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By Hand

Honorable David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

Attn: Weighted Average Dumping Margin

Dear Mr. Spooner:

On behalf of Dofasco Inc. ("Dofasco"), we hereby submit rebuttal comments in response to the Department's March 6, 2006 notice proposing a change in the Department's standard practice of calculating weighted average dumping margins in an original antidumping duty investigation. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 43 Fed. Reg. 11,189 (Dep't Comm. Mar. 6, 2006) ("March 6 Notice").

I. INTRODUCTION.

One of the first principles of American jurisprudence is that laws should be written in a manner as to give the public fair notice of what is prohibited and how to comply with the law. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist

that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 480 U.S. 108 (1972). This principle should apply equally to the antidumping law: the antidumping law should be administered so as to allow foreign producers and exporters to comply with the law. Any system that is inherently biased to find dumping from random price fluctuations, or that is so complex or uncertain that foreign companies cannot determine a minimum fair value price, denies them an opportunity to comply with the law. The Department should resist protectionist pressures to administer the law this way.

The Department has committed to change its practice in response to a ruling by a WTO panel finding that the Department's policy of zeroing in connection with average-to-average margin calculation in investigations is inconsistent with the WTO Antidumping Agreement. March 6 Notice, at 11,189. On April 18, 2006, the WTO Appellate Body confirmed that finding of the panel. Report of the Appellate Body, United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R, ¶¶ 203-05, 263(b). That Appellate Body finding went further, holding that the Department's practice of zeroing in administrative reviews, as applied to the administrative reviews included within the European Commission's complaint, also is inconsistent with the WTO Antidumping Agreement. Id. ¶¶ 133, 263(a).

Many of the domestic industry representatives that submitted comments on April 5 proposed clever ways to circumvent the World Trade Organization ("WTO") ruling by switching to various transaction-to-transaction schemes, instead of eliminating the underlying problem of zeroing. U.S. law does not authorize, much less require, the Department to devise calculation methodologies that make compliance impossible. Because all of these transaction-to-transaction schemes make it extremely difficult, if not impossible, for foreign producers or exporters to comply, and because these transaction-to-transaction schemes are inconsistent with the U.S. statute, the Department should reject them and instead comply with the WTO through the straightforward method of eliminating zeroing.

II. CONTRARY TO U.S. STEEL'S POSITION, ZEROING IS NOT REQUIRED UNDER THE STATUTE.

U.S. Steel attempts to rehash settled law by asserting that a statute silent on the issue of "zeroing" or negative margin "offsets" somehow commands zeroing. The Department should reject this argument.

A. U.S. Steel Selectively Quotes from the Controlling Timken Decision, Failing to Mention the Federal Circuit's Specific Rejection of the Argument That the U.S. Statute Requires Zeroing Negative Dumping Margins.

U.S. Steel begins its argument by stating correctly that in Timken Co. v. United States, the U.S. Court of Appeals for the Federal Circuit considered whether the statute mandates zeroing. U.S. Steel's comments, at 3. U.S. Steel then states that the Federal Circuit found this to be a "close question". Id. (quoting Timken Co. v. United States, 354 F.3d 1334, 1341 (Fed.

Cir.), cert. denied, 543 U.S. 976 (2004). But U.S. Steel fails to mention that it was not such a close question as to be irresolvable by the Court; the Court concluded that "the statute does not directly speak to the issue of negative-value dumping margins." Timken, 354 F.3d at 1342. Because Congress did not directly speak to the issue in the statute, the Court in Timken correctly concluded that the Department had discretion whether to zero out negative dumping margins.

B. U.S. Steel's Argument Reverses the Burdens in the Chevron Doctrine; U.S. Steel Must Prove that Congress Directly Spoke to the Issue of Whether the Department May Treat Average-to-Average Methods the Same With Respect to Negative Margin Transactions.

Implicitly acknowledging, as it must, that the Court in Timken already held that U.S. law does not require zeroing, U.S. Steel devises what it claims is an argument that was never considered in Timken. U.S. Steel argues that if the Department does not zero out negative dumping margins in any investigations, then it would render meaningless a special provision providing for an average-to-transaction methodology in investigations where the petitioner demonstrates that the foreign manufacturer or exporter engages in "targeted dumping". U.S. Steel comments, at 4-6; see also Committee to Support U.S. Trade Laws ("CSUSTL") comments, at 4-9. According to U.S. Steel, an average-to-average methodology without zeroing and an average-to-transaction methodology without zeroing mathematically must yield the same result in the final weighted-average dumping margin, and therefore the Department cannot interpret the statute to allow elimination of zeroing. Id. But of course, this entire

argument depends on the assumption that the Department must eliminate zeroing in the "targeted dumping" provision if it eliminates zeroing for the average-to-average methodology. U.S. Steel attempts to support this faulty assumption by stating that nothing in the statute or the WTO Anti-Dumping Agreement support the idea that zeroing is allowed for one methodology but forbidden for another. Id. at 10.

This argument is ludicrous. It tosses aside the fundamental principle of administrative law that courts review an agency's interpretation of a statute through a two-step process: first, it determines "whether Congress has directly spoken to the precise question at issue," but "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). The statute, to be sure, provides a special average-to-transaction calculation methodology for targeted dumping, but nowhere does it state that the targeted dumping provision and the average-to-average methodology must operate consistently with respect to zeroing. Therefore, under the Chevron doctrine, the Department can decide to treat the two situations differently just as easily as it can decide to treat the two situations the same, so long as the Department's interpretation is reasonable. U.S. Steel would in effect rewrite the Chevron doctrine to provide a reverse

presumption that an agency must read two provisions of the same statute in pari materia[1] unless the statute states otherwise or expressly commits the interpretation to agency discretion. But of course, that is not the law, and Commerce need not interpret the statutory provision for the average-to-average methodology in investigations as requiring zeroing even assuming arguendo that the logic of the statute requires it under the average-to-transaction targeted dumping provision.

C. Legislative History of Uruguay Round Amendments Shows That the Policy Concerns That Gave Rise to Zeroing Were Addressed Through Targeted Dumping Provision, Thus Average-to-Average Methodology Need Not Be Read In Pari Materia With Average-to-Transaction Methodology.

Examination of the history of the zeroing practice and how it was addressed through the targeted dumping provision in the Uruguay Round shows further that the ordinary average-to-average calculation methodology provision should not be read in pari materia with the average-to-transaction "targeted dumping" methodology.

The zeroing controversy is not new. Prior to the Uruguay Round, in investigations the Department compared each U.S. transaction to a weighted-average home market value for the same or most similar CONNUM, and zeroed out any negative dumping margins. As early as

[1] "In pari materia" literally means "upon the same matter or subject". The in pari materia canon of construction holds that separate statutes, or subsections of the same statute, that relate to the same subject matter, should be construed together. Black's Law Dictionary 791 (6th ed. 1990).

1987, the Court of International Trade considered, and rejected, the argument that U.S. law forbids zeroing. Serampore Indus. v. U.S. Dep't of Comm., 675 U.S. F. Supp. 1354, 1360-61 (Ct. Int'l Trade 1987). The Court held that the statute was silent, and that the Department reasonably interpreted the statute to allow zeroing because zeroing prevents foreign companies from masking dumped sales with more profitable sales. Id.; see also Böwe Passat Reinigungs- und Wäschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1149-50 (Ct. Int'l Trade 1996) (interpreting and explaining rationale of zeroing in pre-Uruguay Round Agreements Act ("URAA") law).

During the Uruguay Round negotiations, the United States initially opposed efforts by other countries to move from the average-to-transaction to an average-to-average methodology because of concerns about targeted dumping. See Statement of Administrative Action ("SAA"), at 842 ("[i]n part, the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal 'targeted dumping'"). But the Department's view is that the parties compromised, moving to average-to-average, with two important limitations. First, average-to-average would be limited only to investigations, not administrative reviews, and second, the administering authority could use average-to-transaction where targeted dumping could be shown and could not be taken into account through an average-to-average method. Id. at 843.

This historical background shows that Congress was concerned only about retaining a methodology that avoids "masked" or "targeted" dumping, and that it addressed the problem through the targeted dumping provision. If the Uruguay Round negotiators and Congress had been concerned about punishing non-targeted, random price fluctuations (the only other conceivable situation other than the targeted dumping scenario in which zeroing would make a material difference in the ultimate margin), then Congress would have explicitly required zeroing in all investigations. Thus, it makes perfect sense to interpret the statute to mean that Congress may have intended to retain zeroing for investigations involving targeted dumping, but was at best indifferent about zeroing in all other investigations.

U.S. Steel's urging that 19 U.S.C. § 1677f-1(d)(1)(A)(i) (average-to-average) be read in pari materia with 19 U.S.C. §1677f-1(d)(1)(B) (average-to-transaction for targeted dumping) therefore makes no sense given the fact that the two provisions serve materially different purposes. "That two sections of the same legislative enactment relate to the same subject matter does not compel in pari materia construction if the two sections in question were intended to serve significantly different purposes." Getek v. Ohio Cas. Ins. Co., 868 F. Supp. 751, 754 (E.D. Pa. 1994) (citing Erlenbaugh v. United States, 409 U.S. 239, 244 (1972)). Although here both sections relate to the weighted-average dumping calculation, the targeted dumping section clearly serves a different purpose, in this case precisely the same purpose that, prior to the Uruguay Round, was proffered as an excuse for the prior practice in investigations

of calculating margins based on average-to-transaction prices, with zeroing. Even if the statute or legislative history showed that Congress had "directly spoken" to the issue of zeroing in the targeted dumping situation, it surely does not show that Congress spoke to the issue of zeroing in investigations where no targeted dumping has been uncovered.

D. U.S. Steel's Assertion That Average-to-Transaction Without Zeroing Yields the Same Margin as Average-to-Average Without Zeroing Is Simply Wrong.

Finally, U.S. Steel's comparison of computation of dumping margins through an average-to-average method, without zeroing, to an average-to-transaction method, without zeroing, is wrong because it makes an incorrect assumption about the mechanics of the average-to-transaction method in a targeted dumping situation. U.S. Steel's analysis presumes that the average-to-transaction calculation would compare each individual U.S. sale in the respondent's database to all home market sales throughout the period of investigation. That assumption is incorrect. The Department's regulations provide that in a targeted dumping situation, the Department will limit the application of the average-to-transaction method only to those sales that constitute "targeted dumping". 19 C.F.R. § 351.414(f)(2). Within the segregated pool of U.S. sales for which the Department applies an average-to-transaction comparison, the Department will compare each individual U.S. transaction to a weighted average of home market prices during the contemporaneous month in which the compared U.S. sale is made. See id. §§ 351.414(e)(1), 351.414(f)(1). Because the universe of comparison

home market sales will change, both for the U.S. sales within the targeted dumping subset, and for the U.S. sales outside the targeted dumping subset (which will still be compared average-to-average), the final dumping margin need not, and usually will not, be the same in comparison to a straight average-to-average comparison across the board.

III. THE DEPARTMENT SHOULD NOT MOVE TO ANY TRANSACTION-TO-TRANSACTION METHOD, BECAUSE U.S. LAW PROHIBITS USE OF THE TRANSACTION-TO-TRANSACTION METHODOLOGY AS A GENERAL RULE.

Several of the commenters representing petitioners urge the Department to adopt a transaction-to-transaction calculation methodology as a general rule for investigations, in order to avoid simple compliance with the WTO panel decision by eliminating zeroing. Such efforts are misguided generally, for the reasons stated below.

A. The Legislative History Makes Clear That the Average-to-Average Method Is the Approach the Department Should Follow in "Normal" Investigations, and Transaction-to-Transaction Is Reserved for Special Situations, Such as Custom-Made Merchandise.

The SAA expressly discusses the calculation methodology the Department should follow in original investigations. The SAA states as follows:

> Consistent with the [AD] Agreement, new section 777A(d)(1)(A)(i) [19 U.S.C. § 1677f-1(d)(1)(A)(i)] provides that in an investigation, Commerce normally will establish and measure dumping margins on the basis of a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices.

SAA, at 172 (emphasis added). The Administration in the SAA deliberately used the stronger word "will" instead of "may" for a reason, to underscore that the Department may have discretion to deviate from the average-to-average methodology in unusual investigations, but not in a normal investigation. In its March 6 notice, the Department has made clear that it is changing its practice generally, not just for the specific investigations that were the subject of the European Commission's WTO complaint. March 6 Notice, at 11,189. Thus, any change that the Department makes to its practice generally must take into account the requirement that Congress expects the Department normally to calculate dumping margins in an original investigation on the basis of an average-to-average methodology.

Moreover, the legislative history reporting the URAA out of the House Ways and Means Committee makes clear that transaction-to-transaction must be the rare exception to the usual rule of average-to-average:

> In addition to the use of averages, section 777A(d)(1)(A)(ii) [19 U.S.C. §1677f-1(d)(1)(A)(ii)] also permits the calculation of dumping margins on a transaction-by-transaction basis. Such a methodology would be appropriate in situations where there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made. However, given past experience with this methodology and the difficulty in selecting appropriate comparison transactions, the Committee expects that Commerce will use this methodology far less frequently than average-to-average methodology.

H. Rep. 103-826, pt. 1, at 99 (1994) (emphasis added). No amount of excuses about the Department's supposed original rationale for preferring average-to-average over transaction-to-

transaction as the default rule can get around the unmistakable command that Congress "expects that Commerce will use this [transaction-to-transaction] methodology far less frequently than average-to-average methodology". With such clear legislative history, the Department's supposed original rationale of preferring average-to-average based on computational limitations of transaction-to-transaction is irrelevant. Put bluntly, if the Department implements transaction-to-transaction as the default calculation methodology in investigations in light of the clear legislative history forbidding it except in unusual cases, this rule surely will be overturned by the courts. The Department will be unable to rely on Chevron deference, because Congress has spoken directly to the matter of whether average-to-average or transaction-to-transaction can be used as the default rule, and therefore the courts will never reach the question of whether the Department's interpretation of the statute is reasonable.

B. The Department's Own Regulations Reiterate the Same Preference as the Legislative History for Average-to-Average.

The preference for average-to-average over transaction-to-transaction in the vast majority of cases is memorialized not only in the legislative history of the URAA, but also in the Department's regulations implementing the URAA. The regulations state as follows:

> In an investigation, the Secretary normally will use the average-to-average method. The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.

19 C.F.R. § 351.414(c)(1) (2005) (emphasis added). Thus, what the commenters urging use of the transaction-to-transaction method propose would require not only ignoring the legislative history, but also would require changing the Department's regulations.

As Dofasco noted in its April 5 comments, in past cases where the Department has changed its regulations or procedure pursuant to section 123(g)(1) of the URAA, the Department has issued a formal, specific proposed rule, allowed time for public comment on that specific proposed rule, and then issued a final rule. See Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 Fed. Reg. 47,738, 47,738 (Dep't Comm. Aug. 15, 2005) (proposed rule) (citing section 123(g)(2) of the URAA); Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 Fed. Reg. 62,061, 62,062 (Dep't Comm. Aug. 15, 2005) (final rule) (again citing section 123 of the URAA). Regardless of whether section 123(g)(1) serves as a substitute or an adjunct to the normal notice-and-comment requirements of the Administrative Procedures Act, if the Department were to implement the transaction-to-transaction method for most investigations, the Department would be obliged to issue a specific proposed rule to change 19 C.F.R. § 351.414(c)(1), and offer an additional opportunity for public comment on any such rule.

C. The Preamble to the Regulations and the Department's Own Antidumping Duty Manual Reiterates the Same General Preference and Delineates the Special Situations In Which Transaction-to-Transaction May Be Appropriate.

Some commenters claim that the preference for average-to-average in the Department's regulations was based on computer limitations that no longer exist. See, Coalition for Fair Lumber Imports comments, at 5; Stewart and Stewart comments, at 10 n.21. However, the Department explained in the Preamble to the promulgation of the 1997 regulations that the Department's preference for average-to-average over transaction-to-transaction was not merely because of computer processing time concerns for execution of the transaction-to-transaction method with large databases. Instead, the Department codified the average-to-average preference in its regulations because, "[i]n the Department's view, section 777A(d)(1) of the Act [19 U.S.C. § 1677f-1(d)(1)] establishes a preference for average-to-average price comparisons in investigations." Antidumping Duties; Countervailing Duties; Final Rule (hereinafter "Preamble"), 62 Fed. Reg. 27,296, 27,375 (May 19, 1997). The Department explained further:

> In the Department's view, the SAA makes clear that Congress did not contemplate broad application of the transaction-to-transaction method. SAA at 842. Specifically, the SAA recognizes the difficulties the agency has encountered in the past with respect to this methodology and suggests that even in situations where there are very few sales, the merchandise in both markets should also be identical or very similar before the agency would make transaction-to-transaction comparisons. Accordingly, we continue to maintain that the transaction-to-

> transaction methodology should only be applied in unusual situations.

Id. at 27,374 (emphasis added). So in order to implement general use of the transaction-to-transaction method as suggested by some of the commenters, the Department would have to not only ignore the legislative history on its face, but it would also have to ignore the legislative history as the Department itself interpreted the statute at the time that it promulgated the regulations.

Moreover, the Department's own Antidumping Duty Manual makes clear that the average-to-average preference had nothing to do with computer concerns about the transaction-to-transaction method, but instead that the transaction-to-transaction method is "normally done only for large capital goods made to order, such as transformers", because "[t]he difference between these custom-made products render average prices meaningless." Antidumping Duty Manual, ch. 6, at 7 (1998). Even assuming arguendo that the Department could ignore the legislative history and rewrite its own regulations, it would be incorrect to suggest that a move to transaction-to-transaction is merely a logical step following the progression of computing technology.

D. There Is Nothing In the Legislative History, the Preamble To the Department's Regulations, or Any Other Authoritative Guide On Intent To Suggest That the Legislative History or Regulations Would Have Been Different If the WTO's Decisions Forbidding Zeroing Had Been Known.

Some commenters posit that the Department should not be held to its own clearly-stated preference for average-to-average because the regulations were written at a time where the Department always zeroed negative-margin price comparisons. Stewart and Stewart comments, at 10 n.21. This is just post-hoc rationalization. There is absolutely nothing in the legislative history of the URAA, the Preamble to the Department's regulations, or any other authoritative guide on the intent of Congress in 1994 or the intent of the Department in 1997, to suggest that the statute or the regulations would have been written to prefer transaction-to-transaction had Congress or the Department known that the WTO Anti-Dumping Agreement prohibits zeroing in connection with the average-to-average methodology.

IV. THE TRANSACTION-TO-TRANSACTION METHODOLOGY USED IN SOFTWOOD LUMBER MAKES IT EXTREMELY DIFFICULT, IF NOT IMPOSSIBLE, FOR POTENTIAL RESPONDENTS TO COMPLY WITH U.S. LAW BEFORE A PETITION IS FILED.

As explained in the introduction, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 480 U.S. 108 (1972). U.S. antidumping duty law is already complex. For sophisticated foreign producers such as Dofasco, it takes a team of accountants and computer

experts years to master the complexities of U.S. law, starting with the model match and date of sale and ending with a host of movement, selling adjustments, and packing expenses. That mastery is essential for a foreign manufacturer to do business in the U.S. market in the face of an antidumping duty order, because otherwise the foreign manufacturer is left to guess at what price it may charge for export to the United States without dumping liability. Respondents with fewer resources are left with the Hobson's choice of taking a chance with no clear price benchmark, or exiting from the U.S. market. Movement to a transaction-to-transaction methodology for most cases will make an already difficult situation well-nigh impossible, which is precisely the protectionist goal of certain domestic producers.

A. The Home Market Comparison Sale Criteria Used in Softwood Lumber Increases Uncertainty in Estimating Normal Value, Because It Depends Much More Heavily On the Precise Date of Sale Than the Average-to-Average Method.

In the average-to-average method, the Department's task for extracting the universe of U.S. and home market sales upon which to make comparisons is based primarily on the model match characteristics and level of trade. Date of sale plays a role only in determining whether sales are inside or outside the one-year period of investigation, plus those expense adjustments that are derived from the universe of sales as a whole. Not so in the transaction-to-transaction method used in the Department's Section 129 WTO panel compliance determination in Softwood Lumber. The Department explained the date-of-sale component of its methodology as follows:

> Because lumber prices were extremely volatile and the market was in a constant state of flux during the period of investigation (POI), we first attempted to find an identical match at the same level of trade on the same day. If no identical match was found, we looked for an identical home-market sale the day before the U.S. sale, then the day after the U.S. sale, and so forth, up to seven days before or after the U.S. sale. We did not match U.S. sales to home market sales that occurred either more than seven days before or more than seven days after the date of the U.S. sale.

Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 22,636, 22,637 (Dep't Comm. May 2, 2005) (emphasis added) (hereinafter "Softwood Lumber Section 129 Determination").

Under the average-to-average method, respondents attempting to comply with U.S. law by monitoring their sales in advance of a potential antidumping petition normally do not have to pay too much attention to date-of-sale considerations in calculating sample dumping margins, because the database and matches for most respondents change relatively little based on potential decisions by the Department regarding the date of sale, unless large long-term contracts are involved. Use of POI-wide average home market prices as the basis for normal value provides more predictable results, because it smoothes out aberrational sales, both high-priced and low-priced, so the "tail" does not "wag the dog" in the dumping calculation. By contrast, under the transaction-to-transaction method the Department used in Softwood Lumber, different possible views by the Department as to the appropriate date of sale for a

block of sales can change everything. It becomes virtually impossible for a responsible foreign producer to comply with U.S. law when the hypothetical dumping margin that it calculates to make sure that it is selling its products in the U.S. market above normal value can yield a wide variety of results depending on what the Department later may decide is the appropriate date of sale. Even if, for example, the issue is whether the appropriate date of sale is order date or order confirmation date, and the company's order confirmation usually issues one or two days after the order, numerous matches will change, and therefore the dumping margin will change. If the Department makes such a change in the calculation methodology, in effect it will make compliance impossible. There is no statutory basis to allow the Department to devise a methodology that makes compliance with U.S. law impossible.

B. The Transaction-to-Transaction Method Focuses Excessive Attention of the Parties on Arguments Over Date-of-Sale Methodology, Instead of Underlying Pricing Behavior That Antidumping Laws Are Designed to Address.

The Department already spends significant resources in investigations resolving disputes between petitioners and respondents over the appropriate date of sale. Dofasco does not mean to suggest that the date of sale should be a trivial matter in the Department's consideration. Under the average-to-average method, date of sale is important primarily in determining the universe of sales made during the POI. A ruling by the Department that the appropriate date of sale should be changed from invoice date to order confirmation date, for example, may mean that a few sales drop out of the sale population at the beginning of the POI,

and a few sales are added at the end of the POI. However, the attention devoted to this issue under the average-to-average methodology will be magnified immensely under the transaction-to-transaction method described above in Softwood Lumber, because it will affect not only the universe of sales, but each and every match. The result could be endless arguments about the date of sale for each and every sale, requiring the Department to make thousands of separate rulings on date of sale for every respondent in every investigation. The Department must not lose sight of the forest for the trees. Administration of the antidumping laws should be first and foremost about pricing behavior, not whether the material terms of agreements were fixed on the date of order, order confirmation, invoice, shipment, or some other date. Wholesale use of the transaction-to-transaction method will transform international trade advocacy into esoteric discourse about contract formation on each separate transaction, an exercise best relegated to the first year of law school.

C. The Transaction-to-Transaction Methodology Is Especially Inappropriate for Most of the Products That Are the Subject of New Investigations, Such as Steel, Because of the Large Number of Transactions and the Elaborate Model Match Structures That Result in Hundreds or Thousands of Control Numbers.

Dofasco's concerns are those of a Canadian steel producer. But the Department should keep in mind steel investigations when it changes the weighted-average calculation methodology for investigations generally, because history shows that by far the largest share of new antidumping investigations in the past fifteen years have involved steel products.

The model match structure for corrosion-resistant steel currently is 12 variables. The 2002 cold-rolled investigations employed a 15-variable model match. Many of the individual variables subdivide merchandise into large numbers of sub-categories. For example, in the model match for corrosion-resistant steel, the variable for metallic coating weight provides 23 sub-categories, and the variable for minimum thickness provides 11 sub-categories. These elaborate model match structures, combined with the tens of thousands of transactions typical of a major steel producer in a one-year period of investigation, results in large numbers of products that the Department recognizes as distinct control numbers ("CONNUMs") and database calculation outputs that are already complex. Magnifying the complexity by adding an elaborate tie-breaker system to select a single home market sale match for each U.S. transaction will result in a calculation procedure that only Rube Goldberg could admire. As explained above, an important goal of U.S. trade law is to establish rules that are sufficiently understandable and predictable that good corporate citizens in foreign countries can comply with U.S. law. The transaction-to-transaction test fails that test miserably, particularly for already-complex investigations involving steel products. Nothing in the statute authorizes the Department to devise a methodology that in effect blocks compliance with the dumping law.

D. The Softwood Lumber Approach Arbitrarily Eliminates Potential Home Market Matches Based On Criteria That Do Not Affect Price Comparability.

In Softwood Lumber, the Department established an elaborate tie-breaker procedure to select a single home market sale to compare to each U.S. transaction. When sales were equally similar based on product characteristics, the Department looked for the home market sale for which the variable cost of manufacturing was most similar. If there were still multiple candidate home market transactions, the Department turned to the following tie-breakers: (1) most similar quantity; (2) most similar customer category; (3) total movement expenses; and (4) number of days between payment and shipment. Softwood Lumber Section 129 Determination, at 22,638. As the Committee on Pipe and Tube Imports ("CPTI") correctly notes, "[t]he use of tie-breakers, such as freight, which do not affect price comparability to derive a single home market sale for comparison with the U.S. sale improperly removes comparable home market sales from the margin analysis." CPTI comments, at 13. In short, the Softwood Lumber transaction-to-transaction approach is arbitrary and makes compliance impossible.

V. ALLEGED IMPROVEMENTS IN COMPUTER CAPABILITIES DO NOT JUSTIFY ADOPTION OF THE TRANSACTION-TO-TRANSACTION METHODOLOGY.

As noted above, certain commenters argued that the Department locked itself into the average-to-average methodology at a time where it was impractical to use the transaction-to-

transaction method for investigations with large numbers of observations, because of low limits on computing capability. This is simply a ruse.

A. The Basic SAS Programming Structure Has Not Changed Significantly Since the Department Adopted Its Regulations in 1997.

It is misleading to suggest that somehow that in 1997, when the Department adopted regulations stating a preference for average-to-average in accordance with the legislative history of the URAA, that the Department was incapable of developing a transaction-to-transaction program, complete with a subroutine to select a single home market sale among a group falling under the identical CONNUM. The Department then, as now, uses SAS programming, and that programming structure has not changed significantly since 1997. The only thing that has changed since 1997 is the programs that took a few hours to run in 1997 now take a few minutes to run. The Department should not rely on such a slender reed to justify a wholesale change in calculation methodology.

B. Programming for the Transaction-to-Transaction Methodology Is Inherently Cumbersome and Riddled With Risk for Error, Because of the Elaborate Tie-Breaking Procedures for Selecting a Single Home-Market Sale to Match to Each U.S. Sale.

Large sales databases submitted in investigations typically contain numerous small computational reporting or computational errors. If detected early in the process, respondents have ample opportunity to correct the errors. If detected immediately before, during or after verification, however, the opportunity to correct the errors are limited. Many of the errors are

ignored because they are so small as to have an unnoticeable effect on the dumping margin. But under the Softwood Lumber approach, every error, no matter how minor, in the date of sale, variable cost of manufacturing, quantity, customer category, total movement expenses, or number of days between payment and shipment, has the potential to result not only in a trivial change in the net sales price, but also change the model match entirely, and thus greatly affect the final weighted-average dumping margin. The complexity of the transaction-to-transaction analysis under the Softwood Lumber approach unnecessarily compounds almost every error in the database.

VI. CPTI'S PROPOSAL IS UNWORKABLE, BECAUSE IT REQUIRES ALMOST AN EXPONENTIAL INCREASE IN DUMPING COMPARISONS.

CPTI proposes a variation on the transaction-to-transaction method that avoids going through an elaborate tie-breaker procedure to select a single home market transaction to compare to each U.S. transaction. Under CPTI's proposal, each U.S. transaction would be compared to each home market transaction within the same CONNUM at the same level of trade, and then after disregarding any comparisons with zero or negative margins, the rest would be weight-averaged to derive a weight-averaged dumping margin for each U.S. transaction. CPTI comments, at 12-15.

The CPTI proposal, like all transaction-to-transaction proposals, cannot be applied under the existing statute, as interpreted by the legislative history, or under existing regulations.

It avoids the date-of-sale sensitivity of the Softwood Lumber scheme, but it greatly increases complexity and processing time because of the sheer number of comparisons.

As a typical example, assume in an investigation a respondent reported over a one-year POI 100,000 U.S. transactions and 100,000 home market transactions. If all U.S. and home market transactions were distributed evenly among 10 CONNUMs (10,000 transaction per CONNUM on both the U.S. and home market side), the total number of dumping comparisons would be one billion comparisons. In ordinary investigations, this would lead to much longer processing time to perform the computer margin calculation, plus make analysis of the output for errors immensely more complicated. Assuming even distribution of the transactions on both sides among the various CONNUMs, the number of comparisons would be

$$\frac{N^2}{C}$$

where N = number of observations and C = number of CONNUMs.[2]

In investigations involving unusually large numbers of transactions, such as lumber, there might be as many as 1,000,000 transactions in each market in the database. If these transactions were distributed evenly among 10 CONNUMs, the number of comparisons would

[2] If transactions tend to be clustered within a few CONNUMs, as is typically the case, the problem is magnified, because within each CONNUM, the number of comparisons is simply Nc^2, where Nc = number of transactions within the CONNUM. To the extent that transactions are concentrated in a few CONNUMs, the total number of comparisons overall approaches N^2.

be 100 billion comparisons. Processing that many comparisons might be literally beyond the computing capabilities of all but a few computers in the world. Certainly it would be unreasonable to expect a foreign producer to have that computing capability, which it would need in order to make sure it is in compliance with U.S. law.

VII. THE "SMORGASBORD" APPROACH OF STEWART AND STEWART IS UNREASONABLE.

Stewart and Stewart support the transaction-to-transaction method. Stewart and Stewart comments, at 9-11. Like the Softwood Lumber approach and unlike the CPTI approach, Stewart and Stewart assumes that the Department must find exactly one home market match for each U.S. transaction. Stewart and Stewart offers three alternatives to the Softwood Lumber tiebreaker system to select the lucky home market sale: (1) random selection; (2) highest-priced sale; or (3) sale priced closest to the mean. Aside from the fact that all of the alternatives are unlawful and undesirable for the reasons stated above generally for all transaction-to-transaction methodologies, each of the three alternatives in the Stewart and Stewart "smorgasbord" approach suffer from fatal drawbacks.

A. The "Random Selection" Approach Creates Even Greater Uncertainty for Producers and Exporters, Who Cannot Possibly Foresee Which Home Market Sale Will Be Chosen From the Random Selection.

Stewart and Stewart's first suggestion is to select randomly among multiple home market sales within the same CONNUM and level of trade on the same date as the U.S. sale. Stewart and Stewart comments, at 14-15. Stewart and Stewart justifies this approach on the

grounds that the WTO Antidumping Agreement does not specifically preclude random selection of a home market match. Id. Of course, the WTO Antidumping Agreement also does not specifically forbid determination of dumping through trial by ordeal, but that would be little justification for considering resolution of international trade disputes through medieval justice. More important, it is by definition impossible to predict in advance the identity of the home market sale if it is to be selected randomly, and therefore impossible for a foreign producer to ascertain normal value so it can comply with U.S. law. It is hard to imagine that the Department would seriously consider such a proposal, but it would be a protectionist's dream come true.

B. The Highest-Priced Sale Approach Guarantees Finding Dumping Whether or Not True Trans-Border Price Discrimination Exists.

Stewart and Stewart's second suggestion is to select among otherwise equally comparable home market sales by selecting the highest-priced sale. Stewart and Stewart comments, at 15. Because dumping is ordinarily measured as the difference between the ex-factory price of above-cost home market sales and the ex-factory price of U.S. sales, the higher the home market price, the greater the likelihood of a positive dumping margin and the higher the magnitude of the dumping margin. Such a solution does not serve any rational economic purpose behind the dumping laws, it serves only as an artificial non-tariff barrier to the U.S. market. This suggestion should be dismissed out of hand as well.

C. The "Sale Priced Closest to the Mean" Approach Is Virtually Indistinguishable From a Transaction-to-Average Calculation Methodology, Which Is Permitted Only In the Case of Targeted Dumping.

Stewart and Stewart's final tie-breaker approach would be to select among equally comparable home market sales "the transaction that is closest in price to the median or the mean of the prices that are equally comparable". Stewart and Stewart comments, at 16. In theory, the home market transaction chosen under such a method should be virtually equal in ex-factory price to the weighted ex-factory price of all home market sales of the same CONNUM. If so, then this approach is virtually indistinguishable from an approach that would compare individual U.S. transactions to normal value based on the weighted-average of home market prices. That, of course, is the average-to-transaction methodology. But the statute specifically provides that the Department may use the average-to-transaction methodology only 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 [average-to-average or transaction-to-transaction] …." 19 U.S.C. § 1677f-1(d)(1)(B). U.S. Steel complains that elimination of zeroing somehow effectively writes out part of the statute, but in fact it is the Stewart and Stewart approach that would eviscerate the statutory preconditions to application of a methodology that is effectively an average-to-transaction approach.

VIII. CONCLUSION.

For the foregoing reasons, the Department should continue to calculate dumping margins in investigations based on the average-to-average method, except under certain narrow circumstances. The Department should conform its practice with the WTO Antidumping

Agreement by eliminating zeroing, not by switching to transaction-to-transaction as a general rule for investigations.

Respectfully submitted,

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