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Honorable Penny Pritzker
Secretary of Commerce
Central Records Unit, Room 1870
U.S. Department of Commerce
International Trade Administration
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Attn: Charles Vannatta
Melissa Brewer

Re: Comments on Differential Pricing Analysis

Dear Secretary Pritzker:

Stewart and Stewart provides these comments in response to the U.S. Department of Commerce's request for comments on its "differential pricing" analysis. *See Differential Pricing Analysis: Request for Comments*, 79 Fed. Reg. 26720 (Dep't Commerce May 9, 2014) ("*DP Comments Request*"). As the Department explains, with its differential pricing analysis it is "developing a new approach for determining whether application" of an alternative comparison method, based on average-to-transaction comparisons for determining dumping margins is appropriate. *Id.* at 26722. This new approach, in the Department's view, is meant to embody "a more precise characterization of the purpose and application" of 19 U.S.C. § 1677f-1(d)(1)(B) (referred to hereinafter as "*DP Provision*").[1] *Id.* This statutory provision is also referred to as the "targeted dumping" element of the statute.

The law firm of Stewart and Stewart has participated in numerous antidumping proceedings for over fifty years. These comments reflect the experience we have obtained over that time.[2] The firm believes that capturing the full extent of dumping is a critical part of the

[1] The statutory provision, of course, addresses only investigations, reflecting the fact that when the statute was implemented the average-to-transaction comparison methodology was the default for administrative reviews. Since the Department modified its practice, so that the average-to-average method has become the default in reviews, it has relied on an analysis consistent with the *DP Provision* to address the selection of a comparison methodology. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Final Modification*, 77 Fed. Reg. 8101, 8102 (Dep't Commerce Feb. 14, 2012) (the Department adopted its approach to reviews "in a manner that parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations."). As the Department states, its new "price differentiation" approach is meant to implement its regulation (19 C.F.R. § 351.414(c)(1)) and be consistent with 19 U.S.C. § 1677f-1(d)(1)(B). *DP Comments Request,* 79 Fed. Reg. at 26722.

The relevant regulation reads:

§ 351.414 Comparison of normal value with export price (constructed export price)

(c) *Choice of Method.* (1) In an investigation or review, the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case.

The relevant statutory provision reads:

§1677f–1 Sampling and averaging; determination of weighted average dumping margin and countervailable subsidy rate

(d) Determination of less than fair value

(1) Investigations

(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).

[2] These comments are submitted on behalf of the firm and do not reflect the views of any of the firm's clients.

Department's implementation of the antidumping duty law and that its use of an alternative margin calculation methodology when warranted is a critical step to achieving that goal. The firm has in previous filings provided comments to the Department on its implementation of the *DP Provision*.[3]

As we stated in our June 23, 2008 comments, Stewart and Stewart believes that the success and efficacy of any proposed method for determining whether to employ the alternative comparison method will arise from these factors: (1) the ability of the methodology to identify all of the types of differential pricing that are of concern to Congress (and were identified by U.S. negotiators during the Uruguay Round) and to domestic parties, (2) the extent to which domestic parties concerned about unfair trade practices may have the issue of targeting considered in a proceeding without a significant increase in effort, (3) the method's level of transparency, (4) the ability of the method to capture the full measure of dumping occurring through selective pricing (targeting), and (5) the extent to which the methodology permits the identification of all possible differential pricing patterns and ensures an equivalence of outcome regardless of the pattern identified.[4] In our view, these factors continue to be the most significant for assessing whether a methodology properly implements the statute in a manner that is faithful to its language and Congressional intent. We believe that to achieve a robust differential pricing methodology that incorporates these elements, the Department must above all be flexible in its implementation. A

[3] *See* Stewart and Stewart comments filed with the Department on June 23, 2008 (available online at http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/stewart-stewart-td-cmt-20080623.pdf) and December 10, 2007 (available online at http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/stewart-stewart-td-cmt-20071210.pdf).

[4] We note that our 2008 comments addressed a methodology for identifying targeted dumping in the context of the Department's investigations. These factors are equally relevant to a methodology employed for administrative reviews.

flexible approach to the particulars of each case will permit the Department to establish a logical connection between facts found and decisions made.[5]

In its notice, the Department identifies a number of analytical methods and associated standards for implementing its differential pricing analysis. We do not object and, indeed support, the Department's adoption of objective standards that will provide guidance to and consistent application for all interested parties. At this time, we do not, in fact, object to any of the specific norms identified by the Department. However, each antidumping proceeding involves different facts, and, in particular cases, the individual facts may warrant a departure from standard practice. As we discuss in more specific details below, we urge the Department to modify the practice described in its notice to allow interested parties to assert that a particular standard and/or element of analysis should be modified to address the particular facts of individual cases.

We first review the statutory purpose to provide an introduction to the issues raised by the Department's notice, then identify elements of the Department's current practice that embody important elements of a flexible practice and should serve as starting points for the Department's practice going forward, and finally address particular concerns that may warrant modification of adopted standards.

[5] *See Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962) (requiring a rational connection between facts found and the choice made).

Statistory Purpose

As the Department is aware, during the Uruguay Round negotiations, a provision addressing price differentiation was included in the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 to respond to U.S. concerns that dumping would be masked if weighted averages were compared to weighted averages in investigations. *See* Terence P. Stewart, Susan G. Markel, and Michael T. Kerwin, *The GATT Negotiating History (1986–1992)*, Vol. I, "Antidumping" at 96, Kluwer Law & Taxation Publishers, 1993. The provision has been incorporated into U.S. law at 19 U.S.C. § 1677f-1(d)(1)(B).

In the Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, the Administration noted the Department's existing preference for comparing an average normal value to individual export prices in both investigations and administrative reviews. *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316, Vol. 1, at 172 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 ("SAA"). The SAA explained, however, that the new statutory provisions provided for the normal computation of margins in investigations using average-to-average comparisons, as well as transaction-to-transaction comparisons (although the latter approach was likely to be used far less frequently than the former). *Id.* at 172–73.

In describing this change, the SAA recognized that the Department had been reluctant to use an average-to-average methodology based on a concern that such a methodology could conceal "targeted dumping." *Id.* In light of this concern, the SAA described a new statutory provision, which allowed for the use of average-to-transaction comparisons where targeted dumping may be occurring. *Id.* at 173. It explained that "in determining whether a pattern of significant price differences exists, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another." *Id.* (emphasis added). We believe that it is important that the Department evaluates its proposed methodology to ensure that the SAA's articulated concern that "small differences," which may be significant for a particular industry, is not lost. The United States has the right to robust implementation of the law so that the concealment of dumping through selective price aggression is prevented. The Department should ensure such an implementation through any regulatory measures it adopts.

When the SAA was adopted and the law changed, the only masking that could occur was among the sales of a particular model and then only if the Department used weighted-average to weighted-average prices, because low-priced sales of the model could be masked by higher-priced sales of it. As the Department did not offset dumping margins found for one model with the non-dumped prices found for another model, there was no masking between models.
While the statute has provided the right to pursue price differentiation within a model since the change in law in 1995, in most cases petitioners did not pursue that analysis. In the few cases where such differentiation was pursued, the Department's approach resulted in no differentiation being found. Whatever the merits of the Department's early experience, the importance of a robust approach by the agency moving forward is underlined by the extraordinary masking that can occur when dumping within one product can be masked not only by non-dumped sales of the same product but also by any other product sold by the exporter/foreign producer.

Important Elements of Current Practice

Certain elements of the Department's existing practice enable the Department to achieve, at least in part, some of the elements that we have identified as critical to a successful methodology.

Transparency

As the Department describes its differential pricing analysis in its notice and as it has implemented that analysis in practice (so far as we are aware), the Department has done so in a transparent manner.[6] This meets the stated goal of transparency and helps to ensure the achievement of all other identified objectives. We support a continued transparent implementation of the Department's approach.

The Identification of Differential Pricing

The Department has explained that it will normally examine for differential pricing by consolidated customer code ("purchaser"), U.S. Census regions identified via zip code ("region"), and quarters within the period of investigation or review ("periods of time"). *DP Comments Request*, 79 Fed. Reg. at 26722. Stewart and Stewart strongly supports the Department's

[6] Under its "targeted dumping" practice using the *Nails* test, the Department ultimately added a *de minimis* requirement to existing practice *without identifying any de minimis thresholds. See, e.g., Certain Stilbenic Optical Brightening Agents from Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 76 Fed. Reg. 68154, 68156 (Dep't Commerce Nov. 3, 2011) ("[W]e preliminarily determine that the overall proportion of [respondent]'s U.S. sales during the POI that satisfy the criteria of section 777A(d)(1)(B)(i) of the Act and our practice as discussed in Nails is insufficient to establish a pattern of EPs for comparable merchandise that differ significantly among certain customers or regions. Accordingly, the Department has determined that criteria established in 777A(d)(1)(B)(i) of the Act have not been met."*), unchanged in Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 17027, 17027–28 (Dep't Commerce March 23, 2012).

During the short period of time in which the Department employed its modified *Nails* test, it did not specify the actual *de minimis* level that it was employing. This left some uncertainty as to what specifically would pass this test and what would not. Had the Department continued to employ the test over a longer period of time, its threshold would surely have become evident. The advantage of the Department's differential pricing approach is that it does not appear to include any such elements—the Department has made explicit all of its thresholds.

selection of standard criteria for identifying the existence of differential pricing. Without excluding the possibility of using other criteria, the Department's selection of standard groups furthers the goals of transparency and automatic implementation of the statute.

On the other hand, the Department also states that during an investigation or a review, interested parties will be "given the opportunity to present arguments and justifications for modifying these default group definitions." *Id.* By this language, we understand that the Department intends to be flexible and allow interested parties to identify patterns of price differentiation that might not be apparent using the Department's "default" group definitions.[7] Such an approach is consistent with the Department's observation at the time it first issued proposed regulations implementing the Uruguay Round Agreements Act that "those interested parties familiar with the market for the subject merchandise are in the best position to direct the Department's attention towards possible targeted dumping." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7307, 7350 (Dep't Commerce Feb. 27, 1996) (notice of proposed rulemaking and request for public comments). This furthers, in part, the desired goal of identifying all types of price differentiation or other forms of targeting of concern to Congress (and to U.S. negotiators during the Uruguay Round) and to domestic parties. As we review below, the Department should also adopt this principle for a number of other standards and practices that it employs.

[7] For example, a large customer for subject merchandise may have its own nomenclature for different models so that the same model sold to different customers will have a different model number and a conversion algorithm will have to be used to standardize part numbers so as to reveal differential pricing. Or the subject merchandise may follow sales patterns that alter over short periods of time so that the time period demonstrating differential pricing is the sales month rather than the sales quarter. Or the geographic sales patterns for the subject merchandise may be more refined than would be evident by examining the Census four Regions so that it is an analysis based on Census's nine Divisions that will demonstrate a pattern of pricing differences.

Results-based Comparison of Margin Comparison Methodologies

The statute requires that, if the Department uses an alternative comparison methodology, the Department must explain why pricing differences "cannot be taken into account" using one of the standard margin comparison methodologies. 19 U.S.C. § 1677f-1(d)(1)(B)(ii). The Department explains that it will address this obligation by comparing the margins computed using the different approaches. *DP Comments Request*, 79 Fed. Reg. at 26723. Our firm supports this approach. It is transparent and provides an objective basis for consistent action by the Department that will ensure an equivalence of outcomes under similar situations. The Department identifies specific comparison results that will result in a decision that the alternative methodology should be used.[8] *Id.*

As we review below, this is an element that warrants flexibility on part of the Department. If a party can provide a reasonable basis for applying a different standard than the 25% threshold, the Department should consider the party's arguments and, if the facts warrant it, apply a revised standard.

Automatic Implementation

The Department states that its differential pricing analysis "would be conducted in each segment of a proceeding." *Id.* at 26722. Formerly, when the Department employed its *Nails* test,

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[8] The Department states:

> In determining whether a difference in the two weighted-average dumping margins is meaningful, the Department considers whether (1) the resulting weighted-average dumping margin moves across the *de minimis* threshold, or (2) there is a 25 percent or greater relative change in the weighted-average dumping margins between the average-to-average method and an appropriate alternative comparison method where both rates are not zero or *de minimis*.

DP Comments Request, 79 Fed. Reg. at 26723.

it required interested parties to make an allegation of targeted dumping by a fixed time in each segment of a proceeding. The Department's inclusion of the computer language automatically implementing its differential pricing test is a significant improvement on the former practice.[9] It ensures a more accurate identification of differential pricing while reducing the burden on domestic parties.

Elements that Warrant Flexibility

<u>The Use of the Cohen's *d* test</u>

The Department explains that it has chosen the Cohen's *d* test ("a generally recognized statistical measure of the extent of the difference in the means between a test group and a comparison group") "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." *Id.* In other words, the Department has chosen this test to identify the statute's "pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time." We support the Department's selection of a specific kind of analysis to identify the pricing behavior identified in the *DP Provision*. But the Department must keep in mind its ultimate purpose—the identification of patterns of significantly different pricing—and respond to the identification of patterns of significant pricing differences that do not pass this particular test. Indeed, the Department has already responded to one such situation by including in the computer code that implements the

[9] *See* Commerce Department margin program found online at http://enforcement.trade.gov/sas/programs/diffpriceprograms/DP-MarginProgram-sas.txt.

Cohen's *d* test instructions that automatically classify certain sales as passing the test without meeting its actual requirements.[10]

The Department is likely to encounter additional factual circumstances where the facts demonstrate a pattern of significant pricing differences but its test will not be passed. For example, a significant volume of sales of a particular model may be made to a single customer located in a single region during a short period of time so that no sales of the model have been made to another customer, region, or time period. Such sales may nonetheless demonstrate a pattern of pricing differences—the majority may be sold at prices below cost while most other sales of subject merchandise are above cost. The Department should consider using the alternative comparison methodology when interested parties identify patterns that do not pass the Cohen's *d* test, yet demonstrate a pattern of significant differential pricing.

<u>Cohen's *d* Thresholds</u>

The Department notes that three thresholds are used to measure the extent of differences determined using the test: small, medium, and large. *Id.* The Department states that it recognizes that pricing is significantly different if the results of the application of Cohen's *d* analysis is equal to or exceeds the large threshold. *Id.* This appears to us to be a reasonable norm for the Department to adopt for its differential pricing analysis. However, it is possible that the particular facts of a case will support a finding of differential pricing when the medium level

[10] If there are sets sales of a particular model at only two prices, one set at one price to a test group and the other at another price to the comparison group, they would not pass the Cohen's *d* test because the standard deviation for each set of sales (test and comparison) will be zero and the resulting coefficient calculated will also be zero. This result would not pass the test as implemented by Commerce. The Department recognizes that such pricing is the simplest example of a pattern of pricing differences and so accounts for it by automatically identifying it as passing the Cohen's *d* test. *See* Commerce Department macro code implementing the Cohen's *d* test, available online at: http://enforcement.trade.gov/sas/programs/diffpriceprograms/DP-macros-sas.txt.

of difference is identified. The Department should allow interested parties to provide facts and arguments supporting the use of a different threshold.

The Ratio Test

The Department explains that it uses a "ratio test" to assess the extent of significant price differences that it has identified using its Cohen's *d* test. *Id.* It explains that if the value of sales that pass the test account for 66% or more of the value of total sales, "then the identified pattern of export sales that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. *Id.* at 26722–23. If the passing sales value is greater than 33% and less than 66%, "then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method, and application of the average-to-average method to those sales identified as not passing the Cohen's *d* test." *Id.* at 26723. If 33% or less of the value of total sales passes the Cohen's *d* test, "then the results of the Cohen's *d* test do not support consideration of an alternative to the average-to-average method." *Id.*

Again, the thresholds established in the Department's ratio test appear to us to be a plausible basis norm for its differential pricing analysis, although elimination of the ratio test would permit greater capture of targeted dumping that is found. Assuming the Department adopts the ratio as proposed, the Department should nonetheless allow parties to argue that different thresholds trigger different responses based on the particular facts of individual cases. We have been able to identify one such fact pattern and expect that there will be others.

<u>Ratio Test Problem: Significant Quantities of Sales Do Not Normally Qualify for the Cohen's *d* Analysis</u>

As we have reviewed above, the Department first identifies instances of significant pricing differences via the use of the Cohen's *d* test. *Id.* Then it applies a "'ratio test' to assess the extent of the significant price differences for all sales as measured by the Cohen's *d* test." *Id.* This test is passed (and a decision made as to whether to use the alternative comparisons methodology) based on comparison of "the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test" and "the value of total sales." *Id.* at 26722–23. If both of these tests (the Cohen's *d* and the ratio) are passed, then the Department will determine whether the using the average-to-average methodology can account for the pricing differences. *Id.* at 26723.

The Department will only calculate the Cohen's *d* coefficient "with respect to comparable merchandise 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." *Id.* at 26722. This limitation means that when it applies its "ratio test" by dividing the sum of the values of sales passing the Cohen's *d* test by the value of total sales, the Department in most instances will be comparing apples to oranges. The universe of the sales represented in the denominators will be different from the universe of the sales that may potentially be included in the numerator used to calculate the ratio. Sales of particular models of subject merchandise that have been made in small quantities to particular customers, regions, or time periods (less than 5% of sales of the model) and sales where there is only one sales transaction for the model (regardless of quantity) to a particular customer, region, or time period will never appear in the numerator. However, they are included in the denominator used to calculate the ratio for the "ratio test."

Often, the differences between the sales included in the numerator and those included in the denominator will be minimal so that the Department may reasonably employ the ratio test. However, there are likely to be situations where the inclusion of sales in the denominator that do not qualify for the numerator introduces a distortive element into the calculation and reduces the reliance that can reasonably be placed on the analysis. To take an extreme example, if only 32% of the sales pass the Department's threshold so that the Cohen's *d* test is applied and 100% of these sales are identified as differentially priced, those sales will not pass the "ratio test" and the Department will not consider using the alternative comparison methodology. This is so despite the fact that all of the evidence that the Department has been able to develop indicates that there are sales of differentially priced subject merchandise.

We urge the Department to modify its methodology to address those instances where a database of U.S. sales of subject merchandise includes a number of sales that do not qualify for its Cohen's *d* analysis. We can identify at least two modifications that can be made to the Department's approach that would address (at least in part) this issue. One or both of these may easily be implemented by the Department:

(a) Employ consistent numerators and denominators. First, the Department can alter the numerator for its ratio test so that it is consistent with its denominator by only including in the denominator those sales that are included in its Cohen's *d* analysis. This will provide a more accurate measure of the level of differential pricing among those sales that may be differentially priced.

(b) Compare similar merchandise. When the Department calculates a dumping margin using average-to-average

> comparisons, a small number of U.S. sales, or even a single U.S. sale, of one model may mask the dumping of similar models. Under the Department's test, however, price-differentiation between similar models would not be picked up by the Cohen's *d* test and thus the full extent of differential pricing may not be revealed. In order to avoid this result and so be consistent with its stated goal of consistency with the *DP Provision*, the Department should compare the pricing of similar merchandise sold in the U.S. market just as it does when it compares U.S. sales of merchandise to home market sales of similar merchandise to determine dumping.[11] The *DP Provision* provides for the comparison of weighted average normal values "to the export prices (or constructed export prices) of individual transactions for comparable merchandise" when there is a pattern of differential pricing "for comparable merchandise"[12] Clearly, the first reference to "comparable merchandise" includes similar merchandise as defined in 19 U.S.C. § 1677(16); thus the use of the exact same language later in the same sentence should be read to include similar merchandise defined the same way. The addition of such comparisons to the Department's methodology would be consistent with the *DP Provision* while ensuring a more complete analysis for differential pricing.

The Margin Difference Threshold

The Department has explained that it will use the alternate comparison methodology if the resulting weighted-average dumping margin moves above *de minimis* or if the actual margin changes by 25%. *DP Comments Request,* 79 Fed. Reg. at 26723. We do not object to the Department's adoption of this standard as a norm. However, there may be proceedings where a case can be made for the modification of the 25% threshold. The Department should allow interested parties to argue for the use of a different threshold based on the facts of particular cases and employ a different standard if it determines that it is warranted. As jurisdictional

[11] *See* 19 U.S.C. § 1677(16).

[12] 19 U.S.C. § 1677f-1(d)(B)(1) (emphasis added).

courts have often held, the purpose of the Department's proceedings is to determine the most accurate margin possible.[13] The facts of particular cases may demonstrate that a different threshold should be used to determine the most accurate margin.

Thank you for your consideration of these comments.

Respectfully submitted,

/s/ Terence P. Stewart

Terence P. Stewart
William A. Fennell
STEWART AND STEWART

[13] "It is the duty of ITA to determine dumping margins "as accurately as possible." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).