COMMITTEE TO SUPPORT U.S. TRADE LAWS

1776 K Street, NW / Washington, DC 20006 / (202) 719-7000

Alan H. Price, President
The Committee to Support U.S. Trade Laws
(202) 719-7000

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The Honorable Penny Pritzker
Secretary of Commerce
U.S. Department of Commerce
Attn: Enforcement and Compliance
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Attn: Charles Vannatta, Melissa Brewer

Re: Comments on the Department's Use of Differential Pricing Analysis

Dear Madam Secretary:

On behalf of the Committee to Support U.S. Trade Laws ("CSUSTL"),[1] this submission responds to the Department of Commerce's ("the Department") request for comments regarding

[1] CSUSTL is an organization of companies, trade associations, labor unions, workers, and individuals committed to preserving and enhancing U.S. trade laws. CSUSTL's members span all sectors, including manufacturing, technology, agriculture, mining and energy, and services. CSUSTL is dedicated to ensuring that the unfair trade laws are not weakened through legislation or policy decisions in Washington, D.C., in international negotiations, or through dispute settlements at the World Trade Organization and elsewhere.

the agency's application of its differential pricing analysis in less-than-fair-value investigations and certain reviews, including annual administrative reviews. See Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26,720 (Dep't Commerce May 9, 2014) (hereinafter "DP Request for Comments"). This submission is timely filed in accordance with the Department's request for comments.

I. PROCEDURAL HISTORY OF THE DEPARTMENT'S "DIFFERENTIAL PRICING" ANALYSIS

The Department previously relied on its "targeted dumping" analysis to determine whether there exists a pattern of export (constructed export) prices for comparable merchandise that differ significantly among purchasers, regions, or time periods. See 19 U.S.C. § 1677f-1(d)(1)(B)(i). The Department withdrew the "targeted dumping" analysis[2] after taking into consideration the comments provided by interested parties and following instructions from the courts.[3] Among various complaints regarding the targeted dumping methodology were concerns regarding the cumbersome and unpredictable nature of the test, and a lack of transparency. Interested parties also argued that the Department's analysis placed unreasonable burdens on petitioners and respondents alike.[4]

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2 *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930 (Dep't of Commerce Dec. 10, 2008); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Final Modification* 77 Fed. Reg. 8101 (Dep't of Commerce Feb. 14, 2012), ("Feb 14 Final Modification"); and *DP Request for Comments*, 79 Fed. Reg. 26,722 (Dep't of Commerce May 8, 2014).

3 *See, e.g., Certain Steel Nails from the United Arab Emirates*, 73 Fed. Reg. 33,985 (Dep't of Commerce June 16, 2008); *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 64,318 (Dep't of Commerce Oct. 18, 2011); *Mid Continent Nail Corp. v. United States*, 34 CIT__, Slip Op. 10-47, at 3 (May 4, 2010); *Mid Continent Nail Corp. v. United States*, 34 CIT___, Slip. Op. 10-48 at 2 (May 4, 2010); and http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html (comments on interim final targeted dumping rule).

4 *See generally id.*

The Department subsequently initiated the use of its "differential pricing" analysis to assess whether to apply an average-to-transaction methodology in analyzing a respondent's sales to account for a pattern of export (constructed export) prices for comparable merchandise that differ significantly among purchasers, regions, or time periods. The Department's differential pricing analysis consists of three elements: (1) application of the Cohen's *d* test, a statistical effect size analysis; (2) application of the so-called "ratio" test; and (iii) an assessment of whether the average-to-average methodology can account for a respondent's targeted dumping.[5]

First, in applying the Cohen's *d* test, the Department determines the Cohen's *d* coefficient for each set of testable sales groups in order "to evaluate the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise."[6] A sales group is testable "when the test and comparison groups of data each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise."[7]

Second, in applying the ratio test, the Department evaluates how the "identified pattern of export prices" determined by the Cohen's *d* test fits within a series of ranges.[8] Specifically, if the value of the sales in the differential pricing pattern is 33 percent or less than the value of all U.S. sales, then the Department applies the average-to-average methodology to all sales.[9] If the value of the sales in the differential pricing pattern is more than 33 percent but less than 66

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5 DP Request for Comments, 79 Fed. Reg. at 26,722-23.

6 DP Request for Comments, 79 Fed. Reg. at 26,722.

7 *Id.*

8 *Id.* at 26,722-23.

9 *Id.* at 26,723.

percent of the value of all U.S. sales, then the Department applies the average-to-transaction methodology to the sales that passed the Cohen's *d* test and applies the average-to-average methodology to the remaining sales.[10] If the value of the sales in the differential pricing pattern is 66 percent or more of the value of all U.S. sales, then the Department applies the average-to-transaction methodology to all sales.[11]

Third, the Department determines whether the average-to-average methodology can account for masked dumping by assessing whether the application of the average-to-transaction methodology yields a "meaningful difference," which is evidenced by a margin that crosses the *de minimis* threshold or increases by 25 percent relative to the margin generated by the average-to-average methodology.[12]

As discussed below, CSUSTL recommends that the Department adopt several modifications to its differential pricing methodology in order to refine and improve its efforts to unmask dumping by respondents in investigations and reviews.

II. WHERE THE DEPARTMENT FINDS DIFFERENTIAL PRICING, IT SHOULD APPLY THE AVERAGE-TO-TRANSACTION METHODOLOGY TO ALL SALES

The Department should cease applying the ratio test, which is inconsistent with the statute and the Department's own practice. Under the statute's express terms, the Department's application of an average-to-transaction methodology in an investigation to calculate a respondent's dumping margin is appropriate based simply on a finding that a pattern of

10 *Id.*

11 *Id.* at 26,722-23.

12 *Id.* at 26,723.

differential pricing exists and that the average-to-average methodology cannot account for the dumping behavior inherent in that pattern. See 19 U.S.C. § 1677f-1(d)(1).

The statute does not contain any provision authorizing the Department to condition its application of the average-to-transaction methodology on the extent of an identified pattern of targeted dumping. Nor does the Statement of Administrative Action ("SAA") indicate any requirements beyond the statute's plain terms. In fact, the SAA simply calls for the application of the average-to-transaction methodology "where targeted dumping may be occurring" without regard to any "ranges" or partial application of the methodology.[13]

As the Department has recognized, "{t}he only limitations the statute places on the application of the average-to-transaction method are the satisfaction of the two criteria set forth in the provision."[14] Indeed, by applying an additional criterion assessing the range or extent of a pattern of targeted dumping, the Department improperly reads an additional element into the limited requirements of the statute.[15] The Department's application of the Cohen's *d* test is sufficient to establish a pattern of differential pricing among comparison groups, and its further application of the ratio test is not necessary or appropriate.

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[13] Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA") at 843; reprinted in 1994 U.S.C.C.A.N. 4040, 4178.

[14] Issues and Decision Memorandum accompanying *Polyethylene Retail Carrier Bags from Taiwan*, 75 Fed. Reg. 14,569 (Dep't Commerce Mar. 26, 2010) ("IDM in Carrier Bags from Taiwan") (final determ.) at Comment 1.

[15] *See*, e.g., *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003) (finding that the Department acted reasonably in declining to read an additional component into the adverse facts available analysis set out in the statute).

Moreover, the Department's application of 33 percent and 66 percent thresholds is arbitrary.[16] The Department has never identified its rationale for the ranges used in the ratio test, and the commentary the Department has offered regarding the ratio test provides little to no guidance:

> The Department finds that this approach is reasonable because whether, as an alternative methodology, the average-to-transaction method is applied to all U.S. sales, a subset of U.S. sales, or no U.S. sales depends on what percentage of U.S. sales pass the Cohen's *d* test. Thus, there is a direct correlation between the U.S. sales that establish a pattern of export prices that differ significantly and to what portion of the U.S. sales the average-to-transaction method is applied.

Issues and Decision Memorandum in Xanthan Gum from China, 78 Fed. Reg. 33,351 (Dep't Commerce June 4, 2013) ("IDM in Xanthan Gum from China") (final determ.) at 28. Because this description of the Department's ratio test does not identify "the basis on which {it} exercised its expert discretion," the Department does not have a reasonable basis for interpreting the statute to apply the ratio test.[17]

In contrast, the Department has repeatedly determined that a finding of any targeted dumping merits the application of the average-to-transaction methodology to all U.S. sales regardless of the extent of the pattern of such pricing.[18] In Wood Flooring from China, the Department stated that "once {it} finds any instances of targeted dumping, the Department has

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16 *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (an agency decision is arbitrary if the agency fails to state "the basis on which {it} exercised its expert discretion") ("Burlington Truck Lines"); see also Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("State Farm").

17 Burlington Truck Lines, 371 U.S. at 167.

18 *See*, e.g., IDM in Carrier Bags from Taiwan at Comment 1; *Issues and Decision Memorandum in Multilayered Wood Flooring from China*, 76 Fed. Reg. 64,318 (Dep't Commerce Oct. 18, 2011) ("IDM in Wood Flooring from China") (final determ.) at Comment 4.

determined that application of the average-to-transaction methodology is necessary to fully analyze the extent of the dumping that is taking place."[19]

In addition, the Department was explicit in Carrier Bags from Taiwan that the application of the average-to-transaction methodology to all sales "is more consistent with the Department's approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally," as opposed to selectively applying the average-to-transaction methodology to a subset of sales.[20] In recognition of this fact, the Department withdrew a regulation that limited the application of the average-to-transaction methodology to only a subset of U.S. sales[21] and recently reiterated its unequivocal repudiation of that practice.[22] In short, the Department's own practice clearly demonstrates that applying the average-to-transaction methodology to all sales where the Department finds any targeted dumping is the proper interpretation of the statute.

Application of the average-to-transaction methodology to all sales is warranted (and justified under the statute) where: (1) the requirements of the Cohen's *d* test are met; and (2) it is demonstrated that the average-to-average methodology cannot account for the targeted dumping. No other analysis, such as that performed under the so-called ratio test or any other test, is

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19 IDM in Wood Flooring from China at 32.

20 IDM in Carrier Bags from Taiwan at Comment 1. See also IDM in Xanthan Gum from China at 29 ("If Congress had intended for the Department to apply the average-to-transaction method only to a subset of transactions and use a different comparison method for the remaining sales of the same respondent, Congress could have explicitly said so, but it did not.").

21 *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930 (Dep't Commerce Dec. 10, 2008) (interim final rule).

22 *Non-Application of Previously Withdrawn Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 79 Fed. Reg. 22,371 (Dep't Commerce Apr. 22, 2014) (final rule).

required. Indeed, Congress specifically intended for the Department to use the average-to-transaction methodology in cases such as this in order to unmask targeted dumping.[23]

Recent decisions by the United States Court of International Trade allowing the Department to use a "sufficiency test" when conducting the "Nails test" for targeted dumping in administrative reviews do not change this conclusion.[24] Notably, those cases did not consider either the Department's differential pricing analysis or the propriety of employing "ranges" in determining how to apply the average-to-transaction methodology.[25] Furthermore, in Timken I and Timken II, the Court upheld the Department's sufficiency test in certain administrative reviews only because the pattern of targeted dumping was limited to a "minuscule percentage of sales."[26] In contrast, in applying its differential pricing analysis, the Department declines to apply the average-to-transaction methodology even where a significant portion of a respondent's U.S. sales — up to 33 percent — are part of a pattern of targeted dumping.

The Department's reliance on arbitrarily designated ranges to selectively apply the average-to-transaction methodology to certain subsets of sales, or to no sales at all, is inconsistent with the statute, contrary to Congress' intent, and flatly inconsistent with the Department's practice. The Department should dispense with the ratio test and apply the average-to-transaction methodology to all sales where it finds that the other parts of the differential pricing analysis are satisfied.

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23 SAA at 842-843; reprinted in 1994 U.S.C.C.A.N. 4040, 4177-78.

24 *Timken Co. v. United States,* (Ct. Int'l Trade 2014) ("Timken I"); *CP Kelco Oy v. United States*, (Ct. Int'l Trade 2014) ("CP Kelco"); *Timken Co. v. United States*, (Ct. Int'l Trade 2014) ("Timken II").

25 Timken I, No. 12-00415, slip op. at 14.

26 Timken II, No. 13-00069, slip op. at 17; see also Timken I, No. 12-00415, slip op. at 20 ("{T}he percentages of sales found to be targeted were very small.").

III. THE DEPARTMENT SHOULD ELIMINATE THE FIVE PERCENT RULE IN APPLYING THE COHEN'S D TEST

As stated above, the Department currently applies a five percent rule to the comparison group before applying the Cohen's *d* test. When testing whether sales to a particular customer, region, or time period have significant price differences, the comparison group must represent at least five percent of the entire sales database (by quantity). As a result, if there are two sales of a product to a particular customer that are being tested, the sales of that same product to all other customers must represent at least five percent of total sales. In this way, before the Cohen's *d* test is even applied, the Department is greatly limiting the number of possible comparisons. The Cohen's *d* test does not inherently place any such limitation on the analysis; rather, this is a construct applied by the Department on its own accord.

The Department's application of the five percent rule completely eliminates the possibility of a differential pricing finding in many situations where it is likely to occur. For example, any CONNUM which is less than five percent of the total sales database could simply not be found to be differentially priced. This is particularly problematic for sales databases with a large number of CONNUMs. Small-volume CONNUMs could be sold to particular customers, regions or time periods at any price with impunity. Similarly, large-volume CONNUMs could be sold at any price to any individual customer so long as the volumes sold to other customers does not exceed five percent of the total sales database. These are precisely the type of scenarios that are supposed to be detected by the Department's differential pricing test.

The Department's application of the five percent rule is unnecessary and limits the sales that could pass the Cohen's *d* test for no legitimate reason. While the Department is perhaps attempting to limit the comparisons when only a small amount of data is available, the amount and effect of these sales would also likely be small, especially if the Department's current thresholds under the ratio test are retained. Thus, it is not clear why the five percent rule exists as it serves no justifiable reason, and it should be eliminated.

IV. TOTAL SALES SHOULD NOT BE USED AS THE DENOMINATOR WHEN CALCULATING THE PERCENTAGE OF SALES THAT PASS THE COHEN'S D TEST

The Department's measurement of the extent of a pattern of targeted dumping by comparing the total value of the sales that passed the Cohen's *d* test to the total value of all sales – including those sales that were not tested using the Cohen's *d* analysis – distorts the differential pricing analysis and masks targeted dumping behavior. To the extent the Department continues to employ the ratio test in its differential pricing analysis, the Department should use the total value of sales subject to the Cohen's *d* test as the denominator of the calculation used to determine the extent of the pattern of differential pricing.

The Department's methodology completely disregards the fact that a portion of a respondent's sales may not even be tested under Cohen's *d* to determine whether or not they contributed to a pattern of targeted dumping.[27] The Department's differential pricing analysis compounds this problem when assessing the extent of the pattern of targeted dumping under the ratio test by comparing the total value of the sales that passed the Cohen's *d* test to the total value of all sales, including those sales that were not tested at all.

Given that the differential pricing analysis only tests identical CONNUMs in testing groups according to customer, region, or time period, a respondent could easily side-step the analysis by slightly adjusting data such as a customer's identity, the destination, the date of sale,

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27 DP Request for Comments, 79 Fed. Reg. at 26,722 (noting that a sale will be tested under Cohen's *d* only "if the test and comparison groups of data each have at least two observations, and if the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise").

or a product's physical characteristics to eliminate any chance of testing groups forming. Accordingly, the value of the tested sales that passed the Cohen's *d* test relative to the value of all the tested sales is the best measure of a respondent's dumping behavior.

V. THE MEANINGFUL DIFFERENCE TEST SHOULD BE ELIMINATED

The statute authorizes the Department to apply the average-to-transaction methodology when it finds a pattern of differential pricing, if it explains why those price differences cannot be taken into account under the average-to-average and the transaction-to-transaction methodologies. See 19 U.S.C. § 1677f-1(d)(1)(B)(ii). The Department's current practice is to compare the average-to-average margins to the average-to-transaction margins in order to determine whether there is a meaningful difference between the two. The Department defines meaningful difference as either: (1) crossing the de minimis threshold; or (2) a 25 percent change in the margin. If the difference is meaningful, the Department finds that average-to-average cannot account for differential pricing and opts for the average-to-transaction methodology.

The Department should eliminate this step in its differential pricing methodology, because the average-to-average methodology inherently cannot account for the occurrence of differential pricing. The use of the average-to-average methodology eliminates the appearance of differential pricing by averaging individual sales together. The only way to unmask differential pricing is to compare individual U.S. sales to normal value (i.e., the average-to-transaction methodology). It is the individual sales that are targeted, not the average of those sales. Application of the average-to-average methodology could never reveal or account for differential pricing. When the sales prices of individual sales are weight averaged with other sales of the same CONNUM, regardless of customer or region, the margin on those targeted sales unfairly disappears. As such, the average-to-average methodology simply cannot account for the occurrence of differential pricing.

In addition, the Department should find that any difference in the margin is sufficient to establish that price differences cannot be taken into account under the average-to-average methodology. Any difference in the margin is a meaningful difference. The Department's current threshold of a 25 percent change in the margin is excessive. If the Department does not find that any margin change is meaningful, it should drastically lower this 25 percent threshold.

VI. THE DEPARTMENT SHOULD RETAIN FLEXIBILITY IN MODIFYING ITS DIFFERENTIAL PRICING METHODOLOGY AS NECESSARY

In addition to the Cohen's *d* test, there are a number of potential statistical tools that could be used by the Department to find differential pricing (e.g., Pearson *r* (correlation), Hedges' *g* test). In order to ensure that its differential pricing methodology has the breadth and flexibility to unmask dumping the Department should make clear that it has the authority to change the specific test applied to identify differential pricing in any particular proceeding.

The Department should also maintain flexibility when it comes to the acceptable thresholds, if any, that are allowable for a particular industry. The Department's one size fits all approach is inconsistent with the realities of the numerous different industries that seek relief under the U.S. unfair trade laws. For example, a certain level of differential pricing might be acceptable in the metals industry where pricing tends to be more homogenous, but a different level might be appropriate for agricultural products where prices often fluctuate. The Department should not needlessly tie itself to certain thresholds and should consider the particularities of the different industries in establishing thresholds on a case-by-case basis.

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We appreciate the Department's consideration of these comments. Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,

Alan H. Price
President
Committee to Support U.S. Trade Laws