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REM: LTFV Investigation
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RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND
Chang Chun Petrochemical Co. Ltd., v. United States
Consol. Court No. 11-00095, Slip Op. 13-49 (CIT April 10, 2013)

A. Summary

These final results of remand redetermination are prepared in accordance with the order of the U.S. Court of International Trade (the Court or CIT) in *Chang Chun Petrochemical Co. Ltd., v. United States*, Consol. Court No. 11-00095, Slip Op. 13-49 (CIT April 10, 2013) (*Remand Order*). The litigation involves challenges to the final determination of the U.S. Department of Commerce (the Department) in the antidumping investigation on polyvinyl alcohol from Taiwan. *See Polyvinyl Alcohol From Taiwan: Final Determination of Sales at Less Than Fair Value*, 76 FR 5562 (February 1, 2011) and accompanying Issues and Decision Memorandum (collectively *Final Determination*).

In accordance with the Court's order, the Department has provided an explanation, pursuant to 19 CFR 351.414(f)(1)(ii),[1] as to why the transaction-to-transaction method cannot account for the differences in the U.S. sales prices of Chang Chun Petrochemical Co. Ltd. (CCPC). Furthermore, the Department has reconsidered its position regarding the application of the average-to-transaction method to CCPC's sales because there is no meaningful difference between applying the average-to-average method and the average-to-transaction method when the

[1] This regulation was in effect at the time this investigation was initiated. We have since withdrawn this regulation. *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008).

average-to-transaction method is applied to only those sales found to be targeted pursuant to 19 CFR 351.414(f)(2) (2004).[2]

We released our draft results of remand redetermination to interested parties on May 23, 2013 (*Draft Remand*) and provided parties the opportunity to comment.[3] We received comments separately from CCPC and Sekisui Specialty Chemicals America LLC (the petitioner) on June 11, 2013.[4]

In the *Final Determination*, we determined a weighted-average dumping margin of 3.08 percent for CCPC. In these final results of remand redetermination, we determine a weighted-average dumping margin of 0.00 percent for CCPC.

B. Analysis

I. The Transaction-to-Transaction Comparison Method

In its *Remand Order*, the Court found that the *Final Determination* is not in accordance with law because it lacks an explanation regarding the insufficiency of using the transaction-to-transaction method in this investigation. For the following reasons, we find that use of the transaction-to-transaction method is inappropriate in this investigation.[5]

Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended (the Act), sets forth the general rule that the average-to-average method or the transaction-to-transaction method will be employed in antidumping investigations to calculate weighted-average dumping margins. Section 777A(d)(1)(B) of the Act sets forth the exception to this general rule, by which the Department may employ the average-to-transaction method if (1) there is a pattern of export

[2] Regulations referencing "(2004)" in the citation have since been withdrawn.
[3] *See* the Department's May 23, 2013 comment deadline letters to interested parties, and June 3, 2013 extension letter.
[4] *See* CCPC's brief dated June 11, 2013, and Sekisui's brief dated June 11, 2013 (Petitioner Brief).
[5] The Department did not include an analysis with respect to the use of the transaction-to-transaction method in the *Final Determination* because no party raised this issue.

prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time; and (2) the agency explains why such differences cannot be taken into account using the average-to-average method or the transaction-to-transaction method.

The Department's discretion to employ a preferred method is evidenced by the statute's use of the disjunctive term "or" in section 777A(d)(1)(B)(ii) of the Act, which signifies that the Department need only explain why one of the listed options (*i.e.*, the average-to-average method or the transaction-to-transaction method) cannot account for such differences. An interpretation of the statute by which the Department would be required to explain why neither the average-to-average nor the transaction-to-transaction methods could account for such differences would read into the statute's express terms a requirement that is not present (*i.e.*, "neither" and "nor").

In considering the express terms and objectives of the statute, we find instructive the SAA,[6] the *Preamble* to the Department's regulations,[7] the regulations, and the Department's previous experience using the transaction-to-transaction method in *Softwood Lumber*.[8] Pursuant to 19 CFR 351.414(c)(1) (2004), the transaction-to-transaction method will be employed only in "unusual situations." The *Preamble* to the regulations similarly provides that, "Congress did not contemplate broad application of the transaction-to-transaction method."[9] It then reiterates the

[6] *See* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 316, 103d Cong. 2d Session (1994), at 842-43.
[7] *See Antidumping Duties and Countervailing Duties*, 62 FR 27296 (May 19, 1997) (*Preamble*).
[8] *See Notice of Final Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 FR 22636 (May 2, 2005) (*Softwood Lumber*).
[9] *See Preamble*, 62 FR at 27374.

points articulated in the SAA and concludes that, "we continue to maintain that the transaction-to-transaction methodology should only be applied in unusual situations."[10]

The SAA explains that the Department will employ the transaction-to-transaction method "far less frequently" than the average-to-average method given the agency's "past experience with this methodology" and the "difficulty in selecting appropriate comparison transactions."[11] The SAA further elaborates that the transaction-to-transaction method would be appropriate where "there are very few sales and the merchandise sold in each market is identical or very similar or is custom made."[12]

Each of these sources makes clear that Congress intended that the Department would employ the transaction-to-transaction method in limited situations.[13] In this case, use of the transaction-to-transaction method is inappropriate because none of the unusual situations identified by Congress that warrant use of this method are present (*i.e.*, there are a substantial number of sales and the product is not "custom made").

The unique factual circumstances in *Softwood Lumber* that warranted use of the transaction-to-transaction method are also not present here. Specifically, in *Softwood Lumber*, the Department determined that use of the transaction-to-transaction method was appropriate because "among other things, the volatility of prices of subject merchandise and of the product sold in Canada during the {period of investigation} distinguishes this case from the norm."[14] The reason set forth in *Softwood Lumber* that warranted use of the transaction-to-transaction method – the volatility of prices – is not applicable to the instant proceeding because those

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[10] *Id*. at 27373-74.
[11] *See* SAA at 842-43.
[12] *Id*. at 842.
[13] *See Final Determination of Sales at Less than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 FR 60630 (October 25, 2007), and accompanying Issues and Decision Memorandum at Comments 5, 6.
[14] *See Softwood Lumber*, 70 FR at 22639.

circumstances are not present with respect to CCPC's sales.[15] Thus, we find that the *Softwood Lumber* case is distinguishable.

For these reasons, we find that use of the transaction-to-transaction method is inappropriate because none of the unique circumstances that warrant its use is present. As such, the Department considered whether the average-to-average method could account for the pattern of prices that differ significantly.

II. Application of the Limiting Clause

The Court ruled that the Department did not provide an explanation pursuant to the prior targeted dumping regulation as to why it departed from the "normal" application of an alternative method to only targeted sales. As a result, the Court remanded the *Final Determination* for the Department to provide a reasoned analysis or explanation, pursuant to 19 CFR 351.414(f)(2) (2004), as to why the specific circumstances of this case are such that the normal limitation on application of the average-to-transaction method is inappropriate to employ in this investigation.

The Court observed that the Department discussed two examples of what it did not consider "normal" situations that would allow for the application of the average-to-transaction method to all sales when it promulgated the targeted dumping regulation.[16] First, when "targeted dumping by a firm is so pervasive that the average-to-transaction method becomes the best benchmark for gauging the fairness of that firm's pricing practices,"[17] and second, when "the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company."[18] The Court found that these two examples formed the Department's policy for applying the average-to-transaction

[15] *Id*.
[16] *Remand Order* at 25.
[17] *See Antidumping Duties; Countervailing Duties*, 61 FR 7308, 7350 (February 27, 1996).
[18] *See Preamble*, 62 FR at 27375.

method to all U.S. sales under the regulations in place at the time the investigation was initiated.[19] Thus, in applying 19 CFR 351.414(f)(2) (2004), the Department would apply the average-to-transaction method to all sales when it was impracticable to segregate the targeted sales or when the targeting was extensive.

On remand, we find that it is neither impracticable to segregate CCPC's targeted sales nor that the targeting by CCPC was extensive. Because of the proprietary nature of this analysis, for further discussion *see* the memorandum to the file entitled "Analysis Memorandum for Draft Results of Redetermination (Consol. Court No 11-00095) for Chang Chun Petrochemical Co. Ltd. (CCPC) in the Antidumping Duty Investigation of Polyvinyl Alcohol From Taiwan" dated May 22, 2013 (CCPC Analysis Memo). Moreover, we can discern no other distinguishing facts or features of CCPC's U.S. sales (targeted or otherwise) such that the "normal" limitation of applying the average-to-transaction method to only CCPC's targeted sales is inappropriate. Therefore, in accordance with the regulatory language applicable to this investigation,[20] we have limited the application of the average-to-transaction method to only CCPC's targeted sales and recalculated CCPC's weighted-average dumping margin.

C. Comments

The petitioner argues that the Department should apply the average-to-transaction method to all of CCPC's U.S. sales for this remand redetermination, as was done in the *Final Determination*. It states that the Department's decision to apply the average-to-transaction method to only the targeted sales is an inappropriate and "abrupt about-face" with no "reasoned

[19] *Remand Order* at 25.
[20] *See supra* note 1 (explaining that the targeted dumping regulation applicable in this case has subsequently been withdrawn).

explanation" for such a change in methodology.[21] The petitioner explains that the Department's policy at the time of the initiation of the LTFV investigation provided two exceptions to 19 CFR 351.414(f)(2) (2004): 1) when "targeted dumping by a firm is so pervasive that the average-to-transaction method becomes the best benchmark for gauging the fairness of that firm's pricing practices," and 2) when "the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company."[22] The petitioner claims that had the Department performed its analysis correctly, it should have found that both of these exceptions were satisfied, and that the Department should, therefore, have concluded that the "normal" limitations of the average-to-transaction method were not appropriate, consistent with the Department's practice at that time.

The petitioner states that the Department incorrectly quantified the amount of the targeted sales and understated the extent and impact of the targeted sales. The petitioner further claims that if the Department had correctly quantified the amount of the targeted sales, then it would have found it "impracticable to segregate {CCPC's} targeted sales" and that "the targeting was extensive."[23] For these reasons, the petitioner contends, the Department should follow its policy in effect at the time of the initiation of the LTFV investigation and find that limiting the application of the average-to-transaction method to targeted sales is inappropriate for this remand redetermination.

Regarding the results of the targeted dumping analysis, the petitioner explains that the Department based its analysis on only a "sample" of sales to the allegedly targeted groups which

[21] *See* Petitioner Brief at 3 (citing *In re Sang Su Lee*, 277 F.3d 1338 (Fed. Cir. 2002), and *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).
[22] *See Remand Order* at 25.
[23] *See* Petitioner Brief at 4.

was limited to the sales of products (*i.e.*, defined by the reported product control numbers or "CONNUM") for which the same product was also sold to allegedly non-targeted groups. The petitioner agrees with the Department's use of a "sample" of allegedly targeted sales because, pursuant to *Nails from the PRC*,[24] this "sample" of sales represents a substantial portion of CCPC's sales to the allegedly targeted groups. However, the petitioner argues, the Department's treatment of this "sample" as the universe of potentially targeted sales is unjustified. Specifically, the petitioner asserts that while it is appropriate to use a "sample" of the targeted sales to determine whether a particular purchaser, region or time period has been targeted, for the final results of this remand redetermination, the Department should find targeted all sales made to such purchasers, regions and time periods which were found to have been targeted based on the "sample." Further, the petitioner argues, for products sold to the allegedly targeted groups for which the same products were not also sold to non-targeted groups, the Department should base its analysis on sales of similar products to the non-targeted groups. If the Department alters its calculation accordingly, the petitioner claims, it will find that targeting by purchaser and time period during the period of investigation was so extensive and widespread that it is impracticable to segregate CCPC's targeted sales and, therefore, that the application of the average-to-transaction method to all sales is appropriate.

CCPC states that it agrees with the Department's decision in the *Draft Remand* to apply the average-to-transaction method only to those sales found to be targeted.

[24] *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008) (*Nails from the PRC*).

D. Department's Position

We disagree with the petitioner. As an initial matter, the Department did not make an "abrupt about face" when it changed its calculation of CCPC's weighted-average dumping margin in the *Draft Remand*. The Court directed the Department to provide a reasoned explanation for departing from the "normal" application of the average-to-transaction method to only the targeted sales. The Department, in this remand redetermination, has found that it is neither impracticable to segregate CCPC's targeted sales nor that the targeting by CCPC was extensive, and we could discern no other distinguishing facts or features of CCPC's U.S. sales (targeted or otherwise) such that the "normal" limitation of applying the average-to-transaction method to only CCPC's targeted sales is inappropriate.

The foundation of the petitioner's argument is its apparent assumption that all sales to the allegedly targeted customer and time periods are targeted. This is factually incorrect. This can be seen from the results of the SAS program we used for the *Draft Remand*. For example, the SAS program output shows that substantially less than 100 percent of sales to the allegedly targeted customer which we were able to test (*i.e.*, which were sales of products that were also sold to non-targeted customers) were targeted.[25] The SAS program output also shows that substantially less than 100 percent of sales to the allegedly targeted time periods which we were able to test (*i.e.*, which were sales of products that were also sold to non-targeted time periods) were targeted.[26] Thus, the petitioner's argument is based on a flawed premise.

For the following discussion, "tested sales" refers to sales to the alleged target for which we found sales of the identical products to groups that are not alleged to be targeted (*i.e.*, sales which we were able to test). Conversely, "non-tested sales" refers to sales to the alleged target

[25] *See* the program output attached to the CCPC Analysis Memo at 11-12.
[26] *Id.* at 25-26.

for which there were no sales of the identical products to groups that are not alleged to be targeted (*i.e.*, sales which we were not able to test).

To assist in analyzing the petitioner's claims, we modified the *Draft Remand* SAS program to determine the volume of non-tested sales. Specifically, we added steps to demonstrate the: 1) volume of tested sales which we found to be targeted; 2) volume of tested sales which we found not to be targeted based on comparisons to sales of the identical product to groups that are not alleged to be targeted; 3) volume of non-tested sales; and 4) volume of sales to purchasers, regions, or time periods that are not alleged to be targeted.

We found that a substantial proportion of tested sales was not targeted.[27] Moreover, we found that, even if one assumes that all non-tested sales were targeted, the targeted sales were neither extensive nor widespread such as to warrant the use of the average-to-transaction method for all of CCPC's U.S. sales.[28] Accordingly, consistent with the *Draft Remand*, we find no basis to apply the average-to-transaction method to all sales.

Also consistent with the *Draft Remand*, we find that application of the alternative average-to-transaction method for only targeted sales results in a *de minimis* weighted-average dumping margin for CCPC. Accordingly, upon further consideration and in a change from the *Draft Remand*, we find no reason in this case to depart from the standard average-to-average method which results in a zero weighted-average dumping margin for CCPC.[29] Thus, although

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[27] *See* the memorandum dated July 15, 2013, entitled "Analysis Memorandum for Results of Redetermination (Consol. Court No 11-00095) for Chang Chun Petrochemical Co. Ltd. (CCPC) in the Antidumping Duty Investigation of Polyvinyl Alcohol From Taiwan" at 2-3.

[28] *Id*.

[29] *See* 19 U.S.C. 1677f-1(d)(1)(B); *see, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico***,** 76 FR 67688, 67691-92 (Nov. 2, 2011) (applying the average-to-transaction method to LGEMM's sales because the average-to-average methodology concealed differences in the pattern of prices and the alternative methodology yielded a material difference in the margin), revised in *Notice of Final Determination of Sales at Less than Fair Value and Affirmative Critical Circumstances*

the Department continues to find targeted sales constituting a pattern of prices that differ significantly among purchasers and periods of time, the Department has applied the standard average-to-average method in these final results of remand redetermination to calculate CCPC's weighted-average dumping margin because the standard average-to-average method does not fail to account for such differences.

D. Results of Redetermination

In accordance with the CIT's *Remand Order*, the Department has provided an explanation why the transaction-to-transaction method is not appropriate to use in this investigation, and has reconsidered its findings regarding the application of the average-to-transaction method to all sales as an alternative to the standard average-to-average method. Based on these changes, the Department has determined that there is no meaningful difference between the results of the standard and alternative methods in this case. Accordingly, the Department has recalculated CCPC's weighted-average dumping margin by applying the standard average-to-average method. The recalculated weighted-average dumping margin for CCPC in this antidumping investigation is 0.00 percent.

Ronald K Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

July 12, 2013

Date

Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico, 77 FR 17422, 17424 (March 26, 2012), and accompanying Issues and Decision Memorandum at Issue 1 (applying the average-to-average method to LGEMM's sales because, after revising the U.S. sales data based on verification findings, there was no meaningful difference in the resulting margin when applying the standard method or the alternative method).