SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.

WASHINGTON, D.C. 20005-2111
———
TEL: (202) 371-7000

FAX: (202) 393-5760

www.skadden.com

FIRM/AFFILIATE OFFICES
———
BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
SAN FRANCISCO
WILMINGTON
———
BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO
VIENNA

June 23, 2008

Total Pages: 28

PUBLIC DOCUMENT

BY HAND DELIVERY AND E-MAIL
David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

> Re: Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations

Dear Assistant Secretary Spooner:

On behalf of United States Steel Corporation ("U.S. Steel"), we hereby respond to the

May 9, 2008 request for comments issued by the Department of Commerce (the "Department")

on the issue of targeted dumping.[1] Specifically, the Department asked for comments concerning

its proposed methodology for determining whether targeted dumping exists (the "Proposed

Methodology").[2] In addition, the Department requested comments regarding other issues related

---

[1] *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 Fed. Reg. 26371 (Dep't Commerce May 9, 2008) (request for comments) ("*Request for Comments*"). Although comments in response to the Department's request were originally due on June 9, 2008, the Department extended the deadline for such comments to June 23, 2008.

[2] *Id.*

to targeted dumping.[3] In particular, the Department asked for comments concerning the criteria

and standards to be used in defining "region" and "time period" for purposes of targeted dumping,

the methodology by which the Department should address multiple allegations of targeted

dumping made with respect to one respondent, the standards that the Department should adopt

for accepting an allegation of targeted dumping, and the criteria as to when the Department

should apply the targeted dumping methodology – *i.e.*, the average-to-transaction method for

calculating a respondent's dumping margin – to all sales by the respondent to the targeted entity.[4]

As discussed more fully below, the Proposed Methodology imposes a standard for

finding targeted dumping that is unlawful because it splits the statutory standard for targeted

dumping of a pattern of significant price differences into two separate and distinct tests – one for

pattern and a separate one for significance. In addition, the Proposed Methodology is

fundamentally flawed in that it is impermissibly a function of factors that are irrelevant under the

statute as to the question of whether targeted dumping has occurred. Accordingly, the

Department should *not* adopt the Proposed Methodology. Rather, the Department should use the

"preponderance at 2 percent" ("P/2") test that the Department employed in *Coated Free Sheet*

Paper from Korea to determine whether a respondent has engaged in targeted dumping.[5]

As also demonstrated below, the Department's determinations of the regions and time

periods to be used in the context of targeted dumping should be made on a case-by-case basis

with assistance from the domestic industry. The parameters of the separate regions and time

---

[3] *Id.*

[4] *Id.*

[5] Issues and Decision Memorandum in *Coated Free Sheet Paper from the Republic of Korea*,
72 Fed. Reg. 60630 (Dep't Commerce Oct. 25, 2007) (final determ.) at Comment 1.

periods relevant to the targeted dumping analysis will be a function of the specific industry being examined. Therefore, no general definition of region or time period should be used by the Department.

The Department should also accept allegations that a respondent has engaged in targeted dumping based on any combination of customer, region or time period. Regarding the threshold for the Department to accept an allegation of targeted dumping, the Department should not apply a standard that imposes any additional requirements on petitioners. Rather, the Department should accept allegations of targeted dumping that may not completely fulfill the requirements articulated by the Department for a finding of targeted dumping on the grounds that additional factual information uncovered during the investigation may cause the Department to find that targeted dumping has, in fact, occurred. Finally, when the Department determines that a respondent has engaged in targeted dumping, the Department should, at a minimum, apply the targeted dumping methodology to all sales by the respondent to the targeted entity. Furthermore, when the Department cannot determine the full extent of the respondent's targeted dumping or when the respondent's targeted dumping equals or exceeds 20 percent of its U.S. sales by quantity, the Department should apply the targeted dumping methodology to all of the respondent's sales.

I.   **The Department's Proposed Methodology Is Unlawful and Fatally Flawed**

A.   **Overview of the Governing Law and Legislative History**

Under Section 777A(D)(1)(B)(i) of the Tariff Act of 1930, as amended (the "Act"), the Department must find that there is a pattern of prices for comparable merchandise that differ

significantly in order to establish targeted dumping.[6] The Statement of Administrative Action

("SAA") accompanying the Uruguay Round Agreements Act further provides that the

Department is to find targeted dumping where there is a "pattern *of* significant price

differences."[7] Thus, under both the statute and the corresponding legislative history, pattern and

significance are intertwined such that there is one requirement to establish targeted dumping – a

pattern of significant price differences between the targeted and non-targeted entities. However,

as shown below, the Proposed Methodology impermissibly separates pattern and significance.

Indeed, in both *Certain Steel Nails from the United Arab Emirates*, 73 Fed. Reg. 33985 (Dep't

Commerce June 16, 2008) (final determ.) ("*Nails*") and *Certain Steel Nails from the People's

Republic of China*, 73 Fed. Reg. 33977 (Dep't Commerce June 16, 2008) (final determ.), the

Department highlighted the fact that the Proposed Methodology separates pattern and

significance.[8] As a result, the Proposed Methodology clearly violates the statute.

**B.   The Proposed Methodology Impermissibly Separates Pattern and
          Significance**

The Proposed Methodology consists of two separately administered tests, both of which

must be met for the Department to find targeted dumping.[9] In the first test, the Department

---

[6]   19 U.S.C. § 1677f-1(d)(1)(B)(i) (2000); 19 C.F.R. § 351.414(f)(1)(i) (2008).

[7]   H.R. Rep. No. 103-316 at 843, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4178 (emphasis added).

[8]   *See, e.g.,* Issues and Decision Memorandum in *Nails* at Comment 8 ("{w}e disagree with the
      petitioners that the P/2 test is more accurate and reliable than the new targeted dumping
      methodology. The P/2 test *collapses the pattern and significant difference requirements,
      which are analyzed separately under our {Proposed Methodology}*.") (emphasis added).

[9]   *Request for Comments*, 73 Fed. Reg. at 26372.

determines the share of the targeted customer's[10] purchases of subject merchandise from the

respondent that are at prices more than one standard deviation below the weighted-average price

of all the respondent's comparable sales.[11] If this share exceeds 33 percent of the total value of

the respondent's sales of subject merchandise to the targeted customer, then the first test is

satisfied.[12] According to the Department, if the first test is met, then a pattern has been

established.[13]

When the first test is satisfied, the Department conducts yet another test. In this second

test, the Department examines the aforementioned sales to the targeted customer that were at

prices more than one standard deviation below the weighted-average price of all the respondent's

comparable sales.[14] Using the sales in question to the targeted customer, the Department

determines the total sales value for which the difference between the average price to the

targeted customer and the next higher average price to a non-targeted customer exceeds the

average price gap for sales to the non-targeted group. If this total sales value exceeds 5 percent

of the total value of sales of subject merchandise to the targeted customer, than the second test is

satisfied.[15] According to the Department, if the second test is satisfied, then significance is

established. Consequently, the Department would find that targeted dumping has occurred.

---

[10] For consistency with the *Request for Comments*, U.S. Steel is using customer-specific examples. Targeted dumping may also, of course, be found with respect to regions or periods of time. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2000); 19 C.F.R. § 351.414(f)(1)(i) (2008).

[11] *Request for Comments*, 73 Fed. Reg. at 26372.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

The Proposed Methodology is improper and, in fact, unlawful and should not be adopted by the Department. Indeed, the multiple, cumulative tests imposed by the Proposed Methodology for a finding of targeted dumping make it practically impossible that any set of facts, even those in which targeted dumping has obviously occurred, would fulfill the necessary requirements. It is simply beyond comprehension that the Department would construct such an overwhelming barrier to using the targeted dumping methodology in light of the fact that targeted dumping has become a greater problem in investigations involving average-to-average comparisons now that the Department permits offsets – *i.e., does not zero* – in such investigations.[16] For this reason alone, the Proposed Methodology should be rejected.

But even more importantly, the Proposed Methodology's use of two separate and distinct tests to establish targeted dumping is inconsistent with the statute. As established above, the statute and legislative history instruct the Department to determine whether there is *a pattern of significant price differences*. This is a single, integrated requirement. However, as acknowledged by the Department in *Nails*, the Proposed Methodology impermissibly separates pattern and significance. Accordingly, the Proposed Methodology violates the statute.

C. **The First Test in The Proposed Methodology Produces Results That Are a Function of Factors Simply Irrelevant to the Question of Whether Targeted Dumping Has Occurred**

Even beyond splitting the statutory standard for a finding of targeted dumping, the first test of the Proposed Methodology is improper for several reasons. As an initial matter, the threshold used in the first test of the Proposed Methodology is entirely arbitrary. There is simply

---

[16] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 77722 (Dep't Commerce Dec. 27, 2006) (final modification).

no justification for the Department to ground its determination in the first test based on a standard deviation threshold. There is no significance whatsoever in the context of the antidumping law for price differences that fall either within or beyond a standard deviation. Simply put, the use of the standard deviation threshold is unfounded in antidumping law.

Moreover, as shown below, the first test in the Proposed Methodology is impermissibly a function of factors that are simply not relevant to the determination of whether targeted dumping has occurred. In fact, the Proposed Methodology is fundamentally flawed in that it will result in a finding of no targeted dumping notwithstanding the existence of significant price differences.

The inherent flaws in the first test in the Proposed Methodology may be readily demonstrated with an example whereby a targeted customer purchases 12 units at a price of $10.00 per unit and a non-targeted customer purchases 10 units at prices between $19.00 and $21.00 per unit. Clearly, targeted dumping has occurred under these facts based on the significant price difference between the two sets of sales. Specifically, as shown in Figure 1, the average price to the non-targeted customer is *twice* the average price to the targeted customer. However, under the first test of the Proposed Methodology, *none* of the sales pass the standard deviation threshold *even though they are sold at half the price*. Therefore, the Department would find under the Proposed Methodology that targeting has not occurred even though, under any reasonable definition, the respondent has clearly engaged in targeted dumping.

Furthermore, by simply increasing the volume purchased by the non-targeted entity, the exact same significant price difference in Figure 1 would be found to constitute targeting under the first test of the Proposed Methodology. Specifically, if four additional units are sold to the non-targeted customer at the prevailing average price for that customer, then all of the sales to the targeted customer would satisfy the standard deviation threshold. Consequently, the sales to

Figure 1
Standard Deviation Test

Customer	Unit Price (A)	Quantity (B)	Value (C) (A x B)	Average Price (D) (C / B)	Line
Targeted	10.00	1	10.00		a
	10.00	1	10.00		b
	10.00	1	10.00		c
	10.00	1	10.00		d
	10.00	1	10.00		e
	10.00	1	10.00		f
	10.00	1	10.00		g
	10.00	1	10.00		h
	10.00	1	10.00		i
	10.00	1	10.00		j
	10.00	1	10.00		k
	10.00	1	10.00		l
	Total	12	120.00	10.00	m =sum(a:l)
Non-Targeted	19.00	1	19.00		n
	21.00	1	21.00		o
	19.00	2	38.00		p
	21.00	2	42.00		q
	19.00	2	38.00		r
	21.00	2	42.00		s
	Total	10	200.00	20.00	t =sum(n:s)
Overall Total		22	320.00		u =(m+t)

Standard Deviation Test Calculations:

Quantity Weighted Average Unit Price[1]	**14.55**	v
Quantity Weighted Standard Deviation[2]	**4.98**	w
Targeted Average Unit Price less Weighted Avg Unit Price[3]	**-4.55**	x
Result of Standard Deviation Test	**No targeting**	y: Absolute value (x) is less than (w)

Notes:
(1) Quantity weighted average unit price = (12/22)x10.00 + (10/22)x20.00 = 14.55
(2) Standard deviation = {((12/22)x(10.00-14.55)^2) + ((10/22)x(20.00 -14.55)^2)}^(1/2) = 4.98
(3) Difference calculated as = 10.00 - 14.55 = -4.55

the targeted customer would be found to constitute targeting under the first test of the Proposed

Methodology. As shown in Figure 2, these additional sales at the prevailing average price would

have a dramatic impact on the results of the Proposed Methodology, yet have no impact

whatsoever on the difference in average prices between the targeted and non-targeted customers.

In other words, the Proposed Methodology yields completely different results based on volume

even though the difference in average price is exactly the same under the two scenarios. For

these reasons, the Department's use of a standard deviation analysis fails to account for a pattern

of significant price differences as required under the statute and, therefore, should be rejected.

In fact, for any comparison in which one targeted customer is being compared to one

non-targeted customer, the first test of the Proposed Methodology will *never* be met when the

targeted customer's share of the total volume of the CONNUM being analyzed is more than 50

percent *regardless of the difference in unit price.*[17] More generally, the results of the first test in

the Proposed Methodology will always be a function of the targeted customer's relative volume

even when more non-targeted customers are compared.[18] Because volume is not a factor set

---

[17] *See* Attachment 1 attached hereto. This problem in the Proposed Methodology will be
amplified if the Department decides not to use a DIFMER adjustment to compare non-
identical merchandise but rather make comparisons based only on identical merchandise.
Request for Comments, 73 Fed. Reg. at 26372. Based on the relatively small set of identical
sales that will be analyzed under the first test, there will likely be numerous comparisons
between one targeted customer and one non-targeted customer. As shown in Attachment 1,
the result of these comparisons will be entirely a function of the relative volume between the
targeted and non-targeted customer rather than the difference in price.

In addition, the Proposed Methodology will be used to determine targeted dumping based on
region and time period. *Id.* Under the Proposed Methodology, any comparison between one
targeted region and one non-targeted region or one targeted time period and one non-targeted
time period *will be entirely driven by relative volume rather than price difference.*

[18] *See* Attachment 1.

Figure 2
Standard Deviation Test

Customer	Unit Price (A)	Quantity (B)	Value (C) (A x B)	Average Price (D) (C / B)	Line
Targeted	10.00	1	10.00		a
	10.00	1	10.00		b
	10.00	1	10.00		c
	10.00	1	10.00		d
	10.00	1	10.00		e
	10.00	1	10.00		f
	10.00	1	10.00		g
	10.00	1	10.00		h
	10.00	1	10.00		i
	10.00	1	10.00		j
	10.00	1	10.00		k
	10.00	1	10.00		l
	Total	12	120.00	10.00	m =sum(a:l)
Non-Targeted	19.00	3	57.00		n
	21.00	3	63.00		o
	19.00	2	38.00		p
	21.00	2	42.00		q
	19.00	2	38.00		r
	21.00	2	42.00		s
	Total	14	280.00	20.00	t =sum(n:s)
Overall Total		26	400.00		u =(m+t)

Standard Deviation Test Calculations:

Quantity Weighted Average Unit Price[1]	15.38	v
Quantity Weighted Standard Deviation[2]	4.99	w
Targeted Average Unit Price less Weighted Avg Unit Price[3]	-5.38	x
Result of Standard Deviation Test	**Targeting**	y: Absolute value (x) is greater than (w)

Notes:
(1) Quantity weighted average unit price = (12/26)x10.00 + (14/26)x20.00 = 15.38
(2) Standard deviation = {((12/26)x(10.00-15.38)^2) + ((14/26)x(20.00 -15.38)^2)}^(1/2) = 4.99
(3) Difference calculated as = 10.00 - 15.38 = -5.38

forth in the statute for determining whether targeted dumping has occurred, the Proposed

Methodology is, again, simply inconsistent with the statute.

Additionally, the Proposed Methodology is impermissibly a function of the number of

distinct non-targeted customers used for the comparison. For example, assume a scenario in

which the targeted customer purchases 120 units at $10 per unit. The one non-targeted customer

purchases 123 units at prices between $15 and $19 per unit. As shown in Figure 3, targeted

dumping will be found in this scenario under the Proposed Methodology.

However, if instead of *one* non-targeted customer, *two* non-targeted customers purchased

the exact same number of units at the exact same prices, then the Proposed Methodology would

show that targeting has *not* occurred. As shown in Figure 4, simply because there were two

distinct non-targeted customers, the Proposed Methodology would produce wholly contradictory

results. As in the case of volume, the number of non-targeted customers is not a factor provided

for in the statute for determining whether targeted dumping has occurred.

Clearly, the Proposed Methodology produces absurd results because its results are a

function of factors – *i.e.*, relative volume and the number of distinct non-targeted customers –

that are irrelevant under the law. Thus, the Proposed Methodology should be rejected.

D.   The Second Test in the Proposed Methodology is Flawed and Unnecessary

As shown above, the first test in the Proposed Methodology is fundamentally flawed in

that clear cases of targeted dumping will not satisfy the first test based on the relative volume

between the targeted and non-targeted customers or based on the number of distinct non-targeted

customers. As a result, the second test will only examine an impermissibly limited pool of sales

– *i.e.*, sales that satisfied the unlawful first test.

Figure 3
Standard Deviation Test

Customer	Unit Price (A)	Quantity (B)	Value (C) (A x B)	Average Price (D) (C / B)	Line
Targeted	10.00	10	100.00		a
	10.00	10	100.00		b
	10.00	10	100.00		c
	10.00	10	100.00		d
	10.00	10	100.00		e
	10.00	10	100.00		f
	10.00	10	100.00		g
	10.00	10	100.00		h
	10.00	10	100.00		i
	10.00	10	100.00		j
	10.00	10	100.00		k
	10.00	10	100.00		l
	Total	120	1,200.00	10.00	m =sum(a:l)
Non-Targeted	15.00	31	465.00		n
	15.00	31	465.00		o
	15.00	31	465.00		p
	19.00	10	190.00		q
	19.00	10	190.00		r
	19.00	10	190.00		s
	Total	123	1,965.00	15.98	t =sum(n:s)
Overall Total		243	3,165.00		u =(m+t)

Standard Deviation Test Calculations:

Quantity Weighted Average Unit Price[1]	13.02	v
Quantity Weighted Standard Deviation[2]	2.99	w
Targeted Average Unit Price less Weighted Avg Unit Price[3]	-3.02	x
Result of Standard Deviation Test	**Targeting**	y: Absolute value (x) is greater than (w)

Notes:
(1) Quantity weighted average unit price = (120/243)x10.00 + (123/243)x15.98 = 13.02
(2) Standard deviation = {((120/243)x(10.00-13.02)^2) + ((123/243)x(15.98 -13.02)^2)}^(1/2) = 2.99
(3) Difference calculated as = 10.00 - 13.02 = -3.02

Figure 4
Standard Deviation Test

Customer	Unit Price (A)	Quantity (B)	Value (C) (A x B)	Average Price (D) (C / B)	Line
Targeted	10.00	10	100.00		a
	10.00	10	100.00		b
	10.00	10	100.00		c
	10.00	10	100.00		d
	10.00	10	100.00		e
	10.00	10	100.00		f
	10.00	10	100.00		g
	10.00	10	100.00		h
	10.00	10	100.00		i
	10.00	10	100.00		j
	10.00	10	100.00		k
	10.00	10	100.00		l
	Total	**120**	**1,200.00**	**10.00**	m =sum(a:l)
Non-Targeted Customer 1	15.00	31	465.00		n
	15.00	31	465.00		o
	15.00	31	465.00		p
	Total	**93**	**1,395.00**	**15.00**	q =sum(n:p)
Non-Targeted Customer 2	19.00	10	190.00		r
	19.00	10	190.00		s
	19.00	10	190.00		t
	Total	**30**	**570.00**	**19.00**	u =sum(r:t)
Overall Total		**243**	**3,165.00**		v =(m+q+u)

Standard Deviation Test Calculations:

Quantity Weighted Average Unit Price[1]	**13.02**	w
Quantity Weighted Standard Deviation[2]	**3.23**	x
Targeted Average Unit Price less Weighted Avg Unit Price[3]	**-3.02**	y
Result of Standard Deviation Test	**No targeting**	z: Absolute value (y) is less than (x)

Notes:
(1) Quantity weighted average unit price = $(120/243) \times 10.00 + (93/243) \times 15.0 + (30/243) \times 19.00 = 13.02$
(2) Standard deviation = $\{((120/243) \times (10.00-13.02)^2) + ((93/243) \times (15.00-13.02)^2) + ((30/243) \times (19.00-13.02)^2)\}^{(1/2)} =$
(3) Difference calculated as = $10.00 - 13.02 = -3.02$

The second test in the Proposed Methodology simply compounds the problem because it cannot be applied in situations where one targeted customer is being compared to one non-targeted customer. Specifically, the second test analyzes the relative price differences between the targeted customer and the lowest-priced non-targeted customer as compared to the average price gap between the non-targeted customers. If there is only one non-targeted customer, there is no price gap between the non-targeted customers to use as a comparator. Thus, the second test cannot make a comparison in this scenario.[19] As a result, the second test cannot be applied in situations in which one targeted customer is being compared to one non-targeted customer.

In addition, the second test is arbitrary and, in fact, unnecessary. There is simply no basis in the antidumping law for the use of the 5 percent threshold provided for in the second test of the Proposed Methodology. But even more fundamentally, there is no need for the Department to conduct a separate inquiry that purports to test for significance if it has properly determined that there is a pattern of significant price differences. Therefore, the Department should set a threshold for significant price differences and make its determinations of whether targeted dumping has occurred based on whether there is a pattern of such significant price differences in the respondent's sales to the targeted customer. As demonstrated below, the way to do this is to use the P/2 test.

E.   The Department Should Use the P/2 Test

Rather than use the arbitrary and unlawful standards set forth in the Proposed Methodology, the Department should test for a pattern of significant price differences using the

---

[19] Indeed, an examination of the *Nails* computer program appears to show that such comparisons between one targeted customer and one non-targeted customer were simply eliminated from consideration in the second test.

preponderance and 2 percent thresholds set forth in the P/2 test. For example, both the antidumping statute and Department policy call for the application of a 2 percent threshold in antidumping investigations when the objective is a determination of the *significance* of a price difference between two groups. In fact, *all* examinations of the significance of price differences in antidumping investigations employ the 2 percent threshold in the P/2 test.

In particular, pursuant to Sections 733(b)(3) and 735(a) of the Act, the Department must disregard any weighted-average dumping margin – *i.e.*, a price difference between two groups (the respondent's U.S. and home market sales) – that is *de minimis*.[20] If a respondent's margin is *de minimis*, the Department will not issue an antidumping duty order on the grounds that such a difference is insignificant.[21]

The Department's arm's-length test also utilizes the 2 percent threshold. The Department will consider calculating normal value based on a respondent's sale to an affiliated company only if the price for that sale is comparable to the price charged to a non-affiliate.[22] The prices between the affiliate and non-affiliate are comparable if they fall within plus or minus 2 percent.[23] In other words, sales to affiliates are eligible for inclusion in the normal value calculation if the price difference between such sales and sales to non-affiliates is within a 2

---

[20] 19 U.S.C. §§ 1673b(b)(3) and 1673d(a)(4) (2000); 19 C.F.R. § 351.106(b) (2008).

[21] *See Antidumping and Countervailing Duties; De Minimis Dumping Margins and De Minimis Subsidies*, 52 Fed. Reg. 30660, 30661 (Dep't Commerce Aug. 17, 1987) (final rule).

[22] 19 C.F.R. § 351.403(c) (2008).

[23] *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69186, 69187 (Dep't Commerce Nov. 15, 2002) (modification of methodology) ("*Affiliated Party Sales in the Ordinary Course of Trade*").

percent threshold. Price patterns beyond this standard are considered significant so as to make

the two groups – *i.e.*, affiliate and non-affiliate sales – not comparable.[24]

As with the 2 percent threshold, the preponderance standard – *i.e.*, the P in the P/2 test –

is also firmly grounded in Department practice. A preponderance standard is used elsewhere by

the Department in determining if there is a pattern of price differences between two groups.

Specifically, the preponderance standard is used to determine if there is a pattern of price

differences for purposes of deciding whether a level of trade ("LOT") adjustment should be

made.[25] Based on the fact that the LOT analysis and the targeted dumping inquiry both seek to

determine if there is a pattern of price differences between two groups, the standards should be

the same. Accordingly, the Department should determine that there is a pattern of price

differences between targeted and non-targeted groups when the preponderance standard has been

met. Indeed, it should also be noted that the preponderance test is more difficult to meet than the

---

[24] 19 C.F.R. § 351.403(c) (2008) (stating that the Department may "calculate normal value based on {sales to an affiliated party} only if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller"). In promulgating the 2 percent threshold for the arm's-length test, the Department rejected an argument that this standard did not "sufficiently recognize natural variability within a respondent's pricing data." *Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. at 69189. The Department instead found that this standard was easily administrable and appropriate for determining the significance of price differences between two separate groups.

[25] *See* 19 U.S.C. § 1677b(a)(7)(A)(ii) (2000); Issues and Decision Memorandum in *Carbon and Certain Alloy Steel Wire Rod from Canada*, 72 Fed. Reg. 26591 (Dep't Commerce May 10, 2007) (final results) at Comment 2 (stating that the Department's normal practice is to determine that there is a pattern of price differences when, for example, "the average prices were higher at one of the LOTs for a preponderance of sales, based on the quantities of each model sold.").

33 percent test used in the Proposed Methodology that purports to test for pattern.[26] For these

reasons, the Department should use the P/2 test rather than the Proposed Methodology.

II. The Department Should Define Region and Time Period on a Case-By-Case Basis

Under both the statute and the Department's regulations, targeted dumping can be found

with respect to customer, region or time period.[27] In its *Request for Comments*, the Department

asked for comments regarding the criteria and standards it should use in determining the

appropriate regions and time periods for the targeted dumping analysis.[28] As shown below, the

Department should not adopt any standard definitions for either region or time period. Rather,

the Department should define the relevant regions and time periods on a case-by-case basis with

assistance from the domestic industry.

Given the relative nuances and complexities of different markets, the Department should

not attempt to set universal definitions of region and time period for targeted dumping inquiries.

Instead, the Department should conduct a case-by-case analysis with assistance from the

domestic industry. As previously acknowledged by the Department, the domestic industry

possesses the information needed to make an accurate distinction between relevant regions and

time periods for the targeted dumping analysis:

> {i}t is the Department's view that normally any targeted dumping examination should
> begin with domestic interested parties. It is the domestic industry that possesses intimate
> knowledge of regional markets . . . and the effect of specific time periods on pricing in
> the U.S. market in general. Without the assistance of the domestic industry, the
> Department would be unable to focus appropriately any analysis of targeted dumping.
> For example, the Department would not know what regions may be targeted for a

---

[26] *Request for Comments*, 73 Fed. Reg. at 26372.

[27] *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2000); 19 C.F.R. § 351.414(f)(1)(i) (2008).

[28] *Request for Comments*, 73 Fed. Reg. at 26372.

particular product, or what time periods are most significant and can impact prices in the U.S. market. Ultimately, the domestic industry possesses the expertise and knowledge of the product and the U.S. market. . . . Fundamentally, the Department needs the assistance of the domestic industry to focus the inquiry and to properly investigate the possibility of targeted dumping.[29]

Therefore, the Department should define region and time period in the context of targeted dumping on a case-by-case basis with assistance from the domestic industry.

III. The Department Should Accept Allegations That a Respondent Has Engaged in Targeted Dumping Based on a Combination of Customer, Region or Time Period

In the *Request for Comments*, the Department also asked for suggestions as to how it should treat multiple allegations of targeted dumping made with respect to one respondent.[30] The Department should accept allegations that a respondent has engaged in targeted dumping based on any of the three grounds for targeting – *i.e.*, customer, region or time period – or based on any combination of such grounds.[31] For example, the Department should accept an allegation that a respondent has engaged in targeted dumping with respect to a specific region or specific customer over the course of a particular period of time. Indeed, a respondent may target a particular segment of a market during a period of significant seasonal price variance. Given the economic reality of respondents engaging in targeted dumping that is based on a combination of customer, region or time period, the Department should accept allegations that combine any of these three criteria.

---

[29] *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27374 (Dep't Commerce May 19, 1997) (final rule) ("*Final Rule*").

[30] *Request for Comments*, 73 Fed. Reg. at 26372.

[31] 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2000); 19 C.F.R. § 351.414(f)(1)(i) (2008).

IV.   The Department Should Not Apply A Standard for Accepting Allegations of Targeted Dumping that Imposes Any Additional Burden on Petitioners

In addition, in the *Request for Comments*, the Department asked for comments as to "what standards, if any, the Department should adopt for accepting an allegation of targeted dumping."[32] Specifically, the Department asked whether it should adopt "some type of *de minimis* threshold {to} apply to the sales on which an allegation is based, either in terms of the quantity of control numbers or share of sales covered{.}"[33]

The Department should accept any allegation of targeted dumping that fulfills the underlying requirements needed to establish that targeted dumping has occurred. There is no justification in the antidumping statute for the Department to impose another hurdle for petitioners to fulfill at the early stage of bringing an allegation – especially one that is unrelated to the underlying requirements needed to show targeted dumping. Accordingly, because neither the Proposed Methodology nor the P/2 test have a *de minimis* threshold for quantity of control numbers or share of sales covered, such thresholds should not be imposed as a prerequisite for an allegation of targeted dumping.

In fact, the Department should accept allegations that might not completely fulfill the requirements that the Department adopts for a finding of targeted dumping. As previously acknowledged by the Department, the deadline for filing an allegation of targeted dumping imposes a high burden on petitioners, and the Department has stated its intent to exercise flexibility as to petitioners based on this burden.[34] One area of needed flexibility would be for

---

[32] *Request for Comments*, 73 Fed. Reg. at 26372.

[33] *Id.*

[34] *Final Rule*, 62 Fed. Reg. at 27375.

the Department to allow submissions of allegations that do not completely fulfill the

requirements for a finding of targeted dumping because they need further information that would

be developed during the investigation.

In addition, the Department should waive the deadline for making an allegation of

targeted dumping when information demonstrating targeted dumping has emerged after the

deadline. This is consistent with the deadline for making an allegation of sales at prices below

the cost of production, which can be waived if the Department determines that the information

on the record is not complete when the deadline passes.[35] For these reasons, the Department

should accept allegations that do not completely fulfill the underlying requirements for a finding

of targeted dumping.

V. The Department Should, At a Minimum, Apply the Targeted Dumping Methodology to All Sales by the Respondent to the Targeted Entity Once Targeted Dumping is Established

Lastly, in the *Request for Comments*, the Department asked under what circumstances it

should apply the targeted dumping methodology to all sales to the targeted customer even if

some sales are not shown to be targeted. The Department should always apply the targeted

dumping methodology to all sales by the respondent to the targeted entity. As established above,

both the statute and the Department's regulations define targeting based on a pattern of sales to a

particular customer, region or time period.[36] Pursuant to the statute and the regulations, the

Department does not determine if individual sales are targeted by the respondent. Rather, the

Department determines if the whole of a customer, region or time period is targeted. Thus, once

---

[35] *See* 19 C.F.R. § 351.301(d)(2) (2008).

[36] 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2000); 19 C.F.R. § 351.414(f)(1)(i) (2008).

a particular group has been determined to have been targeted, there is nothing in the statute or regulations that justifies subsequently limiting the targeted dumping methodology to individual sales. If Congress would have intended such a limit on the targeted dumping methodology, then Congress would have made the targeted dumping analysis a function of individual sales rather than individual customers, regions and time periods. Thus, at a minimum, the Department should apply the targeted dumping methodology to all of the respondent's sales to the targeted entity.

Moreover, as shown below, the Department should apply the targeted dumping methodology to all of the respondent's U.S. sales, including all sales to the targeted entity, either when the Department cannot identify the full scope of the respondent's targeted dumping or when the respondent's targeted dumping equals or exceeds 20 percent of its U.S. sales by quantity.

As previously acknowledged by the Department, neither the antidumping statute nor the SAA address the issue of whether the targeted dumping methodology should be applied to all of the respondent's sales when it engages in targeted dumping.[37] The Department has previously stated that it normally will apply the targeted dumping methodology only to those sales that are found to be targeted.[38] Nevertheless, the Department has also stated that when a firm so extensively engages in targeted dumping that the targeted dumping comparison methodology is the only adequate yardstick by which to measure the respondent's pricing behavior or when the

---

[37] *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7350 (Dep't Commerce Feb. 27, 1996) (request for comments).

[38] *Final Rule*, 62 Fed. Reg. at 27375; *see also* Report of the WTO Appellate Body, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, ¶ 98 (Aug. 15, 2006).

respondent's targeted dumping is so widespread that it is administratively impractical to segregate targeted dumping pricing from normal pricing, the Department will apply the targeted dumping methodology to all of the respondent's sales.[39]

The Department should apply the targeted dumping methodology to all of the respondent's U.S. sales when the Department cannot identify the full scope of the respondent's targeted dumping. The Department will not be able to identify the full extent of targeted dumping in certain cases. For example, in determining whether targeted dumping has occurred, the Proposed Methodology limits its comparisons to identical merchandise.[40] Accordingly, the Proposed Methodology will often exclude from the analysis sales that are non-comparable – sales that could have involved targeted dumping by a respondent that has *already been found to have engaged in such behavior*. In order to ensure that all targeted dumping is accounted for in such situations, the Department should apply its targeted dumping methodology to all sales of the respondent in question. Otherwise, the respondent's full level of targeted dumping will go unaddressed and unremedied.

This approach is certainly consistent with the statement in the *Final Rule* that the Department will apply the targeted dumping methodology to all of the respondent's U.S. sales where it is administratively impractical to do otherwise. In investigations where a respondent is found to have engaged in targeted dumping on certain sales but other sales cannot be appropriately tested, it is administratively impractical to segregate targeted dumping pricing from

---

[39] *Final Rule*, 62 Fed. Reg. at 27375

[40] *Request for Comments*, 73 Fed. Reg. at 26372. This problem would be mitigated if the Department chooses to use a DIFMER adjustment to compare non-identical merchandise.

normal pricing. Accordingly, the Department should apply the targeted dumping methodology

to all sales of the respondent under these circumstances.

In addition, even when the Department can analyze all of the respondent's sales, it should

apply the targeted dumping methodology across the board to all sales when the respondent's

targeted dumping equals or exceeds 20 percent of its U.S. sales by quantity. Based on the

extensive and widespread nature of the respondent's targeted dumping in such cases, the targeted

dumping methodology is the only adequate yardstick by which to measure the respondent's
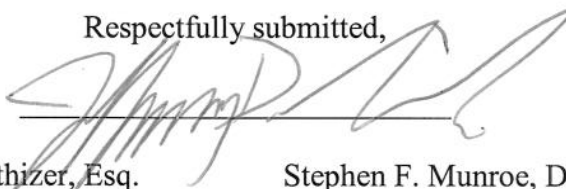
pricing behavior.[41]

VI.   CONCLUSION

For the reasons set forth above, the Department should reject the Proposed Methodology

and adopt the P/2 test to determine whether a respondent has engaged in targeted dumping. The

Proposed Methodology is inconsistent with the statute and fundamentally flawed and, therefore,

should be rejected. Moreover, the Department should define region and time period in the

context of targeted dumping on a case-by-case basis with assistance from the domestic industry.

The Department should also accept allegations that a respondent has engaged in targeted

---

[41] The Department's practice in determining whether to disregard sales at prices below the cost of production is instructive in this context. Pursuant to Section 773(b)(2)(C) of the Act, the Department can disregard such sales if they are made in "substantial quantities." 19 U.S.C. § 1677b(b)(1) (2000). The Department defines "substantial quantities" as representing 20 percent or more of the respondent's home market sales. *See, e.g., Certain Steel Concrete Reinforcing Bars From Turkey*, 72 Fed. Reg. 62630, 62632 (Dep't Commerce Nov. 6, 2007) (final results) (stating that 20 percent represents a substantial quantity for purposes of excluding sales below cost). Based on this definition of substantial quantities, when determining if a respondent has engaged extensively in targeted dumping – *i.e.*, if a substantial quantity of the respondent's U.S. sales are the product of targeted dumping – the Department should use a 20 percent test. Thus, where a respondent is found to have engaged in targeted dumping with respect to 20 percent or more of its U.S. sales by quantity, the Department should apply the targeted dumping methodology to all of the respondent's sales.

dumping based on a combination of customer, region or time period. Furthermore, the

Department should not impose any additional burdens on petitioners when making targeted

dumping allegations. Lastly, when the Department finds that a respondent has engaged in

targeted dumping, it should apply the targeted dumping methodology to all sales of the subject

merchandise made by the respondent to the targeted entity. In fact, the Department should apply

the targeted dumping methodology to all of the respondent's U.S. sales, including all sales to the

targeted entity, either when the Department cannot identify the full scope of the respondent's

targeted dumping or when the respondent's targeted dumping equals or exceeds 20 percent of its

U.S. sales by quantity.

Respectfully submitted,

Robert E. Lighthizer, Esq.   Stephen F. Munroe, Director Of Int'l Trade
John J. Mangan, Esq.   David J. Albright, Economist
Jeffrey D. Gerrish, Esq.
Jared R. Wessel, Esq

On behalf of United States Steel Corporation

cc: Anthony Hill
        Michael Rill

ATTACHMENT 1

Standard Deviation Test
For a Single CONNUM

The following example is a generalized version of the Department's proposed standard deviation test for a single CONNUM. As shown below, the results of the first test in the Proposed Methodology will always be a function of the targeted customer's relative volume. Furthermore, for any comparison in which one targeted customer is being compared to one non-targeted customer, the first test of the Proposed Methodology will never be met when the targeted customer's share of the total volume of the CONNUM being analyzed is more than 50 percent regardless of the difference in unit price.

The following notation is used:

Let σ = standard deviation;
p_i = the average price for Customer i; i=1, 2, 3;
$\overline{p}$ = the quantity weighted average price for Customers 1, 2, 3;
w_i = Customer i's share of the total quantity within the CONNUM;

where $\sum_{i=1}^{3} w_i = 1$ (the quantity shares add to 1).

The quantity-weighted standard deviation can be written as:

$$\sigma = \left\{ w_1 \left(p_1 - \overline{p} \right)^2 + w_2 \left(p_2 - \overline{p} \right)^2 + w_3 \left(p_3 - \overline{p} \right)^2 \right\}^{1/2}$$

For sales in a given CONNUM to be considered targeted, they must first satisfy the requirements of the Department's proposed standard deviation test:

1) there must be sales made to both the alleged targeted customer and at least one non-targeted customer;

2) the targeted customer's average price must be lower than the overall CONNUM average price; and

3) the absolute value of the difference between the targeted customer average price and the overall CONNUM average price must exceed one standard deviation from the overall average price.

Given that Condition (1) must be met before any comparison can be made,

Condition (2) can be written as: $p_1 < \overline{p}$;

Condition (3) can be written as: $\left|p_1 - \overline{p}\right| > \sigma$

Using Condition (2), the absolute value signs can be removed from Condition (3), and it can be written as:

a) $(-1)(p_1 - \overline{p}) > \left\{ w_1 \left(p_1 - \overline{p}\right)^2 + w_2 \left(p_2 - \overline{p}\right)^2 + w_3 \left(p_3 - \overline{p}\right)^2 \right\}^{1/2}$ where $p_1 - \overline{p}$ is by definition negative.

Squaring both sides yields:

b) $(p_1 - \overline{p})^2 > \left\{ w_1 \left(p_1 - \overline{p}\right)^2 + w_2 \left(p_2 - \overline{p}\right)^2 + w_3 \left(p_3 - \overline{p}\right)^2 \right\}$

Rearranging the common terms:

c) $(1 - w_1)(p_1 - \overline{p})^2 > \left\{ w_2 \left(p_2 - \overline{p}\right)^2 + w_3 \left(p_3 - \overline{p}\right)^2 \right\}$

Note that the quantity-weighted average CONNUM price can be written as:

d) $\overline{p} = (w_1 p_1 + w_2 p_2 + w_3 p_3)$

Substituting (d) into each of the terms in parentheses of (c), equation (c) can be written as:

e) $(1 - w_1)(\sum_{i=1}^{3} w_i (p_1 - p_i))^2 > w_2 (\sum_{i=1}^{3} w_i (p_2 - p_i))^2 + w_3 (\sum_{i=1}^{3} w_i (p_3 - p_i))^2$

Note that $1 - w_1 = w_2 + w_3$, and dividing both sides of (e) by $w_2 + w_3$, yields:

f) $(\sum_{i=1}^{3} w_i (p_1 - p_i))^2 > z_1 (\sum_{i=1}^{3} w_i (p_2 - p_i))^2 + z_2 (\sum_{i=1}^{3} w_i (p_3 - p_i))^2$

where

$z_1 = w_2 / ((w_2 + w_3), z_2 = w_3 / ((w_2 + w_3),$

$and \sum_{j=1}^{2} z_j = 1$

The left hand side of (f) is the square of the weighted average difference between the targeted customer average price and each non-targeted customer's average price. Similarly, the right hand side is the weighted average of the square of the weighted average difference between each non-targeted customer's average price and each targeted and non-targeted customer's average price.

In the case of a single non-targeted customer, the differences in average unit prices will cancel out in equation (f). The result of the standard deviation test in this instance will depend only upon the relative quantity share of the targeted customer to the non-targeted customer, as shown below.

For a single non-targeted customer, equation (f) can be written as:

g) $(\sum_{i=1}^{2} w_i(p_1 - p_i))^2 > (\sum_{i=1}^{2} w_i(p_2 - p_i))^2$

Expanding (g) yields:

h) $w_2(p_1 - p_2)^2 > w_1(p_2 - p_1)^2$, or

i) $w_2(p_1 - p_2)^2 > w_1(-1)^2(p_1 - p_2)^2$

By canceling the squared terms, it can be seen that for the standard deviation test to be met, the share of the targeted customer's sales quantity must be less than the share of the non-targeted customer's sales quantity.

j) $w_2 > w_1$, or $(1 - w_1) > w_1$, and finally $1/2 > w_1$.

Because the sum of the shares must equal 100 percent, the targeted customer's sales quantity must be less than 50 percent of the total targeted and non-targeted quantity for the standard deviation test to be met, regardless of the difference in the prices.