



A-580-905
Investigation
POI: 10/01/2018 - 9/30/2019
Public Document
E&C/OIV: TM/JM

July 15, 2020

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Preliminary Determination in the
Less-Than-Fair-Value Investigation of 4th Tier Cigarettes from
the Republic of Korea

I. SUMMARY

The Department of Commerce (Commerce) preliminarily determines that 4th tier cigarettes from the Republic of Korea (Korea) are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The estimated weighted-average dumping margins are shown in the “Preliminary Determination” section of the accompanying *Federal Register* notice.

II. BACKGROUND

On December 18, 2019, Commerce received an antidumping duty (AD) petition covering imports of 4th tier cigarettes from Korea filed in proper form on behalf of the Coalition Against Korean Cigarettes (the petitioner).¹ Commerce initiated its investigation on 4th tier cigarettes from Korea on January 7, 2020.²

In the *Initiation Notice*, we stated that the petitioner identified only one company in Korea, *i.e.*, KT&G Corporation (KT&G), as a producer/exporter of cigarettes and provided independent,

¹ See Petitioner’s Letter, “Petition for the Imposition of Antidumping Duties on 4th Tier Cigarettes from the Republic of Korea,” dated December 18, 2019 (the Petition).

² See *4th Tier Cigarettes From the Republic of Korea: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 2390 (January 15, 2020) (*Initiation Notice*).



third-party information as support.³ On January 16, 2020, Commerce selected KT&G as the sole mandatory respondent for individual examination in this investigation, and issued the AD Questionnaire to KT&G.⁴

On February 4, 2020, the U.S. International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of 4th tier cigarettes from Korea.⁵

The *Initiation Notice* also notified parties of an opportunity to comment on the scope of the investigation, as well as the appropriate physical characteristics of 4th tier cigarettes to be reported in response to the AD Questionnaire.⁶ We received timely comments regarding the physical characteristics of the merchandise under consideration.⁷ Based on the comments received, on February 28, 2020, we issued a letter establishing the product characteristic fields and control number (CONNUM) coding for the investigation.⁸ Additionally, we received comments on the scope of the investigation from KT&G, as well as, rebuttal comments from the petitioner.⁹ As explained below, Commerce addressed the scope comments placed on the record of this investigation by interested parties in the Preliminary Scope Decision Memorandum.¹⁰

On March 16, 2020, KT&G submitted a request to limit the reporting of HM sales.¹¹ In its request, KT&G noted that HM sales that could be reportable involved “tens of millions” of sales observations.¹² Accordingly, KT&G requested that Commerce limit home market sales reporting requirements to only those home market sales that fall into the same tobacco weight categories as those sold in the U.S. market (*i.e.*, the same categories with respect to the dry weight of tobacco used in the production of 1,000 cigarettes, which is the first product characteristic).¹³ Additionally, KT&G requested that Commerce not require reporting of two other sales channels, which represented a small portion of KT&G’s overall sales: (1) sales to a

³ *Id.* at 2393.

⁴ See Commerce’s Initial Questionnaire issued to KT&G, dated January 16, 2020 (AD Questionnaire).

⁵ See *4th Tier Cigarettes From Korea*, 85 FR 7330 (February 7, 2020); see also ITC Preliminary Report, *4th Tier Cigarettes from Korea, Investigation No. 731-TA-1465 (Preliminary)*, ITC Publication 5016, February 2020.

⁶ See *Initiation Notice*, 85 FR at 2390-1.

⁷ See Petitioner’s Letter, “4th Tier Cigarettes from the Republic of Korea: Comments on Physical Characteristics,” dated February 3, 2020; see also KT&G’s Letter, “Fourth Tier Cigarettes from the Republic of Korea: Product Characteristics Comments,” dated February 3, 2020; Petitioner’s Letter, “4th Tier Cigarettes from the Republic of Korea: Rebuttal Comments on Product Characteristics,” dated February 13, 2020; and KT&G’s Letter, “Fourth Tier Cigarettes from the Republic of Korea: Rebuttal to Petitioner’s Product Characteristics Comments,” dated February 13, 2020.

⁸ See Commerce’s Letter, “Product Characteristics - Less than Fair Value Investigation of 4th Tier Cigarettes from the Republic of Korea,” dated February 28, 2020.

⁹ See KT&G’s Letter, “4th Tier Cigarettes from the Republic of Korea: Scope Comments and Notification of Difficulties Responding to the Questionnaire” dated January 27, 2020; see also Petitioner’s Letter, “4th Tier Cigarettes from the Republic of Korea: Response to KT &G’s Comments on Scope,” dated February 6, 2020.

¹⁰ See Memorandum, “4th Tier Cigarettes from the Republic of Korea: Preliminary Scope Decision Memorandum,” dated concurrently with this memorandum (Preliminary Scope Decision Memorandum).

¹¹ See KT&G’s letter, “4th Tier Cigarettes from the Republic of Korea: Request for Limited Reporting,” dated March 16, 2020.

¹² *Id.* at 1.

¹³ *Id.* at 3.

specific customer requiring a unique sales process (sales channel 2); and, (2) sales for “special use” in Jeju Island duty-free stores (sales channel 4).¹⁴ On March 18, 2020, the petitioner submitted comments opposing the reporting exclusions requested by KT&G.¹⁵ On March 25, 2020, Commerce granted KT&G’s request to exclude home market sales in sales channels 2 and 4, but did not grant the request to limit home market sales based on tobacco weight categories.¹⁶ Thus, Commerce limited home market sales reporting requirements to two sales channels: (1) sales to corporate customers; and, (2) sales to retailers and expressway service stations. Additionally, to limit the number of home market sales, Commerce randomly selected one week in each month of the period of investigation (POI), and instructed KT&G to only report home market sales during the selected weeks. The selected weeks were October 1-7, 2018, November 1-7, 2018, December 9-15, 2018, January 20-26, 2019, February 10-16, 2019, March 10-16, 2019, April 14-20, 2019, May 1-7, 2019, June 9-15, 2019, July 14-20, 2019, August 4-10, 2019, and September 1-7, 2019.¹⁷

Between February and July 2020, KT&G submitted timely responses to our initial AD Questionnaire¹⁸ and supplemental questionnaires.¹⁹ During the same time period, the petitioner submitted comments regarding KT&G’s questionnaire responses.²⁰

¹⁴ *Id.* at 5.

¹⁵ See Petitioner’s Letter, “4th Tier Cigarettes from South Korea: Comments on KT&G’s Reportable Sales,” dated March 18, 2020.

¹⁶ See Commerce’s letter, “Less than Fair Value Investigation of 4th Tier Cigarettes from the Republic of Korea: Request to Limit Reporting of Home Market Sales and Extension of Time to File Section B Questionnaire Response,” dated March 25, 2020 (Limited Reporting Letter).

¹⁷ *Id.*

¹⁸ See KT&G’s Letters, “4th Tier Cigarettes from the Republic of Korea: KT&G Section A Questionnaire Response,” dated February 18, 2020 (AQR); “4th Tier Cigarettes from the Republic of Korea: KT&G Section C Questionnaire Response,” dated March 24, 2020 (CQR); “4th Tier Cigarettes from the Republic of Korea: KT&G Section D Questionnaire Response,” dated March 25, 2020 ; and “4th Tier Cigarettes from the Republic of Korea: KT&G Section B Questionnaire Response,” dated March 30, 2020 (BQR).

¹⁹ See KT&G’s Letters, “4th Tier Cigarettes from the Republic of Korea: KT&G Section A Supplemental Questionnaire Response,” dated April 20, 2020 (SQRA1); “4th Tier Cigarettes from the Republic of Korea: KT&G Partial Section A Supplemental Questionnaire Response,” dated April 24, 2020; “4th Tier Cigarettes from the Republic of Korea: KT&G Section D Supplemental Questionnaire Response,” dated May 13, 2020; “4th Tier Cigarettes from the Republic of Korea: KT&G Partial Section D Supplemental Questionnaire Response,” dated May 20, 2020 (SQRD2); “4th Tier Cigarettes from the Republic of Korea: KT&G Section B and C Supplemental Questionnaire Response,” dated May 26, 2020 (SQRBC1); “4th Tier Cigarettes from the Republic of Korea: KT&G Partial Section B and C Supplemental Questionnaire Response,” dated May 29, 2020 (SQRBC2); “4th Tier Cigarettes from the Republic of Korea: Duty Drawback Applications for the Section C Supplemental Questionnaire Response,” dated June 1, 2020 (SQRBC3); “4th Tier Cigarettes from the Republic of Korea: KT&G Partial Section D Second Supplemental Questionnaire Response,” dated June 19, 2020; “4th Tier Cigarettes from the Republic of Korea: KT&G Partial Section D Second Supplemental Questionnaire Response,” dated June 22, 2020; “4th Tier Cigarettes from the Republic of Korea: KT&G Section D Supplemental Questionnaire Response,” dated July 1, 2020; “4th Tier Cigarettes from the Republic of Korea: KT&G Partial Sections A, B, and C Second Supplemental Questionnaire Response,” dated July 6, 2020; and “4th Tier Cigarettes from the Republic of Korea: KT&G Section B Third Supplemental Questionnaire Response,” dated July 10, 2020..

²⁰ See Petitioner’s Letters, “4th Tier Cigarettes from the Republic of Korea: Comments on KT &G’s Section A Questionnaire Response,” dated February 21, 2020; “4th Tier Cigarettes from South Korea: Rebuttal New Factual Information and Deficiency Comments on KT&G’s Sections B-C Questionnaire Responses,” dated April 13, 2020; “4th Tier Cigarettes from South Korea: Comments on KT&G’s Section D Questionnaire Response,” dated April 23, 2020, “4th Tier Cigarettes from South Korea: Deficiency Comments on KT&G’s Section A Supplemental

On April 28, 2020, the petitioner requested that the date for the issuance of the preliminary determination in this investigation be extended by 50 days pursuant to section 733(c)(1)(A) of the Act and 19 CFR 351.205(b)(2).²¹ Therefore, pursuant to section 733(c)(1)(A) of the Act, we postponed the preliminary determination until no later than July 15, 2020.²² The petitioner and KT&G provided pre-preliminary comments on June 26, 2020.²³

We are conducting this investigation in accordance with section 733(b) of the Act.

III. PERIOD OF INVESTIGATION

The POI is October 1, 2018 through September 30, 2019. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the Petition, which was December 2019.²⁴

IV. SCOPE OF THE INVESTIGATION

The products covered by this investigation are 4th tier cigarettes. For a full description of the scope of this investigation, *see* this memorandum's accompanying *Federal Register* notice at Appendix I.

V. SCOPE COMMENTS

In accordance with the *Preamble* to our regulations,²⁵ the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.*, scope).²⁶ As noted above, both KT&G and the petitioner commented on the scope of the 4th tier cigarettes investigations, as published in the *Initiation Notice*. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum. We evaluated the scope comments filed by the interested parties, and are preliminarily not modifying the scope language as it appeared in the *Initiation Notice*.

Questionnaire Responses,” dated May 4, 2020; and “4th Tier Cigarettes from South Korea: Comments on KT&G's Supplemental Section D Questionnaire Response,” dated June 3, 2020.

²¹ *See* Petitioner's Letter, “4th Tier Cigarettes from the Republic of Korea: Request to Postpone Preliminary Determination,” dated April 28, 2020.

²² *See 4th Tier Cigarettes from the Republic of Korea: Postponement of Preliminary Determination in the Less-Than-Fair-Value Investigation*, 85 FR 27991 (May 12, 2020).

²³ *See* Petitioner's Letter, “4th Tier Cigarettes from South Korea: Pre-Preliminary Determination Comments,” dated June 26, 2020; *see also* KT&G's Letter, “4th Tier Cigarettes from the Republic of Korea: KT&G's Pre-Preliminary Determination Comments,” dated June 26, 2020.

²⁴ *See* 19 CFR 351.204(b)(1).

²⁵ *See Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

²⁶ *See Initiation Notice*, 85 FR at 2391.

VI. NEGATIVE PRELIMINARY DETERMINATION OF CRITICAL CIRCUMSTANCES

Section 733(e)(1) of the Act provides that Commerce, upon receipt of a timely allegation of critical circumstances, will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (A)(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at LTFV and that there was likely to be material injury by reason of such sales; and (B) there have been “massive imports” of the subject merchandise over a relatively short period. In accordance with 19 CFR 351.206(c)(2)(i), when a critical circumstances allegation is submitted 20 days or more before the scheduled date of the preliminary determination, Commerce must issue a preliminary critical circumstances determination no later than the date of the preliminary determination.

On April 22, 2020, the petitioner submitted information alleging that, pursuant to section 733(e)(1) of the Act, and 19 CFR 351.206, critical circumstances exist with respect to imports of 4th tier cigarettes from Korea.²⁷ For the reasons discussed below, we preliminarily find that critical circumstances do not exist for KT&G and all-other producers or exporters of 4th tier cigarettes from Korea.²⁸

History of Dumping and Material Injury

To determine whether there is a history of dumping pursuant to section 733(e)(1)(A)(i) of the Act, Commerce generally considers current and previous AD orders on subject merchandise from the country in question in the United States and current orders in any other country on imports of subject merchandise.²⁹ The petitioner did not identify any such proceedings and Commerce is not aware of any such proceedings with respect to 4th tier cigarettes from Korea.³⁰ Consequently, we preliminarily find that there is no history of injurious dumping of 4th tier cigarettes from Korea; thus, this criterion is not met.

²⁷ See Petitioner’s Letter, “4th Tier Cigarettes from South Korea: Critical Circumstances Allegation,” dated April 22, 2020 (Critical Circumstances Allegation).

²⁸ Commerce notes that KT&G is the only producer/exporter of 4th tier cigarettes from the Republic of Korea that was identified in the Petition.

²⁹ See, e.g., *Certain Oil Country Tubular Goods from the People’s Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination*, 74 FR 59117, 59120 (November 17, 2009), unchanged in *Certain Oil Country Tubular Goods from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010).

³⁰ See generally Critical Circumstances Allegation.

Knowledge that Exporters Were Dumping and that There Was Likely to Be Material Injury by Reason of Such Sales

Because there is no prior history of injurious dumping, we next examined whether the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at LTFV, and that there was likely to be material injury by reason of such sales. When evaluating whether such imputed knowledge exists, Commerce normally considers margins of 25 percent or more for export price (EP) sales or 15 percent or more for constructed export price (CEP) sales sufficient to meet the quantitative threshold to impute knowledge of dumping.³¹ In this case, all of KT&G's sales are CEP sales,³² and the preliminary margin is less than 15 percent. According to Commerce's practice, such a margin is normally not sufficient to impute knowledge of sales at LTFV of subject merchandise.³³

Commerce also examined other information on the record and preliminarily concludes that there is insufficient information to demonstrate that the importer knew or should have known that the exporter was selling merchandise at LTFV. In the petition, there is some evidence that the importer claimed that certain subject merchandise was a "low-price leader" in the U.S. market.³⁴ The petition also points out that average unit values (AUVs) of subject merchandise have decreased substantially "in interim 2019 as compared to the same period in 2018."³⁵ The AUV data contained in the petition is ultimately derived from data reported to U.S. Customs and Border Protection by the importer KT&G. While this information tends to indicate that the KT&G may have been selling subject merchandise at increasingly *low prices*, without further information we cannot determine that there is a reasonable basis to believe or suspect that importers knew, or should have known, that exporters were selling subject merchandise at *less than its fair value*.

For purposes of this investigation, Commerce preliminarily determines that the knowledge standard is not met because the preliminary estimated weighted-average dumping margin for KT&G, and for all other producers and exporters, is less than 15 percent and because other information on the record is insufficient to demonstrate that KT&G knew, or should have known, that it was selling merchandise at less than fair value. Accordingly, we preliminarily find that

³¹ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413, 17416 (March 26, 2012).

³² See Critical Circumstances Allegation at 5.

³³ See, e.g., *Carbon and Alloy Steel Wire Rod From Spain: Final Determination of Sales at Less Than Fair Value, and Final Determination of Critical Circumstances, in Part*, 83 FR 13233 (March 28, 2018), and accompanying Issues and Decision Memorandum at Section IV (declining to impute knowledge of dumping for CEP transactions with a margin of 11.08 percent).

³⁴ See Petitioner's Letter, "Petitions for the Imposition of Antidumping Duties Pursuant to Section 731 of the Tariff Act of 1930, As Amended (Vol. I: Common Issues and Injury Petition)," dated December 18, 2019 at Exhibit I-17 ("We entered the U.S. market with the introduction of Carnival in 1999. Later we introduced Timeless Time in 2010 as a low-price leader.")

³⁵ *Id.* at 9 and Exhibit I-5.

critical circumstances do not exist for KT&G or for all-other producers or exporters of 4th tier cigarettes from Korea.

Massive Imports of the Subject Merchandise over a Relatively Short Period

Although we preliminarily found that critical circumstances do not exist because the statutory criteria of section 733(e)(1)(A) of the Act have not been satisfied, we did examine whether imports from KT&G or all-other producers or exporters were massive over a relatively short period, pursuant to section 733(e)(1)(B) of the Act and 19 CFR 351.206(c)(2)(i).³⁶ After analyzing the data submitted by KT&G, we found that there was a “massive” increase in imports over a relatively short period of time.³⁷ However, we do not find that critical circumstances exist, even though there was a “massive” increase in imports, because the statutory criteria of section 733(e)(1)(A) of the Act are not met.

VII. DISCUSSION OF THE METHODOLOGY

Comparisons to Normal Value

Pursuant to section 773(a) of the Act and 19 CFR 351.414(c)(1) and (d), in order to determine whether KT&G’s sales of subject merchandise from Korea to the United States were made at LTFV, we compared the CEP to the normal value (NV), as described in the “Constructed Export Price” and “Normal Value” sections of this memorandum.

A. Determination of the Comparison Method

Pursuant to 19 CFR 351.414(c)(1), Commerce calculates weighted-average dumping margins by comparing weighted-average NVs to weighted-average CEPs, *i.e.*, the average-to-average method, unless the Secretary determines that another method is appropriate in a particular situation. In LTFV investigations, Commerce examines whether to compare weighted-average NVs with the CEPs of individual sales (*i.e.*, the average-to-transaction method), as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the Act.

In numerous investigations, Commerce applied a “differential pricing” analysis for determining whether application of the average-to-transaction method is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and section 777A(d)(1)(B) of the Act.³⁸ Commerce finds that the differential pricing analysis used in certain investigations may be instructive for purposes of examining whether to apply an alternative comparison method in this investigation. Commerce will continue to develop our approach in this area based on comments received in this and other proceedings, and Commerce’s additional experience with addressing the potential masking of

³⁶ See Memorandum, “‘Massive Imports’ Analysis” dated concurrently with this memorandum.

³⁷ *Id.*

³⁸ See, e.g., *Xanthan Gum from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013); see also *Steel Concrete Reinforcing Bar from Mexico: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 79 FR 54967 (September 15, 2014); or *Welded Line Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 80 FR 61362 (October 13, 2015).

dumping that can occur when Commerce uses the average-to-average method in calculating a respondent's weighted-average dumping margin.

The differential pricing analysis used in this preliminary determination examines whether there exists a pattern of CEPs for comparable merchandise that differ significantly among purchasers, regions, or time periods. The analysis evaluates all export sales by purchasers, regions, and time periods to determine whether a pattern of prices that differ significantly exists. If such a pattern is found, then the differential pricing analysis evaluates whether such differences can be taken into account when using the average-to-average method to calculate the weighted-average dumping margin. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. Purchasers are based on the reported consolidated customer codes. Regions are defined using the reported destination code, *i.e.*, zip code, and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the POI based upon the reported date of sale. For purposes of analyzing sales transactions by purchaser, region, and time period, comparable merchandise is defined using the product CONNUM and all characteristics of the U.S. sales, other than purchaser, region, and time period, that Commerce uses in making comparisons between CEP and NV for the individual dumping margins.

In the first stage of the differential pricing analysis used here, the "Cohen's *d* test" is applied. The Cohen's *d* coefficient is a generally recognized statistical measure of the extent of the difference between the mean, (*i.e.*, weighted-average price) of a test group and the mean, (*i.e.*, weighted-average price), of a comparison group. First, for comparable merchandise, the Cohen's *d* coefficient is calculated when the test and comparison groups of data for a particular purchaser, region, or time period each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen's *d* coefficient is used to evaluate the extent to which the prices to the particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen's *d* test: small, medium, or large (0.2, 0.5, and 0.8, respectively). Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the mean of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. For this analysis, the difference is considered significant, and the sales in the test group are found to pass the Cohen's *d* test, if the calculated Cohen's *d* coefficient is equal to or exceeds the large, (*i.e.*, 0.8), threshold.

Next, the "ratio test" assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method,

and application of the average-to-average method to those sales identified as not passing the Cohen's *d* test under the "mixed method." If 33 percent or less of the value of total sales passes the Cohen's *d* test, then the results of the Cohen's *d* test do not support consideration of an alternative to the average-to-average method.

If both tests in the first stage, (*i.e.*, the Cohen's *d* test and the ratio test), demonstrate the existence of a pattern of prices that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, Commerce examines whether using only the average-to-average method can appropriately account for such differences. In considering this question, Commerce tests whether using an alternative comparison method, based on the results of the Cohen's *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the average-to-average method only. If the difference between the two calculations is meaningful, then this demonstrates that the average-to-average method cannot account for differences such as those observed in this analysis, and, therefore, an alternative comparison method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if 1) there is a 25 percent relative change in the weighted-average dumping margins between the average-to-average method and the appropriate alternative method where both rates are above the *de minimis* threshold, or 2) the resulting weighted-average dumping margins between the average-to-average method and the appropriate alternative method move across the *de minimis* threshold.

Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in this preliminary determination, including arguments for modifying the group definitions used in this proceeding.³⁹

B. *Results of the Differential Pricing Analysis*

For KT&G, based on the results of the differential pricing analysis, Commerce preliminarily finds that 26.36 percent of the value of U.S. sales pass the Cohen's *d* test,⁴⁰ and, therefore, does not confirm the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods. Thus, the results of the Cohen's *d* and ratio tests do not support consideration of an alternative to the average-to-average method. Accordingly, Commerce preliminarily determines to apply the average-to-average method for all U.S. sales to calculate the weighted-average dumping margin for KT&G.

VIII. DATE OF SALE

Section 351.401(i) of Commerce's regulations states that, in identifying the date of sale of the subject merchandise or foreign like product, we normally will use the date of invoice, as

³⁹ The Court of Appeals for the Federal Circuit (CAFC) in *Apex Frozen Foods v. United States*, 862 F. 3d 1322 (Fed. Cir. July 12, 2017) affirmed much of our differential pricing methodology. We ask that interested parties present only arguments on issues which have not already been decided by the CAFC.

⁴⁰ See Memorandum, "Preliminary Analysis Memorandum for KT&G Corporation," dated concurrently with this memorandum (KT&G Preliminary Analysis Memorandum).

recorded in the exporter or producer's records kept in the ordinary course of business. Additionally, Commerce may use a date other than the date of invoice if it is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.⁴¹ Finally, we have a long-standing practice of finding that, where the shipment date precedes the invoice date, the shipment date better reflects the date on which the material terms of sale are established.⁴²

KT&G reported the invoice date as the date of sale in its home market and U.S. sales databases, as the date on which the material terms of sale are fixed.⁴³ In no instance did the shipment date precede the invoice date. Based on this information, and consistent with Commerce's practice,⁴⁴ we preliminarily determine that the invoice date is the most appropriate selection for the date of sale for sales in both the home and U.S. markets.

IX. PRODUCT COMPARISONS

In accordance with section 771(16) of the Act, we considered all products that KT&G produced and sold in Korea during the POI that fit the description in the "Scope of Investigation" section of the accompanying *Federal Register* notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales produced by KT&G. KT&G reported resales of the foreign like product in Korea; however, all of KT&G's sales in the U.S. sales database were sales of the subject merchandise produced by KT&G itself. Therefore, we have removed the sales of the foreign like product not produced by KT&G from the home market sales database.⁴⁵ We compared U.S. sales to sales of foreign like products made in the home market, where appropriate.⁴⁶ Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign-like product made in the ordinary course of trade.

In making product comparisons, we matched subject merchandise and foreign like products based on the physical characteristics reported by KT&G in the following order of importance: Tobacco Weight, Stick Dimensions, Filter, Tobacco Stems, Foil Features, and Flavor.

⁴¹ See 19 CFR 351.401(i); see also *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001) (quoting 19 CFR 351.401(i)).

⁴² See, e.g., *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52065 (September 12, 2007), and accompanying Issues and Decision Memorandum (IDM) at Comment 11; see also *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 FR 35497 (May 20, 2002), and accompanying IDM at Comment 2.

⁴³ See BQR at B-30 (with the exception of sale channel 2 for which Commerce granted an exclusion, and which are not included in the sales data) and CQR at C-16; see also SQRBC1 at 6 regarding "date of invoice detail."

⁴⁴ See *Narrow Woven Ribbons with Woven Selvedge from Taiwan; Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 60627 (October 7, 2015), and accompanying Preliminary Decision Memorandum at 9, unchanged in *Narrow Woven Ribbons with Woven Selvedge from Taiwan; Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 22578 (April 18, 2016).

⁴⁵ See KT&G's Preliminary Analysis Memorandum.

⁴⁶ See our discussion for KT&G in section XII, "Home Market Viability."

X. CONSTRUCTED EXPORT PRICE

KT&G classified all of its sales of subject merchandise to the United States as CEP sales because all such sales were invoiced and sold by its U.S. affiliate.⁴⁷ In accordance with section 772(b) of the Act, CEP is the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by, or for the account of, the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

We calculated CEP based on either an ex-warehouse basis or delivered prices to unaffiliated purchasers in the United States.⁴⁸ In accordance with 19 CFR 351.401(c), we adjusted the starting prices for rebates and other discounts, where appropriate. We made adjustments for movement expenses in accordance with section 772(c)(2)(A) of the Act, which included, where appropriate, foreign inland freight expenses, international freight expenses, marine insurance expenses, U.S. brokerage expenses, U.S. warehousing, U.S. inland freight from the warehouse to the unaffiliated customer, U.S. import duties, and federal excise taxes.⁴⁹

In accordance with section 772(d)(1) of the Act, we calculated CEP by deducting selling expenses associated with economic activities occurring in the United States, which included imputed credit expenses, indirect selling expenses, advertising expenses, U.S. domestic taxes other than federal excise taxes, and U.S. repacking expenses. In addition, pursuant to section 772(d)(3) of the Act, we made an adjustment for profit allocated to these expenses.⁵⁰

Duty Drawback

Section 772(c)(1)(B) of the Act states that CEP shall be increased by “the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States.” In determining whether a respondent is entitled to duty drawback, we look for a reasonable link between the duties imposed and those rebated or exempted. We do not require that the imported material be traced directly from importation through exportation. We do require, however, that the company meet our “two-pronged” test in order for this adjustment to be made to CEP. The first element is that the import duty and its rebate or exemption be directly linked to, and dependent upon, one another (or the exemption from import duties is linked to the exportation of subject merchandise). The second element is that the company must demonstrate that there were sufficient imports of the imported raw material to account for the duty drawback or exemption granted upon the export of the subject merchandise.⁵¹

⁴⁷ See CQR at 12.

⁴⁸ *Id.* at 19.

⁴⁹ See KT&G’s Preliminary Analysis Memorandum.

⁵⁰ *Id.*

⁵¹ See, e.g., *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1340-41 (Fed. Cir. 2011) (*Saha Thai*); see also *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 7513 (February 13, 2006), and accompanying IDM at Comment 2; *Certain Welded Carbon Steel Pipe and Tube from Turkey: Final Results of Antidumping Duty*

In this case, KT&G provided information to satisfy each of the two prongs.⁵² Because the respondent has satisfied the criteria described above, we have preliminarily granted duty drawback adjustments to KT&G, consistent with our practice.⁵³ Under this methodology, Commerce will make an upward adjustment to U.S. price based on the amount of the duty imposed on the input and rebated or not collected on the export of the subject merchandise by properly allocating the amount rebated or not collected to all production for the relevant period based on the cost of inputs during the POR.⁵⁴ This ensures that the amount added to both sides of the dumping calculations is equal, *i.e.*, duty neutral, meeting the purpose of the adjustment as affirmed in *Saha Thai*.⁵⁵

Based on the facts of this review, Commerce finds that the import duty costs, based on the consumption of imported inputs during the POR, properly accounts for the amount of duties imposed, as required by section 772(c)(1)(B) of the Act. We have added this per unit amount to the U.S. price.⁵⁶

XI. NORMAL VALUE

A. Home Market Viability

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, *i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales, we normally compare the respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with sections 773(a)(1)(A) and (B) of the Act. If we determine that no viable home market exists, we may, if appropriate, use a respondent's sales of the foreign like product to a third-country market as the basis for comparison market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404.

Administrative Review, 70 FR 73447 (December 12, 2005), and accompanying IDM at Comment 7; and *Federal-Mogul Corp. v. United States*, 862 F. Supp. 384, 410 (CIT 1994).

⁵² See KT&G CQR at 43-45 and Appendix C-18; SQRBC2 at 26-32 and Appendices SC-17, SC-18(a)-(g), and SC-19(a)-(d); SQRBC3 at Appendix SC-16(a); DQR at Appendix D-10; SQRD2 at 1-9 and Appendices SD-18(a)-(c), SD-19, SD-20(a)-(b), SD-21, SD-22, SD-23, SD-33, and SD-34.

⁵³ See, *e.g.*, *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 82 FR 23192 (May 22, 2017), and accompanying IDM at Comment 1.

⁵⁴ See *Certain Corrosion-Resistant Steel Products from India: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 63 (January 4, 2016), and accompanying Preliminary Decision Memorandum at 15.

⁵⁵ The CAFC stated in *Saha Thai* that "it is clear that Commerce only added imputed import duty costs to COP in an amount appropriate to offset Saha's actual import duty exemption under the bonded warehouse program. This did not result in double counting because Commerce merely added the cost of import duties that Saha would have paid on the inputs in category C if Saha had sold the subject merchandise in Thailand rather than exporting it to the United States. Commerce thus calculated an appropriate average COP." See *Saha Thai*, 635 F. 3d. at 1344.

⁵⁶ See KT&G Preliminary Analysis Memorandum.

As noted above in the Background section, pursuant to a limited reporting request by KT&G,⁵⁷ Commerce limited home market sales reporting requirements to two sales channels: (1) sales to corporate customers; and, (2) sales to retailers and expressway service stations. Additionally, to limit the number of home market sales, Commerce randomly selected one week in each month of the POI, and instructed KT&G to only report home market sales during the selected weeks. The selected weeks were October 1-7, 2018, November 1-7, 2018, December 9-15, 2018, January 20-26, 2019, February 10-16, 2019, March 10-16, 2019, April 14-20, 2019, May 1-7, 2019, June 9-15, 2019, July 14-20, 2019, August 4-10, 2019, and September 1-7, 2019.⁵⁸ Based on a comparison of these home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, we preliminarily determine that, pursuant to 19 CFR 351.404(b), the aggregate volume of these home market sales of the foreign like product for KT&G was sufficient to permit a proper comparison with the U.S. sales of the subject merchandise. Therefore, we used home market sales as the basis for NV for KT&G, in accordance with section 773(a)(1)(B)(i) of the Act.

B. *Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, we will calculate NV based on sales at the same level of trade (LOT) as the U.S. sales. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent).⁵⁹ Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.⁶⁰ In order to determine whether the comparison market sales are at different stages in the marketing process than the U.S. sales, we examine the distribution system in each market *i.e.*, the chain of distribution, including selling functions and class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison market sales (*i.e.*, NV based on either home market or third country prices),⁶¹ we consider the starting prices before any adjustments. For CEP sales we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act.⁶²

When we are unable to match sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, we may compare the U.S. sale to sales at a different LOT in the comparison market.⁶³ In comparing EP or CEP sales to sales at a different LOT in the

⁵⁷ See Limited Reporting Letter.

⁵⁸ *Id.*

⁵⁹ See 19 CFR 351.412(c)(2).

⁶⁰ *Id.*; see also *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010) (*OJ from Brazil*), and accompanying IDM at Comment 7.

⁶¹ Where NV is based on constructed value (CV), we determine the NV LOT based on the LOT of the sales from which we derive selling, general and administrative expenses, and profit for CV, where possible. See 19 CFR 351.412(c)(1).

⁶² See *Micron Tech., Inc. v. United States*, 243 F. 3d 1301, 1314-16 (Fed. Cir. 2001).

⁶³ See *Emulsion Styrene-Butadiene Rubber From Brazil: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 82 FR 33048 (July 19, 2017), and the

comparison market, where available data makes it possible, we make a LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability, *i.e.*, no LOT adjustment is possible, Commerce will grant a CEP offset, as provided in section 773(a)(7)(B) of the Act.⁶⁴

In this investigation, we obtained information from KT&G regarding the marketing stages involved in making reported comparison market and U.S. sales, including a description of the selling activities performed by KT&G for each channel of distribution.⁶⁵ Our LOT findings are summarized below.

As noted above in the Background section, Commerce limited the reporting of KT&G's home market sales to two channels of distribution: (1) sales to corporate customers and; (2) sales to retailers and expressway service stations. In these channels, KT&G reported that it performed certain selling functions at the same/similar level of intensity.⁶⁶ However, we found that KT&G did not support its claim that the two channels of distribution provided these selling functions equally. Rather, the record supports that the sales to retailers and expressway service stations are performed at a higher level of intensity than the sales to corporate customers. Due to the proprietary information used in our analysis, please refer to the KT&G Preliminary Analysis Memorandum,⁶⁷ for details regarding our analysis.

With respect to the U.S. market, KT&G reported that it made CEP sales through one channel of distribution, sales through its affiliate KT&G USA to unaffiliated customers.⁶⁸ Thus, we determine that KT&G sells at one LOT in the United States.

We compared the selling activities at the U.S. LOT with the selling activities at the home market LOT and found that the levels of trade in the U.S. and one home market sales channel, sales to corporate customers, were substantially similar, but that the home market LOT for sales to retailers and expressway service stations was at a higher LOT than the U.S. LOT. Due to the proprietary information used in our analysis, please refer to the KT&G Preliminary Analysis Memorandum,⁶⁹ for details regarding our analysis. Accordingly, we have compared KT&G's reported CEP sales to its home market sales to corporate customers for the preliminary determination. Based on our analysis, where we were unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the CEP, we have made an LOT adjustment according to section 773(a)(7)(A) of the Act.⁷⁰ Due to this LOT adjustment, a CEP offset pursuant to section 773(a)(7)(B) of the Act is not warranted.

accompanying IDM at Comment 1 (in which Commerce made an LOT adjustment where it was unable to match home market sales to distributors, to the CEP).

⁶⁴ See, e.g., *OJ from Brazil* IDM at Comment 7.

⁶⁵ See AQR at 29-32 and Appendix A-3-2; see also SQRA1 at 11-14.

⁶⁶ See AQR at Appendix A-3-2.

⁶⁷ See KT&G Preliminary Analysis Memorandum.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

C. Cost of Production Analysis

Pursuant to section 773(b)(2)(A) of the Act, Commerce required that respondents provide CV and cost of production (COP) information to determine if there were reasonable grounds to believe or suspect that sales of foreign like product had been made at prices that represented less than the COP of the product.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of costs of materials and fabrication for the foreign like product, plus amounts for general and administrative expenses and interest expenses.

We relied on the COP data submitted by KT&G.

2. Test of Comparison Market Sales Prices

On a product-specific basis, pursuant to section 773(b) of the Act, we compared the adjusted weighted-average COPs to the home market sales prices of the foreign like product, in order to determine whether the sales prices were below the COPs. For purposes of this comparison, we used COPs exclusive of selling and packing expenses. The prices were exclusive of any applicable billing adjustments, discounts and rebates, movement charges, actual direct and indirect selling expenses, and packing expenses.

3. Results of the COP Test

In determining whether to disregard home market sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether: (1) within an extended period of time, such sales were made in substantial quantities; and (2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with sections 773(b)(2)(B) and (C) of the Act, where less than 20 percent of the respondent's comparison market sales of a given product are at prices less than the COP, we do not disregard any below-cost sales of that product because we determine that in such instances the below-cost sales were not made within an extended period of time and in "substantial quantities." Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below-cost sales because: (1) they were made within an extended period of time in "substantial quantities," in accordance with sections 773(b)(2)(B) and (C) of the Act; and, (2) based on our comparison of prices to the weighted-average COPs for the POI, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

Where we found that, for certain products, more than 20 percent of KT&G's home market sales were made at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time, we excluded these sales and used the remaining sales, if any, as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

D. Calculation of NV Based on Comparison-Market Prices

We based NV for KT&G on comparison market delivered prices to unaffiliated customers where there were an appropriate number of sales at prices above the COP. Where appropriate, we made deductions from the starting price for inland freight expenses, warehousing expenses, and inland freight insurance under section 773(a)(6)(B)(ii) of the Act.

We deducted comparison-market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act. We made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale. Specifically, we deducted imputed credit, inventory carrying costs, certain direct selling expenses including Korean domestic taxes, and indirect selling expenses from the price.

When comparing U.S. sales with comparison-market sales of similar, but not identical, merchandise, we also made adjustments for differences in merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacturing for the foreign like products and merchandise under consideration.⁷¹

XII. CURRENCY CONVERSION

We made currency conversions into U.S. dollars in accordance with section 773A of the Act and 19 CFR 351.415(a), based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

XIII. RECOMMENDATION

We recommend applying the above methodology for this preliminary determination.

☒

Agree

☐

Disagree

7/15/2020

X



Signed by: JEFFREY KESSLER
Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

⁷¹ See 19 CFR 351.411(b).