is needed.[5] For the final determination, we have included the language as suggested by Petitioner in the language of the scope. For a complete listing of the final scope for this investigation, please see the accompanying Federal Register notice.

Comment 5: Whether to amend the preliminary determination for Princeway

Petitioner contends that the Department should issue an amended preliminary determination for Princeway and assign it the PRC-wide rate of 324.43 percent because Princeway has requested the removal of all of its submissions, and thus there is no record evidence supporting the rate the

[5] See Brinly-Hardy Company's December 30, 2008, submission. See also Petitioner's January 12, 2009, submission.

Department assigned Princeway in the Preliminary Determination. Additionally, Petitioner argues that alternatively if the Department decides to retain Princeway's submissions on the record, Petitioner contends that the Department should conclude that the Preliminary Determination was based on false and fraudulent information and an issuance of an amended preliminary determination is warranted.

Department's Position: We have determined not to amend our Preliminary Determination with regard to Princeway.[6] In previous proceedings where the Department has amended its preliminary determinations for reasons other than significant ministerial errors, specific fact patterns lead the Department to amend its preliminary determination. See Amended Preliminary Determination of Sales at Less Than Fair Value: Circular Welded Carbon Quality Steel Pipe From the People's Republic of China, 73 FR 22130 (April 24, 2008). However, such specific facts patterns are not present in this proceeding. Additionally, we disagree with Petitioner that the removal of all of Princeway's submissions from the record would support the Department amending the Preliminary Determination and thus assign Princeway the PRC-wide rate. We have no basis to draw the conclusion that removing all of Princeway's submissions from the record would lead the Department to amend Princeway's rate from the Preliminary Determination using the PRC-wide rate. Further, we have determined that there is insufficient evidence that Princeway submitted any fraudulent or "fake" documentation on the record. The Department concludes that there are no circumstances that necessitate amending our Preliminary Determination.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination of this investigation in the Federal Register.

Agree _____ Disagree _____

_____
Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

_____
(Date)

[6] See Memorandum from Zhulieta Willbrand, International Trade Compliance Analyst, to the File, "Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Conference Call with the Counsel for the Petitioner", dated April 10, 2009.