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VIA HAND DELIVERY

Ronald Lorentzen
Acting Assistant Secretary for Import Administration
U.S. Department of Commerce
Import Administration
Central Records Unit
Room 1870
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Withdrawal of Regulatory Provisions Governing Targeted Dumping in Antidumping Investigations; Request for Comment

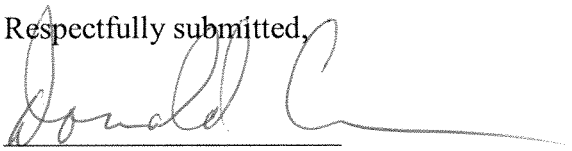
Dear Acting Assistant Secretary:

On behalf of Hyundai HYSCO, Pohang Iron & Steel Co., Ltd., and Union Steel, we hereby submit the enclosed comments in response to the request for comments published in the *Federal Register* on December 10, 2008. *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 74,930 (Dep't Commerce Dec. 10, 2008) ("Request for Comments"). Each of these companies is a Korean producer of steel products, including products that are, or have been, subject to antidumping duty investigations by the Department. These comments are timely filed in accordance with the deadline set forth in the U.S. Department of Commerce's ("Department")

Request for Comments, as subsequently extended by the Department. *Id*; *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Investigations; Extension of Time to Comment*, 74 Fed. Reg. 2,059 (Dep't Commerce Jan. 14, 2009). We are also submitting an electronic copy of these comments via email to the Department's Webmaster at webmaster-support@ita.doc.gov, as requested in the Request for Comments.

Please contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,



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BEFORE THE
UNITED STATES DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION

COMMENTS OF HYUNDAI HYSCO, POHANG IRON & STEEL CO., LTD., AND UNION STEEL ON THE DEPARTMENT'S WITHDRAWAL OF ITS REGULATORY PROVISIONS CONCERNING TARGETED DUMPING

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In accordance with the request for comments that was published in the *Federal Register* on December 10, 2008, *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Investigations;* 73 Fed. Reg. 74,930 (Dec. 10, 2008) ("*Withdrawal Notice*"), Hyundai HYSCO, Pohang Iron & Steel Co., Ltd., and Union Steel (the "Companies") hereby provide their comments on the Department's decision to withdraw the existing regulatory provisions concerning targeted dumping, which have been in effect since May 19, 1997.

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The Department's decision to abruptly, and without advance notice, withdraw its regulations concerning targeted dumping is difficult to understand. The Department stated that it did so because the regulations were adopted at a time when the Department lacked experience in conducting targeted dumping inquiries, and it has become concerned that the regulations therefore may have adopted thresholds or standards that have prevented the use of the average-to-transaction comparison methodology to unmask dumping contrary to Congressional intent. The Department's regulations, however, were largely procedural and the Department has not identified any instance in which it believes the regulations may have improperly limited findings of targeted dumping or otherwise are contrary to Congressional intent. Targeted dumping allegations have recently become more prevalent in antidumping investigations since the

Department ended the use of zeroing in antidumping investigations that use the weighted average-to-weighted average method. Because the Department's policy is to continue zeroing negative dumping margins when it uses the weighted average-to-transaction comparison method pursuant to a finding of targeted dumping, domestic interested parties have increasingly filed allegations of targeted dumping. The Department's abrupt withdrawal of its regulations therefore raises the concern that the Department is seeking to expand the use of targeted dumping findings as a means to reintroduce the widespread use of zeroing in antidumping investigations, and that the Department may be attempting to shield its targeted dumping practice from an "as such" challenge before the WTO.

2. Whether or not the Department promulgates regulations, U.S. law and the WTO Antidumping Agreement both provide that targeted dumping is to be used only in exceptional situations, and that the Department employ standards and thresholds that clearly distinguish targeted dumping from normal variations in export prices. Similarly, U.S. law and the WTO Antidumping Agreement both require the Department to limit the use of the weighted average-to-transaction comparison method to only those transactions found to be targeted.

3. The withdrawal of the Department's former regulations on targeted dumping was unwarranted. The regulations were largely procedural in nature, and re-stated the applicable standards established by the antidumping statute and provided reasonable and flexible procedures for analyzing allegations of targeted dumping. The regulations did not in any way limit the Department's ability to develop reasonable standards and thresholds on a case-by-case basis over time. To the contrary, the Department was able, within the framework of those regulations, to develop a reasonable methodology for examining allegations of targeted dumping, as reflected in its *Steel Nails* methodology.

4. The Department should continue to utilize the *Steel Nails* methodology, which has not been withdrawn, in analyzing allegations of targeted dumping in antidumping investigations, with appropriate adjustments depending on the facts and circumstances of each particular case.

II. THE DEPARTMENT'S ABRUPT AND LARGELY UNEXPLAINED REVOCATION OF ITS REGULATIONS ON TARGETED DUMPING IS UNWARRANTED

The Department's December 10, 2008 notice withdrawing the Department's regulations on targeted dumping stated that the Department had determined to do so because those regulations had been "promulgated without the benefit of any departmental experience on the issue of targeted dumping."[1] According to the Department, because until recently there had been very few allegations or findings of targeted dumping, the Department has now come to question "whether, in the absence of any practical experience, it established an appropriate balance of interests in the provisions," and has expressed concern that "{t}he Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping, contrary to the Congressional intent."[2] Fearing that such a hypothetical failure to "unmask" targeted dumping "would act to deny relief to domestic industries suffering material injury from unfairly traded imports," the Department concluded that the "immediate revocation of the provisions will facilitate the proper and efficient operation of the antidumping law."[3] The Department stated its intent to return to "case-by-case adjudication," which will "allow the Department to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this

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[1] *Withdrawal Notice*, 73 Fed. Reg. at 74,930.

[2] *Id.* at 74,930-74,931.

[3] *Id.* at 74,931.

area."[4]

The Department's explanation for abruptly and without advance notice withdrawing a regulation that had been in effect for over ten years is puzzling to say the least. The notice does not identify any instance in which the Department believes that the former regulations in fact had prevented the Department from "unmasking" targeted dumping in a manner contrary to Congressional intent. This is not surprising since, as discussed below, the Department's regulations were largely procedural and did not set forth any "thresholds or other criteria" that were not drawn directly from the targeted dumping statute itself.

More importantly, although the Department acknowledges that "until recently" there had been "very few" allegations or findings of targeted dumping, the Department's notice does not explain or address the reason for the sudden increase in targeted dumping allegations: the Department's December, 2006 decision to finally acquiesce, in part, to the rulings of the World Trade Organization ("WTO") that zeroing of negative dumping margins is not permitted under the WTO Antidumping Agreement.[5] The Department's current practice in investigations is to calculate dumping margins without zeroing, but only where it uses the average-to-average methodology for computing dumping margins.[6] Thus, where dumping margins are calculated using the average-to-transaction method, as provided for in the case of targeted dumping, the Department's practice is to continue to zero negative dumping margins.[7] Because a finding of targeted dumping is now the only circumstance in most investigations in which the Department

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[4] *Id.*

[5] *See Antidumping Proceedings: Calculation of Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification (*hereinafter *Zeroing Final Modification)*, 71 Fed. Reg. 77,722 (Dec. 27, 2006).

[6] *See id.*, 71 Fed. Reg. at 77,724.

[7] *Id.*; *See also Coated Free Sheet Paper from the Republic of Korea,* 72 Fed. Reg. 60,630, 60,631 (Oct. 25, 2007)("*Coated Free Sheet"*).

will continue to zero dumping margins, the Department has found itself confronting targeted dumping allegations in virtually every new investigation conducted since the Department's publication of its *Final Modification*, as domestic interested parties seek to manufacture dumping margins through the use of zeroing. [8]

As is discussed in part IV, below, the Department's initial response to the surge of targeted dumping allegations was to disclaim responsibility for developing *any* substantive standards or thresholds for defining targeted dumping. Instead, in the investigation of coated free sheet paper, the first investigation conducted subsequent to the *Final Modification*, the Department simply accepted criteria developed by the petitioners in that case without engaging in any independent analysis.[9] To the Department's credit, however, in a subsequent antidumping investigation of steel nails, the Department developed and employed a generally reasonable and thoughtful methodology for analyzing and evaluating allegations of targeted dumping.[10] The Department developed the *Steel Nails* methodology in the context of the facts and circumstances of that investigation, while also requesting public comments on the appropriateness of adopting those standards in future investigations. [11] By proceeding in this manner, the Department

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[8] The Companies note that there appears to be no support for the Department's evident belief that the use of zeroing in this context is any more lawful under the WTO Antidumping Agreement than the use of zeroing when making weighted average-to-weighted average comparisons. To the contrary, the WTO has consistently held the use of zeroing is contrary to the WTO rules regardless of the context. *See* Appellate Body Report, *Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (01/09/2007) ("Japan Zeroing"); Panel Report *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/P/R (01/10/2008)("US-Zeroing (EC) II")

[9] *See Coated Free Sheet*, Issues and Decision Memo at Comment 7.

[10] *Certain Steel Nails from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (June 16, 2008) ("*Steel Nails*").

[11] *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment* 73 Fed. Reg. 26,371 (May 9, 2008). *See*

provided guidance to interested parties while preserving the Department's flexibility to adapt that methodology as appropriate to the facts and circumstance of each individual case, as well as to modify the methodology in response to comments from interested parties or as the Department gained greater experience over time regarding targeted dumping. The *Steel Nails* methodology thus constitutes precisely the type of case-by-case development and elaboration of appropriate standards that the Department now claims the regulations may have prevented it from pursuing. The Department subsequently applied a variant of the *Steel Nails* methodology in subsequent investigations, making affirmative findings of targeted dumping in some cases, while finding no targeted dumping in others.[12]

In short, until the publication of the *Withdrawal Notice*, the Department appeared to be on its way to developing a substantive framework for analyzing allegations of targeted dumping that provided objective criteria for implementing the concepts embodied in the targeted dumping statute, while at the same time preserving the Department's ability to adapt its methodology to particular facts and circumstances, and to refine its methodology on a case-by-case basis as it gained experience in conducting investigations involving allegations of targeted dumping. Significantly, the Department was able to do this all within the framework of the existing targeted dumping regulations, and nowhere in the development and subsequent application of the

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comments posted on Commerce website at: http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html.

[12] *See Preliminary Determination of Sales at Less Than Fair Value and Postponement of the Final Determination: Certain Circular Welded Carbon Quality Steel Line Pipe from the Republic of Korea*, 73 Fed. Reg. 66,020 (Dep't Commerce Nov. 6, 2008); *Sodium Metal from France: Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances*, 73 Fed. Reg. 62,252 (Dep't Commerce Oct. 20, 2008); *Lightweight Thermal Paper from Germany: Notice of Final Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 57,326 (Dep't Commerce Oct. 2, 2008); *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40,485 (Dep't Commerce July 15, 2008).

Steel Nails methodology was there any indication that the Department felt itself to be unduly constrained or limited by the provisions of the regulations, which were largely procedural in nature.

Against this background, the Department's sudden and largely unexplained decision to revoke its existing regulations on targeted dumping is a matter of great concern, and raises the specter that the Department is considering returning to the standard-less and seemingly result-oriented approach to evaluating targeted dumping that was reflected in the *Coated Free Sheet* investigation. If true, this would reduce the Department's conduct of a targeted dumping analysis to an empty formality serving as a pretext for the reintroduction of zeroing in investigations "through the back door." The wholesale reintroduction of zeroing in investigations under the guise of addressing the exceptional practice of targeted dumping would seriously undermine the Department's credibility and would once again place the United States squarely in violation of its WTO obligations. Moreover, the Department's action to abolish regulations that were largely procedural in nature, and which merely re-stated the substantive requirements expressly set forth in the statute, raises the prospect that the Department may be seeking to shield its targeted dumping analysis and the possible reintroduction of wholesale zeroing from "as such" review by the WTO.

III. U.S. LAW AND THE WTO ANTIDUMPING AGREEMENT BOTH REQUIRE THE DEPARTMENT TO DISTINGUISH TARGETED DUMPING FROM NORMAL VARIATIONS IN PRICE, AND TO LIMIT THE USE OF THE WEIGHTED AVERAGE-TO-TRANSACTION METHOD SOLELY TO TARGETED TRANSACTIONS

Even in the absence of formal regulations, the Department's discretion in choosing standards and thresholds in conducting a targeted dumping analysis is far from absolute. Both U.S. law and the WTO Antidumping Agreement make clear that targeted dumping is an exceptional practice and requires clear evidence of a persistent pattern of prices that cannot fairly

be explained as normal variation in prices. In addition, U.S. law and the WTO Antidumping Agreement are clear that even where targeted dumping is found, the Department must provide an explanation of why it cannot account for those variations using the weighted average-to-weighted average comparison method, and must limit the use of the weighted average-to-transaction method to only the targeted transactions.

The targeted dumping provision is set forth in Section 777A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f-1. Subsection (d) of that section provides that in an antidumping investigation the Department shall normally compare the weighted average of the normal values during the period of investigation to the weighted average of export prices (or constructed export prices).[13] Subsection (d)(1)(B) then carves out a limited exception to this requirement:

> **SEC. 777A. SAMPLING AND AVERAGING; DETERMINATION OF WEIGHTED AVERAGE DUMPING MARGIN AND COUNTERVAILABLE SUBSIDY RATE.**
>
> . . . .
>
> (B) Exception. 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).

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[13] 19 U.S.C. § 1677f-1(d)(1)(A)(i). The statute also permits the Department to compare the normal value of individual transactions to individual export prices or constructed export prices. *Id.* at § 1677f-1(d)(1)(A)(ii). The Uruguay Round Agreements Act Statement of Administrative Action ("SAA") makes clear, however, that the average-to-average method is the preferred method in investigations, and the transaction-to-transaction method is intended to be limited to unusual situations such as where there are few sales transactions in each market, and the merchandise is identical or custom-made. SAA at 842. Thus, for the vast majority of antidumping investigations, the Department is directed to make comparisons using the average-to-average method unless the targeted dumping provision applies.

This language tracks the comparable provision of the WTO Antidumping Agreement, which provides that dumping margins in investigations are to be based on a comparison of weighted average normal values to the weighted average export prices of the export transactions, but that

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison[14]

Thus both U.S. law and the applicable international agreement clearly indicate that the use of the weighted average-to-transaction method is to be an exceptional circumstance, to be reserved for instances in which the Department finds a *pattern* of export prices that *differ significantly* among purchasers, regions, or time periods. While the Department certainly has some discretion in defining the specific tests and thresholds used to implement those statutory standards, it is clear that the Department may not find targeted dumping merely because there are variances in the prices of the U.S. sales transactions being examined.

As the U.S. Court of International Trade has explained, targeting dumping as defined by the antidumping statute is not merely "the practice of selling to selected customers or regions at different and preferential prices as compared to the prices charged to other customers or regions."[15] Thus, the Court explained, it is not sufficient to support a targeted dumping finding merely by identifying statistical evidence of price variance, since under this definition "*most*

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[14] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("WTO Antidumping Agreement") ¶ 2.4.2.

[15] *Borden, Inc. v. United States*, 4 F. Supp.2d 1221, 1228 (Ct. Int'l Trade 1998).

pricing would constitute targeted dumping, in that there is price variance along multiple dimensions in many markets. Certainly, not all price variation, not even statistically significant variation, results from targeted dumping."[16] Rather, the Court explained:

> The concept of targeted dumping is that a company might not be able to, or might choose not to, use a dumping strategy toward a whole market but might strategically focus on a more narrowly defined market . . . To ferret out this more complicated dumping, the statute instructs Commerce to look not only at the *magnitude* of price variance but also for a *pattern* of significant price differences.[17]

It is equally clear that, even where targeted dumping is found, the Department may use the weighted average-to-transaction methodology only for the specific sales transactions that were found to be targeted.[18] This is clear from the structure of the statute, quoted above, which recognizes that the use of the weighted average-to-transaction method is an *exception* to the statutory preference for using the weighted average-to-weighted average method. The WTO Antidumping Agreement similarly limits the use of the weighted average-to-transaction method solely to the transactions found to be targeted. Article 2.4.2 begins by stating dumping margins shall "normally" be established using the weighted average-to-weighted average method, and then makes an exception for instances in which targeted dumping is found. Furthermore, all of Article 2.4.2 is prefaced by the statement that the comparison method chosen by the member state must independently comply with the fair comparison requirement of Article 2.4, which requires a "fair comparison" between export price and normal value. The WTO Appellate Body

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[16] 4 F. Supp.2d at 1228 (emphasis in original).

[17] *Id.* (*citing The Administration of the Antidumping Duty Law by the Department of Commerce, in Down in the Dumps* (Richard Boltuck & Robert E. Litan eds., 1991), at 240 (Comment of Michael Coursey).

[18] By definition, where a foreign producer or exporter is engaged in targeted dumping, only a subset of the export sales transactions can be found to have been targeted. Just as it is not possible for all of the children in Lake Wobegon to be above average, it is not possible for *all* of a respondent's transactions to be targeted.

has held on many occasions that this is an independent requirement that must be satisfied.[19] Where the use of the weighted average-to-transaction method is expressly predicated upon a finding of targeted dumping, the application of that methodology to non-targeted transactions would constitute a "fair comparison."

In short, U.S. law and the WTO Antidumping Agreement require that any methodology employed by the Department with respect to targeted dumping, whether set forth in a regulation, a policy bulletin or other statement of practice, or merely adopted in the context of a specific investigation, must distinguish meaningfully between normal price variances and the exceptional practice of targeted dumping, and the Department must apply the weighted average-to-transaction method only to the transactions found to have been targeted. To do otherwise would allow the narrow exception to the use of the weighted average-to-weighted average method to swallow up the rule, in clear violation of both U.S. law and the WTO Antidumping Agreement.

IV. THE DEPARTMENT'S FORMER TARGETED DUMPING REGULATIONS DID NOT IMPEDE THE DEPARTMENT'S ABILITY TO CONDUCT THE TARGETED DUMPING ANALYSIS IN ACCORDANCE WITH CONGRESSIONAL INTENT

The Department's former regulations with respect to targeted dumping are set forth in full below:

> **§351.414 Comparison of normal value with export price (constructed export price).**
>
> . . . .
>
> (f) *Targeted dumping.* (1) *In general.* Notwithstanding paragraph (c)(1) of this section, the Secretary may apply the average-to- transaction method, as described in paragraph (e) of this section, in an antidumping investigation if:

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[19] *See* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AD/R (01/03/2001) at ¶ 59; Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (31/10/2005) at ¶ 7.153.

(i) As determined through the use of, among other things, standard and appropriate statistical techniques, there is targeted dumping in the form of 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 Secretary determines that such differences cannot be taken into account using the average-to-average method or the transaction-to-transaction method and explains the basis for that determination.

(2) *Limitation of average-to-transaction method to targeted dumping.* Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.

(3) *Allegations concerning targeted dumping.* The Secretary normally will examine only targeted dumping described in an allegation, filed within the time indicated in Sec. 351.301(d)(5). Allegations must include all supporting factual information, and an explanation as to why the average-to-average or transaction-to-transaction method could not take into account any alleged price differences.

(g) *Requests for information.* In an investigation, the Secretary will request information relevant to the identification of averaging groups under paragraph (d)(2) of this section and to the analysis of possible targeted dumping under paragraph (f) of this section. If a response to a request for such information is such as to warrant the application of the facts otherwise available, within the meaning of section 776 of the Act and Sec. 351.308, the Secretary may apply the average-to-transaction method to all the sales of the producer or exporter concerned.[20]

Thus, the Department's regulation consisted of four elements. First, it restated the Department's statutory authority to calculate dumping margins using the weighted average-to-transaction method when the Department finds a "pattern of export prices (or constructed export prices)" for comparable merchandise that "differ significantly among purchasers, regions, or periods of time" and the Department concludes that such differences cannot be taken into account using the average-to-average method or the transaction-to-transaction method, and explains the basis for

[20] 19 C.F.R. § 353.414(f),(g) (2008) (revoked Dec. 10, 2008). *See also* 19 C.F.R. § 301(d)(5) (2008) (revoked Dec. 10, 2008), which provided that an allegation of targeted dumping must filed no later than 30 days before the scheduled date of the preliminary determination.

that determination. Since this language is drawn nearly word-for-word from the antidumping statute,[21] it is difficult to see how this element of the Department's former regulations could possibly "have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping, contrary to the Congressional intent."[22] To the contrary, to the extent this element of the regulations can be said to have established any thresholds or criteria, they are drawn directly from the statute enacted by Congress and thus served to implement, not frustrate, Congressional intent.

Indeed, in adopting the regulations the Department made clear its understanding that, because this was a new statutory provision, it was *not* adopting specific substantive criteria that might limit its ability to "exercise the discretion intended by the statute"[23] in identifying and combating targeted dumping:

> In the preamble to the proposed regulations, the Department specifically avoided the adoption of any *per se* rules on targeted dumping due to the Department's limited experience administering this provision of the Act. However, the Department recognizes the need to establish guidance in this area and thus *will issue policy bulletins setting forth more specific criteria as the Department develops its practice in this area.*[24]

Thus, contrary to the suggestion in the *Withdrawal Notice*, the Department took care to ensure that the regulation did not establish "thresholds or other criteria" that unduly constrained the Department's ability to develop appropriate substantive standards and criteria as the Department gained experience in administering the targeted dumping provision. The Department declined, for example, to adopt a proposal that would have stated that particular "common commercial

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

[22] *Withdrawal Notice*, 73 Fed. Reg. at 74,931.

[23] *Id.*

[24] *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,374 (Dep't Comm. May 19, 1997) (final rule) (initial emphasis in original, second emphasis added).

patterns of pricing" such as variations based on the size of orders, seasonal pricing, and passing on cost decreases would, *per se* not constitute targeted dumping. Similarly, the Department rejected a proposal that would have provided that there would be no finding of targeted dumping where similar patterns existed in both the U.S. and comparison markets.[25]

Nowhere in the *Withdrawal Notice* does the Department explain why it has now reversed its view and concluded that the very regulatory language it previously deemed to provide adequate flexibility is now unduly constraining. Nor does the Department anywhere identify any specific "thresholds or other criteria" in the regulations that it believes may in fact have inappropriately limited the Department's flexibility in analyzing allegations of targeted dumping.

The second element of the Department's former regulations was the requirement that it would base its analysis on, among other things "standard and appropriate statistical techniques." The Department's regulation does not define the term "standard and appropriate statistical techniques," and it is difficult to imagine that the Department finds this requirement to have in some way improperly limited its statutory discretion. Such a view would be difficult to reconcile with the statement in the same section of the antidumping statute that the Department may use "averaging and statistically valid samples" in determining normal value and export price (constructed export price).[26]

The third element of the Department's former regulations on targeted dumping was that the Department would "normally" investigate targeted dumping only where an allegation of targeted dumping was made by a domestic interested party, and it set a deadline within which such an allegation should be made. At the time the regulation was adopted, some parties had objected to this requirement. The Department explained its decision on this point as follows:

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[25] *Id.*

[26] 19 U.S.C. § 1677f-1(a).

> It 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, types of customers, 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.[27]

The Department's analysis of this issue was well-reasoned, and nothing in the *Withdrawal Notice* indicates that the Department has now changed its views on this point. As the Department further explained at the time, if it were required in every case to analyze targeted dumping in the abstract, without an allegation by domestic interested parties that would focus the analysis on the salient features of the particular market or industry, "the Department would be compelled to conduct countless comparisons of prices between customers, possible regions, and possibly significant time periods in every case."[28] Nothing in the *Withdrawal Notice* indicates that the Department now believes it is possible or desirable to conduct such an analysis routinely in every case even in the absence of any allegation.

Moreover, the Department's regulation provided merely that it would "normally" examine targeted dumping only in response to an allegation. In the preamble to the final regulations, the Department made clear that in an appropriate case it would examine targeted dumping even in the absence of an allegation from a domestic interested party:

> Nevertheless, there may be instances in which the Department recognizes targeted dumping on its own, without an allegation from domestic interested parties. In such cases, the Department must be able to address the targeted dumping behavior regardless of whether any domestic interested party filed a timely and sufficient allegation. Accordingly, the Department has modified the proposed rule in order to ensure that the regulation properly reflects the Department's authority to address instances of targeted dumping absent an allegation.[29]

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[27] *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,374.

[28] *Id.*

[29] *Id* at 27,374-27,375.

Thus, in the now-revoked targeted dumping regulations, the Department set a reasonable balance by requiring an allegation in most cases, while still maintaining the flexibility to address targeted dumping whenever there was adequate information in the record indicating that a targeted dumping analysis was warranted.[30] It is thus difficult to imagine that it was this aspect of the targeted dumping regulations that led the Department to question whether it had "established an appropriate balance of interests in the provisions."[31]

The fourth element of the Department's former regulations was that, where targeted dumping was found, the Department would limit the use of the average-to-average method to only those sales that were found to constitute targeted dumping. As the Department explained in the preamble to the final regulations in 1997, this element of the regulations is a straight-forward application of the statutory preference for using average-to-average comparisons in investigations:

> In the Department's view, Section 777A(d)(1) of the Act establishes a preference for average-to-average price comparisons in investigations. The statute contemplates a divergence from the normal average-to-average (or transaction-to-transaction) price comparison out of a concern that such a methodology could conceal "targeted dumping." Accordingly, the Department will apply the

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[30] The Department also noted in the preamble to the regulations that the deadline for making the allegation of targeted dumping, which is thirty days before the scheduled date of the preliminary determination, was adopted to ensure that allegations of targeted dumping could be considered by the Department in its preliminary determination and could be addressed at verification. The Department also noted, however, that this deadline, like all such regulatory deadlines, would be extended for good cause should the facts and circumstances of a particular case dictate doing so. *Id.* at 27,375. The deadlines in the previous regulations, together with the explanation in the Preamble, provided the Department with needed flexibility along with deadlines to ensure fairness to all parties. In the absence of the regulations, there are *no* deadlines for allegations. The Department needs to set articulated time limits in order to avoid surprise and to give all parties a reasonable period of time to evaluate all arguments and respond in a thorough manner.

[31] *Withdrawal Notice*, 73 Fed. Reg. at 74,930.

average-to-average transaction approach solely to address the practice of targeted dumping.[32]

As discussed above in part III (and as the Department itself has clearly recognized), the use of the weighted average-to-transaction method for sales that were *not* found to be targeted would be in direct contravention of Section 777A(d)(1) of the Act, as well as of ¶ 2.4.2 of the WTO Antidumping Agreement, both of which establish a clear preference for use of the weighted average-to-weighted average method in antidumping investigations. The withdrawal of the regulations in no way alters this legal analysis, and any attempt to apply the weighted average-to-transaction comparison method to non-targeted transactions would be a *per se* violation of both U.S. law and the WTO Antidumping Agreement.[33]

In short, a review of the Department's former regulations concerning targeted dumping makes clear that these regulations imposed no substantive standards or criteria other than those drawn directly from the antidumping statute, and established basic procedural requirements, while providing the Department with ample flexibility to develop its targeted dumping methodology over time as it gained more experience in analyzing allegations of targeted dumping. Indeed, the Department is well on its way to developing a reasonable and workable methodology for targeted dumping based on the *Steel Nails* methodology, and was able to do so under the previously existing targeted dumping regulations. As discussed above, nowhere in the *Withdrawal Notice* does the Department explain the way in which it believes that the existing

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[32] *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,375 (internal citations omitted.).

[33] A final element of the regulations, set forth in §351.414(g) authorized the Department to request information from the parties relevant to the analysis of targeted dumping and, if a response to that request was deemed to require the use of facts otherwise available, authorized the Department to apply the average-to-transaction method to all sales by such a producer. This provision thus merely re-stated the Department's standard facts available practice as reflected in numerous other areas of the Department's antidumping practice.

regulations may have established "thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping," or have failed to establish "an appropriate balance of interests" in addressing allegations of targeted dumping. For these reasons, the Companies urge the Department to reconsider its decision and promptly reinstate the targeted dumping regulations previously codified at 19 C.F.R. § 351.414(f) and (g).

V. REGARDLESS OF WHETHER THE DEPARTMENT REINSTATES ITS REGULATIONS, THE DEPARTMENT SHOULD CONTINUE TO ADHERE TO THE SUBSTANTIVE ANALYSIS DEVELOPED IN THE *STEEL NAILS* INVESTIGATION

As discussed above, in the first antidumping investigation conducted after the Department's announcement that it was abandoning the use of zeroing in investigations where the average-to-average comparison method is used, the antidumping investigation of coated free sheet paper from Korea, the Department found targeted dumping by the Korean producers Hansol, Moorim, and Hankuk.[34] In so doing, however, the Department expressly declined to set forth *any* standard for evaluating the allegations of targeted dumping made by the petitioner in that case. In the only previous determination made under the targeted dumping provisions of the antidumping statute, the Department had developed a methodology for evaluating targeted dumping in the course of a remand determination ordered by the U.S. Court of International Trade in an appeal of the antidumping investigation of pasta from Italy.[35] In *Coated Free Sheet*, the Department concluded that that the "*Pasta* Test" although affirmed by the Court on remand, was not appropriate. Significantly, however, the Department did not adopt any other methodology or analysis in its place. Rather, the Department merely accepted, without any legal or substantive analysis, the standards unilaterally developed by the petitioner in that case for

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[34] *Coated Free Sheet*, 72 Fed. Reg. 60,631.

[35] *See Borden, Inc. v. United States*, 1999 Ct. Intl. Trade LEXIS 43 (Ct. Int'l Trade 1999).

purposes of its targeted dumping allegation:

> We have determined that it is not appropriate to apply the *Pasta* Test in this investigation. That test was developed within the context of a specific case. Moreover, in considering whether to apply the *Pasta* Test, as a general practice, we took note of the arguments raised by the parties in this investigation. In considering these arguments, we realized that there are a number of issues that would be better resolved with a more complete comment process. In the years since the *Pasta* Test was developed, the Department has had no further experience analyzing targeting and we are examining how the *Pasta* Test standards and threshold could be modified in developing a standard practice for addressing targeting allegations. In view of the Department's uncertainty regarding the general applicability of the *Pasta* Test standards, the overall lack of case precedent on this matter, and the unique circumstances of this case, the Department accepts the petitioner's targeting allegation without endorsing the petitioner's test standards and procedures as a general practice.
>
> We recognize the need to develop a standardized test for future cases. For this reason, the Department intends to issue a separate *Federal Register* notice inviting comment on how a new, more standardized test could be developed and what it should include.[36]

Thus, in *Coated Free Sheet* the Department made an affirmative finding of targeted dumping, without providing *any* analysis of how the facts of record in that case satisfied the statutory requirements that there be a "pattern" of export prices or constructed export prices that "differ significantly" among regions, producers or periods of time.

On the same day that it published the final results in *Coated Free Sheet*, the Department also published a notice requesting comments on the "standards and tests that may be appropriate in a targeted dumping analysis.[37] The Department received comments from more than fifteen parties, including the Korean Iron Steel Association (of which the Companies are members) and the Korean Ministry of Commerce, Industry, & Energy ("MOCIE"). Thereafter, as discussed above, in the course of the antidumping investigation of steel nails, the Department did adopt a

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[36] *Coated Free Sheet*, Issues and Decision Memorandum at Comment 2.

[37] *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 Fed. Reg. 60,651 (Oct. 25, 2007).

methodology for identifying targeted dumping that relied upon generally reasonable statistically valid criteria and thresholds.[38] On May 9, 2008 the Department published a notice in the Federal Register stating its intention to adopt this methodology as a Department practice for considering targeted dumping allegations, and requested comments from interested parties concerning this methodology.[39] It is the Companies' understanding that the Department's withdrawal of its targeted dumping regulation has not affected the status of the methodology, which the Department has already begun to apply in other investigations. While far from perfect, the *Steel Nails* methodology sets forth a reasonable basis for distinguishing instances of targeted dumping from mere routine pricing variations. Furthermore, and contrary to the arguments made by some domestic interested parties,[40] this methodology does not place an unreasonable burden on domestic interested parties and has not prevented the Department from making affirmative findings of targeted dumping. [41]

The Companies urge the Department to continue to use the *Steel Nails* methodology with appropriate adjustments, where warranted, to the particular facts and circumstances of each

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[38] *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 Fed. Reg. 33,977 (June 16, 2008); *See also,* Memorandum from Stephen J. Claeys to David M. Spooner re: Post-Prelim Determinations on Targeted Dumping, Case Nos. A-570-909 and A-520-802 (April 21, 2008).

[39] *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26,371 (Dep't Commerce May 9, 2008).

[40] *See* Letter from Skadden, Arps, Slate, Meagher & Flom LLP to U.S. Department of Commerce re: *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations* (June 23, 2008); Letter from Committee to Support U.S. Trade Laws to U.S. Department of Commerce re: *Comments on Targeted Dumping Methodology* (June 23, 2008).

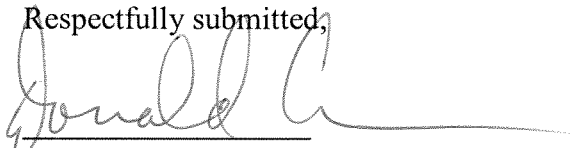
[41] *Preliminary Determination of Sales at Less Than Fair Value and Postponement of the Final Determination: Certain Circular Welded Carbon Quality Steel Line Pipe from the Republic of Korea*, 73 Fed. Reg. 66,020 (Dep't Commerce Nov. 6, 2008).

individual case.

VI. CONCLUSION

For the foregoing reasons, Hyundai HYSCO, Pohang Iron & Steel Co., Ltd., and Union Steel respectfully urge the Department to reconsider its decision to withdraw the existing procedural regulations concerning the analysis of targeted dumping allegations in antidumping investigations, and further urge the Department to continue to use the substantive analysis, with appropriate modifications where warranted, that was developed by the Department in the *Steel Nails* investigation.

Respectfully submitted,



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