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December 10, 2007

Total Pages: 12

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: Targeted Dumping in Antidumping Investigations

Dear Assistant Secretary Spooner:

On behalf of United States Steel Corporation ("U.S. Steel"), we hereby respond to the October 25, 2007 request for comments issued by the Department of Commerce (the "Department") on the "development of a methodology for determining whether targeted dumping is occurring in antidumping investigations."[1] In particular, the Department asked for comments and suggestions concerning "{w}hat standards or methods should be used to show a pattern of price differences" and "{w}hat threshold should there be, if any, for showing that price differences are significant."[2]

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[1] *Targeted Dumping in Antidumping Investigations*, 72 Fed. Reg. 60651 (Dep't Commerce Oct. 25, 2007) (request for comments) ("*Targeted Dumping in Antidumping Investigations*"). Although comments in response to the Department's request were originally due on November 26, 2007, the Department extended the deadline for such comments to December 10, 2007.

[2] *Id.*

As discussed more fully below, the Department should use the "preponderance at 2 percent" ("P/2") test employed in *Coated Free Sheet Paper from Korea* in determining whether a respondent has engaged in targeted dumping.[3] Pursuant to the P/2 test, the Department should find targeted dumping where its comparisons show weighted-average net prices to the targeted group that are less by 2 percent or more than weighted-average net prices to the non-targeted group and the sum of the targeted group's quantity associated with such comparisons represents a preponderance of the quantity sold to the targeted group that can be compared. Moreover, as part of the P/2 test and consistent with other price comparisons in antidumping investigations that test for significance, the Department should adopt a 2 percent threshold in determining whether price differences between the targeted and non-targeted groups are significant. Finally, when the Department determines that a respondent has engaged in targeted dumping, the Department should apply the average-to-transaction methodology – *i.e.*, the targeted dumping methodology – to *all* sales of the respondent in question either when the Department cannot identify the full scope of the targeted dumping or when the targeted quantity equals or exceeds 20 percent of the respondent's total U.S. sales.

I. The Department Should Determine Whether a Respondent Has Engaged in Targeted Dumping by Applying the P/2 Test

Pursuant to 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.[4] The Department should use the P/2 test to

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[3] *Coated Free Sheet Paper from the Republic of Korea*, 72 Fed. Reg. 60630 (Dep't Commerce Oct. 25, 2007) (final determ.).

[4] 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2000); 19 C.F.R. § 351.414(f)(1)(i) (2007).

determine if there is a pattern of price differences pursuant to Section 777A(D)(1)(B)(i) of the Act. In determining if there is a pattern of price differences with respect to a particular customer, for example,[5] the Department should compare the weighted-average net price of the targeted customer to that of the non-targeted customers for comparable merchandise that is sold in the same month. Where individual CONNUM/month comparisons show that the targeted customer's weighted-average net price is less by 2 percent or more than the non-targeted customers' weighted-average net price and the sum of the targeted customer's quantity associated with such comparisons represents a preponderance of the quantity sold to the targeted customer that can be compared,[6] the Department should determine that the respondent has engaged in targeted dumping.

By making comparisons between targeted and non-targeted customers of comparable merchandise, the Department would comply with the requirements of the statute. Specifically, Section 777A(D)(1)(B)(i) of the Act instructs the Department to make comparisons of sales to

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[5] For ease of illustration, U.S. Steel will use customer-specific examples to articulate its proposed methodology. 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) (2007). Except where specifically noted, U.S. Steel's methodology would be the same for each type of targeted dumping.

[6] In some cases, merchandise sold to the targeted customer will not be comparable to any merchandise sold to non-targeted customers. For example, some merchandise might not pass the 20 percent test for comparability. Consequently, sales of such merchandise should be excluded from the Department's targeted dumping analysis. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2000) (calling for the Department to make a determination of targeted dumping on the basis of sales of comparable merchandise). In addition, some merchandise may not be comparable due to differences in when the merchandise was sold. Sales of such merchandise should also be excluded from the Department's targeted dumping analysis.

targeted and non-targeted groups of "comparable" merchandise.[7] Accordingly, the Department should maintain the flexibility to use DIFMER data to make comparisons of sales of merchandise that are comparable, but not identical, when, for example, the respondent did not sell identical merchandise to targeted and non-targeted customers.

In addition, by normally making comparisons between targeted and non-targeted customers based on products sold in the same month, the Department would effectively control for price differences caused by differences in time periods.[8] Consequently, the Department would ensure that the result was an accurate measure of the price difference resulting from the respondent's practice of targeted dumping, rather than a function of price variances over time.[9]

Furthermore, the use of a preponderance standard to identify targeted dumping is also appropriate. 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.[10] Based on the fact that the LOT

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[7] *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2000).

[8] Clearly, if the type of targeted dumping at issue is targeting by time period, the Department would not make comparisons of sales in the same month. Rather, the Department would make comparisons of sales of comparable merchandise in the different time periods at issue.

[9] While in *Coated Free Sheet Paper from Korea* the Department applied the P/2 test to sales between the targeted and non-targeted customers that occurred in the same month, the Department should retain the ability to expand its analysis beyond same month comparisons when, for example, there are limited number of sales occurring in the same month.

[10] *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) at Comment 2 (stating that the Department's normal practice is to determine that there

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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 and, therefore, that targeted dumping has been established when the preponderance standard has been met.

II. The Department Should Adopt a 2 Percent Threshold in Determining Whether Price Differences Between Targeted and Non-Targeted Groups Are Significant

In order to find that a respondent has engaged in targeted dumping, the Department must find that the price differences between targeted and non-targeted groups are significant.[11] Consistent with the Department's other examinations of the significance of price differences in antidumping investigations, the Department should adopt a 2 percent threshold in determining the significance of price differences between targeted and non-targeted groups.

The Department should take the present opportunity to adopt a threshold for significance in targeted dumping determinations. Previously, the Department has declined to adopt such a threshold.[12] However, there are at least three reasons why the Department should adopt a threshold for the significance determination and, furthermore, why it should be 2 percent.

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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.").

[11] 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2000); 19 C.F.R. § 351.414(f)(1)(i) (2007).

[12] *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7350 (Dep't Commerce Feb. 27, 1996) (request for comments) ("*Preamble*"); *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27374 (Dep't Commerce May 19, 1997) (final rule) ("*Final Rule*").

First, a threshold would increase the administrative ease of the targeted dumping inquiry. For example, in adopting the 2 percent threshold used in the arm's-length test, which is discussed in detail below, the Department noted that such a standard can be "readily applied in the context of the variety of situations {that the Department} encounter{s}" as compared to other, more complex statistical-testing approaches.[13] Accordingly, a threshold would decrease the Department's administrative burden.

Second, a threshold for the significance determination could easily be applied in a way that is consistent with the instruction in the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (the "SAA") that the Department "proceed on a case-by-case basis {in determining targeted dumping}, because small differences may be significant for one industry or one type of product, but not for another."[14] Specifically, the Department could normally apply a 2 percent threshold absent an affirmative demonstration that the standard does not adequately represent the significance of price differences for the industry in question. In so doing, the Department would be able to limit its administrative burden by having a normally applicable threshold, but would also retain the ability to proceed on a case-by-case basis as instructed in the SAA by allowing parties to demonstrate that another level of price difference is significant based on the facts at hand.

Third and finally, both the antidumping statute and Department policy call for the application of a 2 percent threshold in antidumping investigations when the objective is a

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[13] *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69186, 69189 (Dep't Commerce Nov. 15, 2002) (modification of methodology) ("*Affiliated Party Sales in the Ordinary Course of Trade*").

[14] SAA, H.R. Rep. No. 103-316 at 843, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4178.

determination of the significance of price differences between two groups. In fact, *all* examinations of the significance of price differences in antidumping investigations employ the 2 percent threshold proposed herein. Based on the overlap of objectives, the Department should use this standard in the context of targeted dumping as well.

For example, 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*.[15] If a respondent's margin is *de minimis*, the Department will not issue an antidumping duty order.

The objective of the *de minimis* test is to determine the significance of price differences between two groups of sales. Indeed, the Department acknowledged the *raison d'être* of the *de minimis* test when, prior to the statutory codification of the present 2 percent threshold, it amended the antidumping regulations to codify its previous practice regarding *de minimis* margins.[16] In so doing, the Department stated that the *de minimis* test "defines a class of cases which the Department could disregard as *insignificant*."[17]

For purposes of targeted dumping, the determination of the significance of price differences between the respondent's two groups of sales – *i.e.*, targeted versus non-targeted – should be based on the same standard used in the *de minimis* test. There is simply no reason to

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[15] 19 U.S.C. §§ 1673b(b)(3) and 1673d(a)(4) (2000); 19 C.F.R. § 351.106(b) (2007).

[16] *See Antidumping and Countervailing Duties; De Minimis Dumping Margins and De Minimis Subsidies*, 52 Fed. Reg. 30660, 30661 (Dep't Commerce Aug. 17, 1987) ("*De Minimis Dumping Margins*"). Congress later codified the 2 percent definition of *de minimis* margins in the antidumping statute. *See* 19 U.S.C. § 1673b(b)(3) (2000).

[17] *De Minimis Dumping Margins*, at 30661 (emphasis added).

apply a different standard to two determinations with the *exact same objective* – to evaluate the significance of price differences between two groups of sales in an antidumping investigation.

In yet another context involving an analysis of price differences, 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.[18] The prices between the affiliate and non-affiliate are comparable if they fall within plus or minus 2 percent.[19] 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 percent threshold. Price differences beyond this standard are considered significant so as to make the two groups – *i.e.*, affiliate and non-affiliate sales – not comparable.[20]

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."[21] The Department instead found that this standard was easily administrable and appropriate for determining the significance of price differences between two separate groups.

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[18] 19 C.F.R. § 351.403(c) (2007).

[19] *Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg at 69187.

[20] 19 C.F.R. § 351.403(c) (2007) (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").

[21] *Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. at 69189.

By adopting a 2 percent threshold for the significance of price differences in the targeted dumping context, the Department would limit its administrative burden, comply with the requirements of the SAA, and make the standard for the significance of price differences in antidumping investigations consistent. Accordingly, the Department should adopt a 2 percent threshold as the basis for determining that price differences between targeted and non-targeted groups are significant.

III. The Department Should Apply the Targeted Dumping Methodology to All Sales If the Department Cannot Identify the Full Scope of the Targeted Dumping Or If the Targeted Quantity Equals Or Exceeds 20 Percent

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.[22] The Department has previously stated that it normally will apply the targeted dumping methodology only to those sales that are found to be targeted.[23] 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 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.[24]

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[22] *Preamble*, 61 Fed. Reg. at 7350.

[23] *Final Rule*, 62 Fed. Reg. at 27375; *see also 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).

[24] *Id.*

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, as discussed above, in determining whether a respondent has targeted by customer, the Department should only compare the prices between the targeted and non-targeted customers for comparable merchandise sold in the same month. However, this methodology will often exclude from the analysis sales that are non-comparable or that are made at different times – 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.

This approach is certainly consistent with the *Preamble's* statement that the Department will apply the targeted dumping methodology to all of the respondent's U.S. sales based on administrative impracticability. 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 normal pricing. Accordingly, the Department should – consistent with the *Preamble* – 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.

The Department's practice in determining whether to disregard sales below the cost of production is instructive in this context. Pursuant to Section 773(b)(2)(C) of the Act, the Department can disregard sales below the cost of production if they are made in "substantial quantities."[25] The Department defines "substantial quantities" as representing 20 percent or more of the respondent's home market sales.[26] 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.

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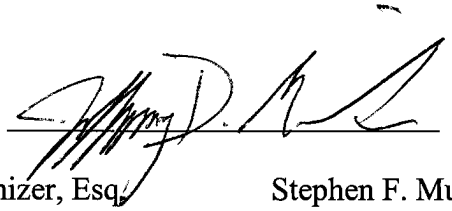
[25] 19 U.S.C. § 1677b(b)(1) (2000).

[26] *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).

IV. CONCLUSION

For the reasons set forth above, the Department should adopt the P/2 test in determining whether a respondent has engaged in targeted dumping. Furthermore, 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 in question if the Department cannot identify the full scope of the respondent's targeted dumping or if the targeted quantity equals or exceeds 20 percent of the respondent's U.S. sales.

Respectfully submitted,



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