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VIA HAND DELIVERY

The Honorable Carlos M. Gutierrez
Secretary of Commerce
U.S. Department of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street & Constitution Avenue, NW
Washington, D.C. 20230

Re: Targeted Dumping in Antidumping Investigations: Response to Request for Public Comments

Dear Secretary Gutierrez:

These public comments are filed on behalf of Hansol Paper Co., Ltd., POSCO, and Samsung Electronics Co., Ltd. in response to the Department's recent request for comments on the appropriate methodology for determining whether targeted dumping is occurring in antidumping investigations. *See Targeted Dumping in Antidumping Investigations: Request for Comment*, 72 Fed. Reg. 60651 (Oct. 25, 2007) ("*Request for Comments*"). Each of the above-named companies is a major Korean and multinational corporation that, in recent years, has participated in the Department's antidumping proceedings and has extensive experience with

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antidumping methodologies. In accordance with the Department's instructions, we are submitting an original and six copies of these comments and are simultaneously transmitting an electronic version via e-mail to the Department's webmaster. This submission contains no business proprietary information.

I. INTRODUCTION

In order for the Department to find that targeted dumping has occurred during the period of investigation, the antidumping statute and regulations require it to find:

- (1) a *pattern* of U.S. prices (i.e., export prices or constructed export prices) for comparable merchandise that differ *significantly* among purchasers, regions, or periods of time; and
- (2) the Department cannot take into account such significant price differences using either the average-to-average or the transaction-to-transaction comparison methods.

19 U.S.C. § 1677f-1(d)(1)(B); 19 C.F.R. § 351.414(f)(1). With regard to the first factor, the Department's regulations further require that the pattern of significant price differences be demonstrated "through the use of, among other things, *standard and appropriate statistical techniques.*" 19 C.F.R. § 351.414(f)(1)(i) (emphasis added).

In the preamble to its regulations, the Department explained that it intended "to employ common statistical methods in its targeted dumping determinations in order to ensure that the test is applied on a consistent basis and in a manner that ensures transparency and predictability to all parties concerned." *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27295, 27374 (May 19, 1997) ("*Preamble to Final Regulations*"). The Department subsequently developed evidentiary requirements and testing procedures for analyzing a targeted dumping

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allegation in the context of a remand determination arising out of the Department's antidumping duty investigation of *Certain Pasta from Italy*. See *Borden, Inc. et al. v. United States*, 4 F. Supp. 2d 1221, 1231 (Ct. Int'l Trade 1998), *aff'd* on remand, 23 C.I.T. 372, 373 (1999) (citing Case No. A-475-818, *Redetermination on Remand; Final Determination of Sales at Less than Fair Value; Certain Pasta from Italy*, Aug. 28, 1998 ("Pasta Remand Redetermination")).¹ The Department explained to the U.S. Court of International Trade ("CIT") that it had developed general standards by which it could evaluate targeted dumping petitions. *Id.* In fact, The *Pasta Test* was carefully designed to incorporate all of the relevant elements of the statute so that it could serve as the basis for evaluating similar types of allegations in the future.

Since the *Pasta Remand Determination*, the Department did not consider any allegations of targeted dumping until a recent antidumping investigation involving *Coated Free Sheet Paper from the Republic of Korea*. See 72 Fed. Reg. 60630 (Oct. 25, 2007) ("*Coated Free Sheet Paper*"). In the *Coated Free Sheet Paper* investigation, the Department declined to use the previously developed *Pasta Test* and instead accepted a far less rigorous approach proffered by the petitioner in that case, which resulted in the Department's acceptance of a targeted dumping allegation for the first time. *Id.*, Issues and Decision Memorandum at Comment 2.² In doing so,

¹ Throughout these comments, we refer to the Department's evidentiary requirements and statistical testing procedures for targeted dumping allegations from the *Pasta Remand Determination* as the "*Pasta Test*." For the Department's reference, **Attachment 1** contains a copy of the *Pasta Test*. See Case No. A-475-818 (Investigation Remand), Memorandum to the File, "Remand on Pasta from Italy; Delverde Revised Targeted Dumping Remand Procedures," Aug. 20, 1998. **Attachment 2** contains a copy of the *Pasta Remand Determination*.

² Prior to *Coated Free Sheet Paper*, the Department rejected each targeted dumping allegation that it had received for failing to satisfy the statutory and regulatory requirements. See *Stainless Steel Wire Rod from Taiwan*, 63 Fed. Reg. 10836, 10837 (Mar. 5, 1998) (preliminary determination) ("*SSWR from Taiwan*"); *Fresh Tomatoes*

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however, the Department explained that it was not “endorsing the petitioner’s test standards and procedures as a general practice” and that it intended to seek public comments on the targeted dumping methodology to be employed in future investigations.

The Department is now soliciting these public comments on three specific aspects of the methodology that it will employ in future antidumping investigations to determine whether targeted dumping is occurring:

- (1) the standards and methods that should be used to show whether a “pattern” of price differences exists among different purchasers, regions, or periods of time;
- (2) the threshold, if any, for showing that price differences are “significant”; and
- (3) the “standard and appropriate statistical techniques” that should be used to evaluate whether targeted dumping exists.

Request for Comments, 72 Fed. Reg. at 60651.³

For the reasons described below, Hansol, POSCO, and Samsung submit that the Department should use the *Pasta Test*’s evidentiary thresholds and statistical testing procedures to evaluate targeted dumping allegations made in future antidumping investigations. The Department created the *Pasta Test* as a means of objectively analyzing whether patterns of price

from Mexico, 61 Fed. Reg. 56608, 56610 (Nov. 1, 1996) (preliminary determination); *Certain Pasta from Italy*, 61 Fed. Reg. 30326, 30329 (June 14, 1996) (final determination); *Polyvinyl Alcohol from Taiwan*, 61 Fed. Reg. 14064, 14065 (Mar. 29, 1996) (final determination); *Certain Pasta from Turkey*, 61 Fed. Reg. 1351, 1353 (Jan. 19, 1996) (preliminary determination).

³ The Department’s *Request for Comments* did not seek comments on how the Department should determine whether to make average-to-average or transaction-to-transaction comparisons in antidumping investigations, or how it should evaluate whether the selected comparison method can take into account price differences that may exist among different purchasers, regions, or time periods. Accordingly, we do not address these issues here. For the record, however, we strongly urge the Department to continue using the average-to-average comparison method as its preferred method in all future investigations and decline to use the transaction-to-transaction method except in the most unusual cases, consistent with 19 C.F.R. § 351.414(c)(1) and its longstanding practice.

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differences exist among different purchasers, regions, or time periods, and whether such price differences are statistically “significant.” Moreover, the Department intentionally structured the *Pasta Test* so that it could be easily modified to fit the facts of any future investigations, and thus it is unnecessary for the Department to create wholesale new statistical testing procedures. However, if the Department decides to craft a new targeted dumping methodology, then we request that the Department do so in a manner that is neutral and rigorous so that the targeted dumping provisions do not become a means of unduly penalizing respondents in future antidumping investigations.

II. THE PASTA TEST IS CONSISTENT WITH THE TARGETED DUMPING PROVISIONS UNDER THE ANTIDUMPING STATUTE AND THE DEPARTMENT’S REGULATIONS

In the *Coated Free Sheet Paper* investigation, the Department did not apply its previously articulated *Pasta Test* to evaluate the targeted dumping allegations, claiming that the *Pasta Test* had been developed specifically for the *Pasta Remand Determination* and that it did not have any subsequent experience with analyzing targeted dumping. *Coated Free Sheet Paper, supra*, Issues and Decision Memorandum at Comment 2. However, as described below, the standards and thresholds from the Department’s *Pasta Test* fairly and completely embody the statutory and regulatory requirements for evaluating targeted dumping allegations. Accordingly, the *Pasta Test* can and should form the basis of a standardized practice to be applied in future antidumping investigations.

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A. The Department Intended to Apply the *Pasta Test* in Future Antidumping Investigations

In the preamble to its regulations, the Department explained that it intended “to employ common statistical methods in its targeted dumping determinations in order to ensure that the test is applied on a consistent basis and in a manner that ensures transparency and predictability to all parties concerned.” *Preamble to Final Regulations*, 62 Fed. Reg. at 27374. Subsequent to the promulgation of the final regulations, the Department articulated statistical methods in the context of the appeal arising out of *Certain Pasta from Italy*. Specifically, in the context of that appeal, the CIT reminded the Department that it was obligated “to articulate the standards by which it would determine that a ‘pattern of export prices’ that ‘differ significantly’ did or did not exist.” *Borden*, 4 F. Supp. 2d at 1229. The CIT then held that:

To facilitate future inquiries, Commerce will need at some point to explain what targeted dumping is, what methods will identify or rule out the pricing patterns referred to by the statute, what degree of significance in those patterns will trigger Commerce to exercise its discretion to make a case-by-case determination to depart from its normal methodology, and on what basis it will make that decision. For example, regarding the significance of the pattern, bearing in mind that Congress intended a case-by-case analysis with reference to variations in price sensitivity by industry, SAA at 843, Commerce might suggest a calculus which relates pricing patterns with price elasticity.

Id. It then charged the Department to either “articulate the standards by which it evaluates a domestic industry’s targeted dumping petitions, in general or for only this case.” *Id.* The Department then developed the *Pasta Test* and presented it to the CIT as part of the *Pasta Remand Determination*.

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In *Coated Free Sheet Paper*, the Department attempted to walk away from its *Pasta Test* by characterizing it as having been developed specifically and only for the *Pasta Remand Determination*. However, a close review of the *Pasta Remand Determination* clearly demonstrates that the Department intended for its *Pasta Test* to serve as the foundation for evaluating all future targeted dumping allegations, albeit with case-specific modifications where appropriate. Specifically, in the *Borden* remand instructions, the CIT “required that Commerce either articulate standards by which it would evaluate a targeted dumping petition or, if not yet prepared to do so, that Commerce conduct its own analysis of the data to determine whether to calculate dumping margins for Delverde using transaction-specific rather than weighted-average prices.” *Borden*, 23 C.I.T. at 373. In reviewing the *Pasta Remand Determination*, the CIT observed that the Department “chose to articulate the standards by which it would evaluate a targeted dumping petition, explicitly noting that the methodology developed for this case might vary in the future.” *Id.* (emphasis added). In other words, the Department represented that it had developed general standards by which it would evaluate targeted dumping petitions, rather than case-specific standards for the pasta investigation.

Indeed, when the Department responded to interested party comments on its draft remand results, the Department explained that it had applied two series of tests to perform its targeted dumping analysis with respect to respondent Delverde, but that it “{did} not intend to perform the second series of tests in future cases.” See *Pasta Remand Determination* at 21, 22. The clear implication of that statement is that the Department *did* intend to perform the first series of tests developed in the *Pasta Remand Determination* in future cases. Similarly, with respect to the

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Pasta Test's 20 percent threshold for identifying the targeted group, the Department stated that it "finds it necessary to set out a threshold that must generally be met by petitioners alleging targeted dumping," again signaling that the procedures were general in nature and that petitioners in future cases would be required to follow them. *Id.* at 19.

The foregoing establishes that, although the Department reserved the discretion to refine specific elements of the *Pasta Test* in future cases, it indisputably intended to use the overall methodology as the starting point for evaluating future targeted dumping allegations. The Department merely caveated that the *Pasta Test* "might vary" in future cases, meaning that the test might be modified or refined depending on the circumstances of future cases, but did not indicate that the test "might be abandoned entirely" subsequent to the *Pasta Remand Determination*. The Department's decision to walk away from the *Pasta Test* in *Coated Free Sheet Paper* seriously undermined the consistency, transparency, and predictability that it sought to achieve through the promulgation of the general standards in the *Pasta Remand Determination*. The Department, therefore, should reaffirm that its *Pasta Test* will serve as the standard test for all future antidumping investigations.

B. The *Pasta Test* Utilizes "Standard and Appropriate Statistical Techniques"

The Department's regulations require that "standard and appropriate statistical techniques" must be used when evaluating whether a pattern of significant price differences exists among purchasers, regions, or time periods. 19 C.F.R. § 351.414(f)(1)(i). The Department specified relevant statistical techniques in the context of the *Pasta Remand Determination*, which the CIT described as follows:

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Commerce defined price difference as a separation in price,⁴ defining price as gross unit prices less adjustments for movement charges, discounts, rebates, and post-sale price adjustments. Accordingly, if targeting had occurred, the allegedly targeted purchaser would receive a lower average price than each allegedly non-targeted purchaser, and that price difference would not be attributable to non-targeting factors such as product type, level of trade, time of sale, or terms/conditions of sale.

Commerce defined two ways it would identify price differences significant enough to trigger a targeted dumping investigation. First, to avoid the illogical conclusion that the majority of purchasers were targeted, the price to the allegedly targeted purchaser must be in the lowest 20 percent of all average transaction prices. Second, to determine what magnitude of price differences is significant for the market at hand, Commerce requires that the price separation between allegedly targeted and non-targeted customers must be equal to or greater than the maximum price separation within the non-targeted group, unless a party shows the exporter's data to be non-representative of the industry as a whole.

Commerce also defined which significant price differences would qualify as a pattern. Specifically, {Commerce} would recognize a pattern of significant price differences if i) they existed, on average, over all relevant time periods and for all products sold by the exporter to the allegedly targeted customer or customers, and ii) average transaction prices exhibited a "downward skewness" with respect to allegedly targeted customers. Commerce noted, in response to comments from the parties, that the department would relax its standards if a party could show that the allegedly targeted purchasers comprised a well-defined group, such as those who buy for a niche market or those who recently changed suppliers due to price-undercutting.

Borden, 23 C.I.T. at 373-74.

The Department's *Pasta Test* undisputedly relies on "standard and appropriate statistical techniques," as required by the regulations. Specifically, the *Pasta Test* involves a "difference-in-means" test, or a "price mean" comparison, by which it segregates the relevant U.S. sales

⁴ The Department defined a "separation in price" as existing when an "alleged targeted customer receives a lower average price than each alleged non-targeted customer" and such price differences are not attributable to other factors such as product type, levels of trade, time of sale, or terms and conditions of sale. *Pasta Remand Determination* at 16.

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database into two groups and then performs statistical tests on the average prices within each group. Through multiple statistical techniques embodied in a SAS computer program, the *Pasta Test* identifies potentially targeted customers, regions, or time periods that are in the bottom 20 percent of the rank-ordered prices (i.e., “frequently at the bottom”) based on the calculated price differences.⁵ The Department’s computer program then evaluates whether the price differences are “significant” and whether they constitute a “pattern.” Therefore, the *Pasta Test* carefully avoids predetermining the outcome by examining all transactions for patterns and significant price differences using various statistical tests.

The Department’s SAS computer program can be modified easily to fit the facts of future cases, as the Department itself recognized in the *Pasta Remand Determination* (at 15-16).⁶ That is, the Department carefully constructed the *Pasta Test* to embody the statutory and regulatory factors that the Department is required to analyze – i.e., whether a “pattern” of “significant” price differences actually exist among different purchasers, regions, or time periods. Although certain aspects of the *Pasta Test* were tailored to the facts of that case, the statistical testing procedures developed were predominantly general in nature, mutually exclusive of the characteristics of the

⁵ The Department intentionally limited the potentially targeted group to those in the bottom 20 percent of average transaction prices “to avoid the illogical conclusion that the majority of purchasers were targeted.” *Borden*, 23 C.I.T. at 373. Even if the Department does not use the *Pasta Test* in future antidumping investigations, it must still ensure that the alleged targeted group does not exceed 20 percent of all transactions so that petitioners do not unreasonably overstate the degree of the alleged targeting.

⁶ In *Coated Free Sheet Paper*, Hansol submitted for the Department’s review a version of the *Pasta Test* that was modified slightly to fit the facts of that investigation, but the Department did not consider it. Nevertheless, Hansol demonstrated that the *Pasta Test*’s computer programming language, which was developed in the context of a purchaser-based allegation, could be tailored easily to fit a regional targeting allegation and the characteristics of the databases submitted in another investigation.

