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Final Results of Redetermination Pursuant to Court Remand
Purified Carboxymethycellulose from Finland
CP Kelco Oy and CP Kelco US, Inc. v. United States
Court No. 13-00079, Slip Op. 14-42 (CIT April 15, 2014)

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A. Summary

The Department of Commerce (the Department) prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT or the Court) in *CP Kelco Oy and CP Kelco US, Inc. v. United States*, Court No. 13-00079, Slip Op. 14-42 (April 15, 2014) (*Opinion and Remand Order*). These final remand results concern the final results of the administrative review of the antidumping duty order on purified carboxymethylcellulose from Finland covering the period of review July 1, 2010 through June 30, 2011.[1] CP Kelco Oy and CP Kelco US, Inc. (together, CP Kelco) challenged various aspects of the Department's analysis for determining whether there is a pattern of export prices or constructed export prices that differ significantly among purchasers, regions, or periods of time. The Court remanded one aspect of the Department's analysis: the lack of an established threshold under which the proportion of sales found to be targeted is insufficient to qualify as a pattern of prices which differ significantly (*i.e.*, a *de minimis* or sufficiency test).[2]

The Court's *Opinion and Remand Order* directed the Department to "define the *de minimis* test's function (*i.e.*, does the test identify a pattern of prices which differ significantly,

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[1] *See Purified Carboxymethylcellulose from Finland: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 11817 (February 20, 2013) (*Final Results*), and the accompanying Issues and Decision Memorandum (IDM).
[2] *See Opinion and Remand Order* at 20-21.

does it guide the agency's discretion to apply {the average-to-transaction (A-to-T) comparison method}, or both?)."[3] Further, the Court held that the Department "must outline the quantitative data, qualitative variables, or other information it considers when determining whether an exporter's targeted sales fall above or below the *de minimis* threshold."[4] The Department must apply this sufficiency, or "*de minimis*," threshold to find whether CP Kelco's targeted sales "pass or fail the *de minimis* test."[5]

In the *Opinion and Remand Order*, the Court allowed the Department 90 days, or until July 14, 2014, to issue its final redetermination.[6] On July 7, 2014, the Court granted the Department an additional extension until August 13, 2014, to issue its final redetermination. On August 11, 2014, the Court granted the Department an additional extension of time to issue its final redetermination until September 10, 2014. Also on August 11, 2014, the Department released to all parties a draft of its determination on remand (Draft Redetermination). We set a deadline of August 18, 2014, for parties to comment on the Draft Redetermination. We received timely comments from CP Kelco on August 18, 2014.[7]

As explained below, the Department's Remand Redetermination complies with the Court's directives set forth in the *Opinion and Remand Order,* and explains the bases for the Department's determination.

[3] *Id.* at 20-21.
[4] *Id.* at 21.
[5] *Id.*
[6] *Id.* At 22.
[7] *See* Letter from CP Kelco, dated August 18, 2014, regarding "Purified Carboxymethylcellulose from Finland; *Comments on Draft Results of Redetermination Pursuant to Court Remand*" (CP Kelco's August 18, 2014, Comments).

B. Remand Issue: The Sufficiency or "*De Minimis*" Test

1. Relevant Legal Framework

Section 771(35)(A) of the Tariff Act of 1930, as amended ("the Act") defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The definition of "dumping margin" calls for a comparison of normal value and export price or constructed export price. Before making the comparison called for, it is necessary to determine how to make the comparison. Section 777A(d)(1) of the Act and 19 CFR 351.414(b) describe three methods by which the Department may compare normal value and export price (or constructed export price) and places certain restrictions on the Department's selection of an appropriate comparison method in investigations. The Act places no such restrictions on the Department's selection of an appropriate comparison method in administrative reviews.

Section 351.414 of the Department's regulations describes three comparison methods by which normal value may be compared to export price or constructed export price in administrative reviews: average-to-average (A-to-A), transaction-to-transaction (T-to-T), and A-to-T. Comparisons between export price (or constructed export price) and normal value are made for each export transaction to the United States when using all three comparison methods. When using the T-to-T or A-to-T methods, the price of the export transaction to the United States used is a transaction-specific export price (or constructed export price). When using the A-to-A method, an average price is calculated for each group of comparable export transactions for which the export prices or constructed export prices have been averaged together (*i.e.*, for each averaging group). This average price is then used in the comparisons to normal value for each export transaction to the United States within the averaging group. Section 351.414(c)(1)

of the Department's regulations fills the silence in the statute on the choice of comparison method in the context of administrative reviews. In particular, the Department has determined that in both investigations and administrative reviews, the average-to-average method will be used "unless the Secretary determines another method is appropriate in a particular case."

In the *Final Results*, the Department found that the statute is silent with regards to the application of an alternative comparison method in administrative reviews.[8] The Department found that the provision governing less-than-fair-value investigations, section 777A(d)(1)(B) of the Act, is instructive. Section 777A(d)(1)(B) of the Act provides:

> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if:
>
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

In its *Opinion and Remand Order*, the Court agreed that the statute is silent concerning the application of an analysis as to whether an alternative method is appropriate in the context of an administrative review.[9]

2. The Department's Analysis to Determine Whether There Exists a Pattern of Prices That Differ Significantly

In the *Final Results*, the Department applied an analysis adopted in *Nails*.[10] The *Nails* test involves a two-step process, as described below. In the first step of the *Nails* test, the

[8] *See Final Results* and IDM at Issue 1.
[9] *See Opinion and Remand Order* at 12.

"standard deviation test," the Department determined the volume of the allegedly targeted group's (*i.e.*, a purchaser, region, or time period) sales of subject merchandise that are at prices more than one standard deviation below the weighted-average price of all sales under review, targeted and non-targeted. Standard deviations are calculated on a product-specific basis by the product control number (CONNUM). If more than thirty-three percent of the sales to an allegedly targeted group are at least one standard deviation below the average price of all reviewed sales, then the Department moves to the second stage of the *Nails* test.

In the second stage, the "gap test," the Department examined all sales sold to the allegedly targeted group which passed the first stage. From those sales, it determined the total volume of sales for which the difference between the weighted-average price of sales for the allegedly targeted group and the next higher weighted average price of sales for a non-targeted group exceeds the average price gap (weighted by sales volume) between the non-targeted groups. The Department weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted group's sales were not included in the non-targeted groups; the allegedly targeted group's weighted-average price was compared only to the weighted-average prices for the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then the Department determined that targeting occurred and that these sales passed the *Nails* test.

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[10] *See Final Results* and IDM at Issue 2; *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*) and *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value*, 73 FR 33985 (June 16, 2008) (*Nails from the United Arab Emirates*) (collectively, *Nails*); *see also Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1376 (CIT 2010).

If the Department determined that the volume of the sales that passed the *Nails* test accounted for a sufficient proportion of the total sales volume of subject merchandise, then the Department considered whether the average-to-average method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using the A-to-T method. Where there is a meaningful difference between the results of the average-to-average method and the A-to-T method, the A-to-A method would not be able to take into account the observed price differences, and the A-to-T method would be used to calculate the weighted-average dumping margin for the respondent in question. Where there is not a meaningful difference in the results, the average-to-average method would be able to take into account the observed price differences, and the average-to-average method would be used to calculate the weighted-average dumping margin for the respondent in question.

In the *Final Results*, the Department determined that a pattern of export prices or constructed export prices that differ significantly among purchasers and time periods exists.[11] Specifically, the Department found that [ ] percent of CP Kelco's sales, by quantity, and [ ] percent, by value, passed the *Nails* test, and, thus, were targeted, and therefore satisfied the requirement under section 777A(d)(1)(B)(i) of the Act.[12]

Next, the Department calculated weighted-average dumping margins for CP Kelco using both the standard A-to-A method and the alternative A-to-T method. The Department compared the results of applying these two comparison methods, and found that the average-to-average

[11] *See Final Results* and IDM at Issue 2.
[12] Memorandum from Tyler Weinhold to The File, "Final Results of the 2010-2011 Administrative Review of Purified Carboxymethylcellulose (CMC) from Finland: Analysis of Data Submitted by CP Kelco Oy and CP Kelco U.S. Inc. (collectively, CP Kelco)," dated February 28, 2011 (*Final Analysis Memorandum*) at 2 and Attachment 7.

method could not take into account such differences.[13] In accordance with section 351.414(c)(1) of the Department's regulations, the Department calculated the weighted-average dumping margin for CP Kelco using the A-to-T method.[14]

The Court affirmed the Department's use of its *Nails* test, both in general, and as applied in the *Final Results*.[15] The Court noted that the *Nails* test has been upheld previously, in *Mid Continent Nail*, and held that the *Nails* test is "based on substantial evidence and not arbitrary."[16] Further, the Court held that CP Kelco had not demonstrated that the Department, in applying the *Nails* test in the *Final Results*, made any specific conclusions that were unsupported by evidence or logic. The Court thus concluded that the Department's decision to use the *Nails* test was based on substantial evidence and in accordance with law.[17]

3. The Sufficiency or "*De Minimis*" Test

During the administrative proceeding, CP Kelco argued that the Department should have found that the percentage of CP Kelco's sales which passed the *Nails* test was "*de minimis*," such that an alternative comparison method should not be applied.[18] In the *Final Results*, the Department rejected this argument, noting that "the percentage of sales by quantity which was found to be targeted in this case is far too high to be considered *de minimis*, and so CP Kelco's argument is not relevant in the context of this case."[19]

The Court held that the Department's "use of the *de minimis* test" was arbitrary.[20] The Court held that the Department found CP Kelco's targeted sales to be more than a sufficient volume, but did not explain the meaning of a *de minimis* or sufficient volume. As to CP Kelco's

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[13] *Id*.
[14] *Id.* at 2.
[15] *See Opinion and Remand Order* at 14-17.
[16] *Id.* at 14-15, citing *Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d at 1377-79 (*Mid Continent Nail)*.
[17] *Id*. at 17.
[18] *See Final Results* and IDM at Issue 2.
[19] *Id*.
[20] *See Opinion and Remand Order*, at 17.

argument that the Department should have offered some definition of a sufficient or *de minimis* volume of sales before finding that its sales exceeded this threshold, the Court agreed.[21] The Court stated that agency decisions are arbitrary if they cannot "be ascribed to . . . the product of agency expertise."[22] Further, the Court stated that "administrative decisions are similarly invalid if they fail to state 'the basis on which the {agency} exercised its expert discretion.'"[23] The Court held that the Department's sufficiency test "founders under either of these standards."[24]

The Court found that the Department never explained what purpose the sufficiency test serves in the statutory scheme.[25] The Court noted that under section 777A(d)(1)(B)(i) of the Act, the Department may apply the A-to-T method in investigations if an exporter's sales constitute "a pattern of export prices" differing significantly among purchasers, regions, or time periods. The Court posited three possible interpretations of this statutory provision: (1) that the sufficiency test could serve as part of the *Nails* inquiry in investigations and reviews, signaling whether targeted sales are voluminous enough to form a "pattern" of significantly differing prices as described in the statute; (2) that the sufficiency test could guide the Department's discretion when deciding whether to apply the A-to-T method, having already found, using the *Nails* test, that such a "pattern" exists; or (3) both.[26] With regard to the second interpretation, the court found that the statute does not compel the Department to apply the A-to-T method to exporters who made targeted sales, but states that the Department "may determine" to use the A-to-T method when deciding whether such exporters made sales at less-than-fair value.[27]

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[21] *Id.*, at 18.
[22] *Id.*, quoting *Motor Vehicle Manu. Ass'n v. State Farm Mutual Auto. Insur. Co.*, 463 U.S. 29, 43 (1983).
[23] *Id.*, quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962); *see also Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 314 F.3d 1373, 1380-81 (Fed. Cir. 2003) (remanding where agency did not articulate rationale for statutory interpretation).
[24] *Id.*
[25] *Id.*, at 18-19.
[26] *Id.*, at 19.
[27] *Id.*, citing section 777A(d)(1)(B) of the Act.

The Court held that the Department "must outline the quantitative data, qualitative variables, or other information it considers when determining whether an exporter's targeted sales fall above or below a sufficiency or *de minimis* threshold."[28] The Department must apply such a threshold to find whether CP Kelco's targeted sales "pass or fail the *de minimis* test."[29]

C. Analysis

1. The Purpose of the Sufficiency Test

With regard to the three possible interpretations provided by the Court, the Department finds that the sufficiency test evaluates the results of the *Nails* test to determine whether the requirement under section 777A(d)(1)(B)(i) of the Act has been satisfied in a particular case. The Department considers that section 777A(d)(B)(i) of Act, by itself, provides ample authority for the Department to implement this provision with the application of the sufficiency test. In addition, section 777A(d)(1)(B) of the Act would support the use of the sufficiency test as discretion provided by Congress because the statute provides that the Department "may determine" whether sales were made at less-than-fair-value using the alternative A-to-T method when subsections (i) and (ii) of this provision are met.

The Department examines the results of the *Nails* test overall using the sufficiency test to determine whether section 777A(d)(1)(B)(i) of the Act is satisfied. In other words, simply because one or more sales for a given CONNUM pass the *Nails* test, it does not necessarily follow that, considered in relation to the total volume of the respondent's export sales, the results of the *Nails* test are sufficient to determine that there exists a pattern of prices that differ significantly by purchaser, region or period of time. This approach has been considered part of the Department's decision making process since the Department withdrew the targeted dumping

[28] *Id.* at 21.
[29] *Id.*

regulations[30] and began applying the alternative A-to-T method to all U.S. sales[31] rather than to only those sales which passed the *Nails* test (*i.e.*, the "limiting" rule of 19 CFR 351.414(f)(2) (1997)). This approach was determinative in the Department's investigation of *OBAs from Taiwan*,[32] where the Department stated:

> we found that the overall proportion of {respondent}'s U.S. sales during the POI that satisfy the criteria of section 777A(d)(1)(B)(i) of the Act was insufficient to establish a pattern of export prices for comparable merchandise that differ significantly among certain customers or regions. Accordingly, the Department determined that the criteria established in 777A(d)(1)(B)(i) of the Act had not been met and applied the average-to-average methodology to all sales.[33]

Subsequently, in *AFBs from France, Germany and Italy*,[34] the Department also determined not to apply an alternative comparison method because the proportion of U.S. sales that passed the *Nails* test was insufficient to consider whether the A-to-A method could take such differences into account. In describing the targeted dumping analysis, the Department stated:

> As explained in the Post-Preliminary Analysis, if the Department determined that a sufficient volume of U.S. sales were found to have passed the *Nails* Test, then the Department considered whether the A-A method could take into account the observed price differences."[35]

In describing the final results for each respondent in these reviews, the Department stated:

> We continue to find, for each respondent, that a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers,

[30] *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008) (*2008 Withdrawal*).

[31] *See Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010) (the first investigation completed after the *2008 Withdrawal* in which an alternative comparsion method (*i.e.*, the A-to-T method applied to all U.S. sales) was applied to calculate the weighted-average dumping margin for TCI Plastic Co., Ltd.).

[32] *See Certain Stilbenic Optical Brightening Agents From Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027 (March 23, 2012), and the accompanying Issues and Decision Memorandum (*OBAs from Taiwan*).

[33] *Id.* at 77 FR 17028.

[34] *See Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011,* 77 FR 73415 (December 10, 2012) and the accompanying Issues and Decision Memorandum (*AFBs from France, Germany and Italy*).

[35] *AFBs from France, Germany and Italy*, Issues and Decision Memorandum at 13.

> regions, or time periods does not exist and, therefore, the Department has not considered whether the A-A method can account for the observed price differences.[36]

Subsequently, in *TRBs from the PRC*,[37] the "{p}etitioner argue{d} that the Department's past practice is to consider any sales which pass the *Nails* test to constitute a pattern. Therefore, any sales which pass the *Nails* test should be considered a sufficient volume, including the results found in the postpreliminary analysis,"[38] while citing to the Department's determinations in *Nails from the United Arab Emirates,* as modified in *Wood Flooring from the PRC*.[39] The Department repeated this same approach with regards to the targeted dumping analysis as it had in the previous determination by first describing the framework of the targeted dumping analysis, stating:

> As explained in the post-preliminary analysis, if the Department determined that a sufficient volume of U.S. sales were found to have passed the *Nails* test, then the Department considered whether the A-to-A method could take into account the observed price differences.[40]

As for the Department's finding with regards to respondent CPZ, the Department further stated

> We continue to find that a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or time periods does not exist and, therefore, the Department has not considered whether the A-to-A method can account for the observed price differences.[41]

The Department has followed this same approach in a number of other final results of review since considering whether the standard A-to-A method was the appropriate comparison method pursuant to 19 CFR 351.414(c)(1): *Circular Welded Carbon Steel Pipes and Tubes From Turkey; Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 77 FR

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[36] *AFBs from France, Germany and Italy*, Issues and Decision Memorandum at 10.
[37] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 3396 (January 16, 2013) and the accompanying Issues and Decision Memorandum (*TRBs from the PRC*).
[38] *TRBs from the PRC*, Issues and Decision Memorandum at 3.
[39] *See Multilayered Wood Flooring.from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (October 18, 2011).
[40] *See TRBs from the PRC*, Issues and Decision Memorandum at 11.
[41] *Id.* at 7.

72818 (December 6, 2012) (*CWP from Turkey*); *Seamless Refined Copper Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35244 (June 12, 2013); *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35248 (June 12, 2013) (*CWP from Korea*); *Certain Pasta From Italy: Notice of Final Results of 15th Antidumping Duty Administrative Review, Final No Shipment Determination and Revocation of Order, in Part; 2010-2011*, 78 FR 9364 (February 8, 2013); *Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Administrative Review of the Antidumping Duty Order; 2010-2011*, 78 FR 9670 (February 11, 2013); *Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea; Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 78 FR 16247 (March 14, 2013) (*CORE from Korea*); *Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination; 2011-2012*, 78 FR 42492 (July 16, 2013) (*Shrimp from India*); *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2011-2012*, 78 FR 56211 (September 12, 2013). For each of the identified respondents in these reviews, the Department found sales passing the *Nails* test, yet it did not consider whether the A-to-A method was inappropriate because the volume of such sales was insufficient.

On the other hand, there have been several final results of reviews, in addition to the review in question here, where once the Department has found sales that have passed the *Nails* test and it has also determined that these sales are sufficient in volume to consider whether the A-to-A method could account for such differences, it has applied an alternative comparison method: *Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review,*

2010-2011, 77 FR 73013 (December 7, 2012); *CWP from Turkey*[42]; *CWP from Korea*; *Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35245 (June 12, 2013); *Purified Carboxymethylcellulose From Finland: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 11817 (February 20, 2013); *Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 9668 (February 11, 2013); *CORE from Korea*; *Shrimp from India*; *Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 29700 (May 21, 2013).[43] For each of the relevant respondents in these reviews, the Department found that a sufficient volume of sales passed the *Nails* test, considered whether the A-to-A method was the appropriate comparison method, found that the A-to-A method could not account for such differences, and accordingly determined to use the A-to-T method to calculate the weighted-average dumping margin for the respondents in question.

As noted above, and as the Court recognized,[44] Congress has also provided that, even when the circumstances described in section 777A(d)(1)(B)(i) and (ii) of the Act are present, the Department "may determine" whether sales were made at less-than-fair-value using the alternative A-to-T method. Thus, Congress again reinforced the idea that the alternative A-to-T method is not required under a precise set of facts, and that the Department has discretion to decide when to apply this alternative. When this statutory provision is read as a whole, it is clear that there is no statutory mandate to apply the alternative A-to-T method under any particular circumstances. Instead, the Department determines, pursuant to 19 CFR 351.414(c)(1) and

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[42] *See also Borusan Mannesman v. United States*, No. 13-00001, Slip Op. 14-71 (CIT 2014).
[43] *See also JBF RAK LLC v. United States*, No. 13-00211, Slip Op. 14-78 (CIT 2014).
[44] *See Opinion and Remand Order* at 19.

section 777A(d) of the Act, based on the evidence on the record for each segment of a proceeding, whether the A-to-A method is the appropriate tool by which to evaluate a respondent's pricing behavior and to measure what amount of dumping, if any, has occurred during the period of investigation or review. 19 CFR 351.414(c)(1) states that "the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case" and section 777A(d)(1)(B) provides that the Department "may determine whether the subject merchandise is being sold in the United States at less than fair value" using the A-to-T method when the requirements under subsections (i) and (ii) have been satisfied. Thus, Congress has also provided the Department with discretion to use, or not to use, the alternative A-to-T method once the statutory criteria have been satisfied.

Even if these two requirements provided for under section 777A(d)(1)(B)(i) and (ii) of the Act are satisfied, the Department is not required to deviate from the standard A-to-A comparison method if it is found appropriate. This was expounded in the Department's final results of review in *AFBs from France, Germany and Italy*:

> Further, as noted above, section 777A(d)(1)(B) of the Act states that the Department "may" determine whether to use the A-T method to calculate the weighted-average dumping margin if the two criteria, (i) and (ii), are satisfied. Therefore, even if both prongs are met, the statute does not obligate the Department to use the A-T method, or any alternative method, to calculate the weighted-average dumping margin.[45]

The CIT recognized this principle in *Timken I,*[46] where it stated that it "will treat the sufficiency determination as part of Commerce's exercise of its discretionary authority basd on the word 'may.'"[47] This same statement was repeated in *TRBs from the PRC*,[48] and was also

[45] *AFBs from France, Germany and Italy*, Issues and Decision Memorandum at 14.
[46] *See The Timken Co. v. United States*, 968 F. Supp. 2d 1279 (CIT 2014) (*Timken I*).
[47] *Timken I* at 13-14.
[48] *See TRBs from the PRC*, Issues and Decision Memorandum at 12.

subsequently affirmed by the CIT in *Timken II*[49] in upholding the Department's determination not to consider an alternative comparison method when it had also found that some of the respondent's U.S. sales had passed the *Nails* test and were found to have been targeted.

The above discussion demonstrates that the Department has applied a consistent, appropriate and non-arbitrary practice in its application of its targeted dumping analysis in administrative reviews. This includes consideration of the sufficiency test both as part of its determination whether the requirement under section 777A(d)(1)(B)(i) has been satisfied, and as part of the exercise of its discretion to apply an alternative comparison method.

2. Sufficient Volume of Sales

The Department previously stated it would not identify a sufficiency threshold, but, rather, would consider various factors on a case-by-case basis.[50] However, the Court held that the Department must outline the proportion of sales which it finds sufficient, or a so called "*de minimis*" threshold, on remand.[51] We have determined that a five percent of sales by quantity threshold is reasonable in light of the thresholds applied in the *Nails* test and elsewhere in the antidumping law.

The Department has relied upon the five percent threshold with respect to another aspect of its targeted dumping analysis, *i.e.*, the percentage of sales passing the gap test.[52] The CIT held that the *Nails* test does not violate the statute and is not otherwise arbitrary and capricious.[53] In its *Opinion and Remand Order*, the Court affirmed the use of a five percent threshold in the price

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[49] See *The Timken Co. v. United States*, No. 13-00069, Slip Op. 14-51 (CIT 2014) (*Timken II*).
[50] *See Carbon and Certain Alloy Steel Wire Rod From Mexico: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 28190 (May 14, 2013), and accompanying decision memorandum at Comment 3; *see also Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews).
[51] *See Opinion and Remand Order* at 21.
[52] *See Final Results* and IDM at Issue 2.
[53] *See Mid Continent Nail*, 712 F. Supp. 2d at 1378.

gap test.[54] Further, in *Mid Continent Nail*, the CIT noted that five percent tests have been used to measure significance for antidumping purposes in other contexts.[55] Therefore, we find that the most appropriate metric for the sufficient volume of sales passing the *Nails* test is five percent, by quantity, of all U.S. sales.

3. Application of the Sufficiency Test as Defined in the Remand Redetermination to CP Kelco's Sales That Pass the *Nails* Test

With regard to CP Kelco in the *Final Results*, the proportion of CP Kelco's U.S. sales that passed the *Nails* test is [ ] percent by quantity.[56] Application of the sufficiency threshold of five percent, by quantity, to CP Kelco in these final results of redetermination demonstrates that the extent that CP Kelco's sales have been found to pass the *Nails* test and considered to be targeted is sufficient to fulfill the requirement under section 777A(d)(1)(B)(i) of the Act, and to consider whether the average-to-average method can account for the observed price differences. Based upon this definition of an appropriate sufficiency threshold of targeted sales of five percent, and the application of this threshold to the proportion of CP Kelco's sales found to be targeted, and the finding that there is a meaningful difference in the weighted-average dumping margins calculated using the standard average-to-average method and the alternative A-to-T method, we have continued to apply the A-to-T method to calculate CP Kelco's weighted-average dumping margin.

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[54] *See Opinion and Remand Order* at 14-5.
[55] *Id.* (citing section 773(a)(1)(B)(ii)(II) of the Act (using five percent test to determine home market viability); section 773(a)(1)(C) of the Act (using five percent test to determine third-country market viability); 19 CFR 351.403(d) (using five percent test to determine whether to calculate normal value based on the sale by an affiliated party).
[56] *See Final Analysis Memorandum,* and *Opinion and Remand Order*.

D. Analysis of Comments Received

Comment 1: Factors Considered by the Department When Determining If a Respondent's U.S. Sales Satisfy the Sufficiency Threshold

CP Kelco argues that our adoption of a five percent sufficiency threshold is unsupported by substantial record evidence, not otherwise in accordance with law, and not supported by adequate reasoning.[57] With regard to our statements in the Draft Redetermination referencing the five percent threshold contained in the *Nails* test, CP Kelco states: "As the threshold to satisfy these two considerations, the Department 'relied upon the five percent threshold with respect to another aspect of its targeted dumping analysis, *i.e.*, the percentage of sales passing the gap test'."[58] CP Kelco elaborates: "The {Draft Redetermination} provides no explanation as to why the five percent threshold used in the 'gap test' has any relevance in determining the existence of 'a pattern. . .'."[59] However, CP Kelco does acknowledge that the Draft Redetermination explains that a "'five percent' test is used to determine home market viability, to determine third-country market viability, and to determine whether to calculate normal value based on the sale by an affiliated party."[60] CP Kelco also contends that we provided no explanation as to how those applications of a five percent threshold inform the Department's finding that a five percent threshold is reasonable to establish the existence of targeted dumping. Finally, CP Kelco notes that the only test contemplated by the statute to evaluate whether sales should be included or excluded from a margin calculation is the sales-below-cost test, for which Congress determined a 20 percent threshold.[61]

[57] *See* CP Kelco's August 18, 2014, Comments at 2-4 and 6.
[58] *Id.* at 2-3
[59] *Id.* at 3
[60] *Id.*
[61] *Id.* at 3-4.

Department's Position:

CP Kelco's interpretation, that the Department settled on a five percent threshold merely because it also used a five percent threshold in the gap test or other instances, is a misreading of our explanation in the Draft Redetermination. To the contrary, the Department did not base its five percent threshold solely upon the fact that this same number has been also used in the gap test or in any other context. As our Draft Redetermination shows, we simply cited the existence of other instances where we had used the same five percent threshold figure, including the gap test, where we had been affirmed in doing so by the CIT.

Rather, to comply with the Court's order, we arrived at a five percent threshold based on the Department's increasing experience of addressing masked dumping using the targeted dumping analysis, including the *Nails* test, and our developing practice in other case-by-case decisions in which the sufficiency test played a substantive role. Moreover, there is statutory precedence for the use of five percent in other contexts to determine that the contemplated behavior does not rise to a level where it should be considered by the Department. For example, a five percent threshold is used in order to determine whether the aggregate quantity of sales in a home market is viable,[62] to determine if the quantity of sales in a third-country market are viable,[63] or when the Department is deciding whether to calculate normal value based on the sales by an affiliated party.[64] We settled upon five percent because we determined that this is a reasonable threshold, among many possibilities, for use as the threshold in the sufficiency test, and because there is some precedence for the use of five percent in other contexts. Accordingly, our use of five percent is reasonable, and not arbitrary.

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[62] *See* Section 773(a)(1)(B)(ii)(II) of the Act.
[63] *See* Section 773(a)(1)(C) of the Act.
[64] *See* 19 CFR 351.403(d).

Moreover, CP Kelco's attempt at equating the sufficiency test to the sales-below-cost test is flawed. As an initial matter, the statute also provides a two percent threshold for determining whether a weighted average dumping margin in a less-than-fair-value investigation is *de minimis*.[65] Therefore, the fact that statute provides for a 20 percent threshold for the sales-below-cost test is, in itself, unpersuasive. CP Kelco's argument that the Department should select the 20 percent threshold because it is used for another test ignores the fact that the Department based its definition of the threshold for the sufficiency test on the Department's experience and developing practice, and not solely because the five percent threshold is used in other contexts. Moreover, sales which "fail" the sales-below-cost test are disregarded from normal value.[66] No sales are disregarded under the sufficiency test. Rather, the sufficiency test guides the Department in identifying an appropriate comparison methodology by which to calculate a respondent's weighted average dumping margin. Further, CP Kelco's implication that the 20 percent threshold for the sales-below-cost test is more authoritative because Congress specified this value in the statute, is unavailing, because Congress also specified a threshold value of five percent when considering whether a home market[67] or third country market[68] is viable as a basis for calculating comparable normal values. Finally, because the 20 percent threshold is used in a less-comparable circumstance than the uses of a five percent threshold, CP Kelco's objections to a five percent threshold (*e.g.*, alleged lack of relevance, alleged inability to inform the Department's findings) can be much more readily and compellingly applied to a 20 percent threshold. Yet, on the premise that the selected threshold has certain unavoidable imperfections, CP Kelco seeks to substitute an even less suitable alternative.

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[65] *See* Section 733(b)(3) of the Act.
[66] *See* Section 773(b)(1) of the Act.
[67] *See* Section 773(a)(1)(B)(ii)(II) of the Act.
[68] *See* Section 773(a)(1)(C) of the Act.

Comment 2: "Meaningful Difference" in CP Kelco's Weighted-Average Dumping Margin

CP Kelco argues that we failed to explain our finding of a meaningful difference in CP Kelco's weighted-average dumping margins. CP Kelco insists that the Draft Redetermination points to no substantial record evidence or rationale to support its finding that CP Kelco's allegedly targeted sales make any meaningful difference in CP Kelco's margin calculation. CP Kelco speculates that the Department may have intended to use its new five percent threshold, or some other threshold, to determine whether there was a meaningful difference.[69]

Department's Position:

The Department concludes that the issue of a meaningful difference in CP Kelco's weighted-average dumping margins is not part of the remand order. The Department's meaningful difference finding addresses the requirement under section 777A(d)(1)(B)(ii) of the Act, which requires the Department to explain why such differences cannot be taken into account using the A-to-A or T-to-T method. The remand order directed the Department to apply the sufficiency test as defined in this Remand Redetermination to CP Kelco's *Final Results* and to recalculate CP Kelco's weighted-average dumping margin in accordance with the results of that test.[70] The Department's definition of the sufficiency test in this Remand Redetermination has not changed the outcome of the sufficiency test from the *Final Results*. Therefore, our "meaningful difference" determination from the *Final Results* has not changed.[71]

D. <u>Final Results of Redetermination</u>

We implemented all changes discussed above. As a result of this remand redetermination, CP Kelco's weighted-average dumping margin has not changed. Upon a final and conclusive decision in this litigation, the Department will instruct U.S. Customs and Border

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[69] *Id.* At 4-5.
[70] *See Opinion and Remand Order* at 22.
[71] *See Final Results* and IDM at 10; *see also* Calculation Memorandum at 2.

Protection to liquidate CP Kelco's entries for this period of review consistent with these final results of redetermination.

Ronald K. Lorentzen

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Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

September 19, 2014

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Date