

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.  
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000  
FAX: (202) 393-5760  
www.skadden.com

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**BY ELECTRONIC SUBMISSION**

Paul Piquado  
Assistant Secretary for Enforcement and Compliance  
Office of Policy, Room 1870  
U.S. Department of Commerce  
14<sup>th</sup> Street and Constitution Avenue, N.W.  
Washington, D.C. 20230

Re: Differential Pricing Analysis

Dear Assistant Secretary Piquado:

On behalf of United States Steel Corporation (“U. S. Steel”), we hereby respond to the May 9, 2014 request for comments issued by the Department of Commerce (the “Department”) on its differential pricing analysis in antidumping proceedings.<sup>1</sup>

U. S. Steel generally supports the Department’s use of its differential pricing analysis to address targeted dumping by a respondent in antidumping investigations and administrative reviews. However, as discussed below, the Department should modify certain aspects of its differential pricing analysis. The Department should also retain the flexibility and discretion to

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<sup>1</sup> Differential Pricing Analysis, 79 Fed. Reg. 26720 (Dep’t Commerce May 9, 2014) (request for comments) (“Request for Comments”).

employ analyses other than the differential pricing analysis so as to be able to uncover and address all forms of targeted dumping.

**I. Where the Department Finds Differential Pricing, It Should Apply the Average-to-Transaction Methodology with Zeroing to All Sales to Unmask the Respondent's Targeted Dumping Behavior**

The Department employs its differential pricing analysis to assess whether to apply the average-to-transaction (“A-to-T”) methodology with zeroing to a respondent to account for targeted dumping. The Department’s differential pricing analysis consists of three steps: (i) the Cohen’s *d* test, (ii) the so-called “ratio” test, and (iii) an assessment of whether the average-to-average (“A-to-A”) methodology can account for the respondent’s targeted dumping.<sup>2</sup> The Department should not employ the ratio test as part of its differential pricing analysis. However, should the Department continue to use the ratio test, it should exclude sales that were not subjected to the Cohen’s *d* test from the denominator of the ratio.

**A. Under the Statute, the Application of the A-to-T Methodology to All Sales is Warranted Where a Respondent Engages in Any Targeted Dumping**

Pursuant to Section 777A(d)(1)(B) of the Tariff Act of 1930, as amended (the “Act”), it is appropriate to use the A-to-T methodology where (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 Department explains why such differences cannot be taken into account using the A-to-A methodology.<sup>3</sup> The Department currently implements this

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<sup>2</sup> Id. at 26722-23.

<sup>3</sup> 19 U.S.C. § 1677f-1(d)(1)(B) (2006). The statute also provides for the Department to assess whether the differences can be taken into account by the transaction-to-transaction methodology, but this methodology is generally only appropriate where there are very few sales or where merchandise is manufactured to custom specifications.

provision of the statute by conducting its differential pricing analysis to determine whether the application of the A-to-T methodology is warranted.

In the first stage of its analysis, the Cohen's *d* test, the Department determines the Cohen's *d* coefficient of 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."<sup>4</sup> A sales group is testable "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."<sup>5</sup> In the second stage, 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.<sup>6</sup> 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 A-to-A methodology to all sales.<sup>7</sup> If the value of the sales in the differential pricing pattern is more than 33 percent but less than 66 percent of the value of all U.S. sales, then the Department applies the A-to-T methodology to the sales that passed the Cohen's *d* test and applies the A-to-A methodology to the remaining sales.<sup>8</sup> 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 A-to-T methodology to all

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<sup>4</sup> Request for Comments, 79 Fed. Reg. at 26722.

<sup>5</sup> Id.

<sup>6</sup> Id. at 26722-23.

<sup>7</sup> Id. at 26723.

<sup>8</sup> Id.

sales.<sup>9</sup> Finally, the Department determines whether the A-to-A methodology can account for masked dumping by assessing whether the application of the A-to-T 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 A-to-A methodology.<sup>10</sup>

The ratio test employed by the Department in the second stage of its analysis is inconsistent with the statute and the Department’s own practice. Thus, the Department should no longer use the ratio test as part of its differential pricing analysis.

Pursuant to the plain language of Section 777A(d)(1)(B) of the Act, applying the A-to-T methodology to calculate a respondent’s dumping margin is appropriate based simply on a finding that a pattern of targeted dumping exists and that the A-to-A methodology cannot account for the dumping behavior inherent in that pattern. The Act does not contain any provision authorizing the Department to condition the application of the A-to-T methodology on the extent of an identified pattern of targeted dumping. Nor does the SAA indicate that there is any requirement beyond the statute’s plain terms. In fact, the SAA simply calls for the application of the A-to-T methodology “where targeted dumping may be occurring” without regard to any “ranges” or partial application of the methodology.<sup>11</sup> As the Department has recognized, “{t}he only limitations the statute places on the application of the average-to-

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<sup>9</sup> Id. At 26722-23.

<sup>10</sup> Id. at 26723.

<sup>11</sup> Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (“SAA”) at 843; reprinted in 1994 U.S.C.C.A.N. 4040, 4178.

transaction method are the satisfaction of the two criteria set forth in the provision.”<sup>12</sup> 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.<sup>13</sup>

Moreover, the Department’s application of 33 percent and 66 percent thresholds is arbitrary. An agency decision is arbitrary if the agency fails to state “the basis on which {it} exercised its expert discretion.”<sup>14</sup> The Department has not justified the rationale for the ranges used in its differential pricing analysis. Indeed, since the time it first announced the differential pricing analysis, the Department has never offered any explanation or justification for the ratio test and its associated ranges. The primary 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.<sup>15</sup>

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<sup>12</sup> Issues and Decision Memorandum (“IDM”) in Polyethylene Retail Carrier Bags from Taiwan, 75 Fed. Reg. 14569 (Dep’t Commerce Mar. 26, 2010) (“IDM in Carrier Bags from Taiwan”) (final determ.) at Comment 1.

<sup>13</sup> 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).

<sup>14</sup> Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962) (“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”).

<sup>15</sup> See, e.g., IDM in Xanthan Gum from China, 78 Fed. Reg. 33351 (Dep’t Commerce June 4, 2013) (“IDM in Xanthan Gum from China”) (final determ.) at p. 28.

This description of the Department's ratio test does not identify "the basis on which {it} exercised its expert discretion."<sup>16</sup> Accordingly, the Department does not have a reasonable basis for interpreting the statute to include an additional element, i.e., the ratio test.

On the other hand, the Department has repeatedly determined that a finding of any targeted dumping merits the application of the A-to-T methodology to all U.S. sales regardless of the extent of the pattern of such pricing.<sup>17</sup> In Wood Flooring from China, the Department stated that "once {it} finds any instances of targeted dumping, the Department has determined that application of the average-to-transaction methodology is necessary to fully analyze the extent of the dumping that is taking place."<sup>18</sup> In addition, the Department was explicit in Carrier Bags from Taiwan that the application of the A-to-T 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 A-to-T methodology to a subset of sales.<sup>19</sup> In recognition of this fact, the Department withdrew a

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<sup>16</sup> Burlington Truck Lines, 371 U.S. at 167.

<sup>17</sup> See, e.g., IDM in Carrier Bags from Taiwan at Comment 1; IDM in Multilayered Wood Flooring from China, 76 Fed. Reg. 64318 (Dep't Commerce Oct. 18, 2011) ("IDM in Wood Flooring from China") (final determ.) at Comment 4.

<sup>18</sup> IDM in Wood Flooring from China at p. 32.

<sup>19</sup> IDM in Carrier Bags from Taiwan at Comment 1. See also IDM in Xanthan Gum from China at p. 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.").

regulation that limited the application of the A-to-T methodology to only a subset of U.S. sales<sup>20</sup> and recently reiterated its unequivocal repudiation of that practice.<sup>21</sup> In short, the Department's own practice clearly demonstrates that applying the A-to-T methodology to all sales where the Department finds any targeted dumping is the proper interpretation of the statute.

Meeting the requirements of the Cohen's *d* test and demonstrating that the A-to-A methodology cannot account for the targeted dumping satisfy the statute's requirements and show that the application of the A-to-T methodology to all sales is warranted. No other analysis, such as that performed under the so-called ratio test or any other test, is required. Indeed, Congress specifically intended for the Department to use the A-to-T methodology in cases such as this in order to unmask targeted dumping.<sup>22</sup>

Recent decisions by the 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.<sup>23</sup> Notably, those cases did not consider either the Department's differential pricing analysis or the propriety of employing "ranges" in determining

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<sup>20</sup> Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 Fed. Reg. 74930 (Dep't Commerce Dec. 10, 2008) (interim final rule).

<sup>21</sup> Non-Application of Previously Withdrawn Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 79 Fed. Reg. 22371 (Dep't Commerce Apr. 22, 2014) (final rule).

<sup>22</sup> SAA at 842-843.

<sup>23</sup> Timken Co. v. United States, 968 F. Supp. 2d 1279, 1290-1292 (Ct. Int'l Trade Feb. 27, 2014) ("Timken I"); CP Kelco Oy v. United States, slip op. 2014-24, Ct. No. 13-00079 (Ct. Int'l Trade April 15, 2014) ("CP Kelco"); Timken Co. v. United States, slip op. 2014-51, Consol. Ct. No. 13-00069 (Ct. Int'l Trade May 2, 2014) ("Timken II").

how to apply the A-to-T methodology.<sup>24</sup> 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 "miniscule percentage of sales."<sup>25</sup> In contrast, in the differential pricing analysis, the Department declines to apply the A-to-T 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 A-to-T 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 A-to-T methodology with zeroing to all sales where it finds any targeted dumping.

**B. The Department Should Not Include Sales that Were Not Subjected to the Cohen's *d* Test in the Denominator of the Ratio Used to Measure the Extent of the Pattern of Differential Pricing Displayed by a Respondent's U.S. Sales**

In addition, the differential pricing analysis conducted by the Department is arbitrary because it measures 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. This methodology 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

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<sup>24</sup> Timken I, 968 F. Supp. 2d at 1290-92; CP Kelco at p. 15.

<sup>25</sup> Timken II at p. 17; see also Timken I, 968 F. Supp. 2d at 1291 (“{T}he percentages of sales found to be targeted were very small.”).

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.

An agency decision is arbitrary where the agency "entirely failed to consider an important aspect of the problem."<sup>26</sup> Here, the Department has completely disregarded 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.<sup>27</sup> 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, 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.

As demonstrated above, the ratio test and the associated ranges used by the Department to determine whether to apply the A-to-T methodology are arbitrary and unlawful and therefore

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<sup>26</sup> State Farm, 463 U.S. at 43.

<sup>27</sup> Request for Comments, 79 Fed. Reg. at 26722 (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").

should not be applied. If the Department continues to use the ratio test, it should exclude the non-tested sales from the denominator of the ratio.

## **II. The Department Should Eliminate or Modify the “Meaningful Difference” Test**

As discussed above, once the Department makes an affirmative finding of differential pricing, it imposes a “meaningful difference” test which requires a 25 percent change in the dumping margin between the A-to-A and A-to-T methodologies (or the difference between a *de minimis* and non-*de minimis* margin) before it will apply the A-to-T methodology with zeroing. This test is not required by the statute and should be eliminated.

Because it involves the averaging of individual U.S. sales together, the A-to-A methodology inherently cannot account for targeted dumping. Indeed, this is the very concern raised by the SAA with respect to the use of the A-to-A methodology.<sup>28</sup> The only way to unmask targeted dumping is to compare individual U.S. sales to normal value (i.e., the A-to-T methodology). The Department should therefore find that any difference in the margin is sufficient to establish that price differences cannot be taken into account under the A-to-A methodology. Any difference in the margin is a meaningful difference and should result in the application of the A-to-T methodology.

At a minimum, the threshold applied as part of the “meaningful difference” test should be reduced. Specifically, the Department should find that there is a “meaningful difference” in the margin results between the A-to-A methodology and the A-to-T methodology where there is a 5 percent or greater change in the relative dumping margins (or the difference between a *de*

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<sup>28</sup> SAA at 842.

*minimis* and non-*de minimis* margin). This change is needed in order to more effectively capture the dumping that is masked by targeting, the very purpose underlying the statute.

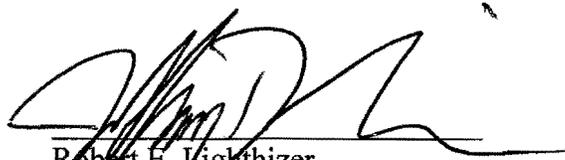
### **III. The Department Should Retain the Flexibility to Find Targeted Dumping Outside of Its Differential Pricing Methodology**

Targeted dumping can take many forms. While the differential pricing analysis will uncover some forms of targeted dumping, it will not reveal all instances where dumping is being masked. As a result, petitioners should be able to raise claims of targeting regardless of whether the Department's standard differential pricing analysis is satisfied. In turn, the Department should make clear that it has the authority to find targeted dumping outside of its differential pricing methodology. Moreover, the Department should maintain flexibility with respect to the acceptable thresholds that it applies in its analyses. A "one size fits all" approach is inconsistent with the realities of the different situations that the Department faces or may face in the future in its antidumping proceedings. The Department should retain the flexibility and discretion to apply different analyses and different thresholds on a case-by-case basis.

#### **IV. Conclusion**

For the reasons set forth above, the Department should modify its differential pricing analysis in certain key respects. In addition, the Department should employ analyses beyond the differential pricing analysis where appropriate to uncover and address different forms of targeted dumping. It is only by taking these steps that the Department will be able to capture the full amount of dumping in its antidumping proceedings consistent with the statute and Congress' intent.

Respectfully submitted,



Robert E. Lighthizer  
Jeffrey D. Gerrish

On behalf of United States Steel Corporation