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Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
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Washington, DC 20230

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Attn: Mr. Michael Rill, Director, Antidumping Policy

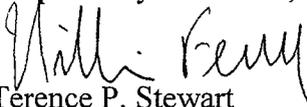
Re: Comments on Interim Final Rule, *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74930 (Dep't Commerce Dec. 10, 2008)

Dear Assistant Secretary:

Stewart and Stewart is responding to the U.S. Department of Commerce's request for comments on its Interim Final Rule withdrawing its regulatory provisions governing targeted dumping analysis in antidumping duty investigations. *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74930 (Dep't Commerce Dec. 10, 2008). As requested in that notice, we are transmitting an original and two copies of our comments which are attached hereto.

Thank you for your consideration of these comments.

Respectfully submitted,


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Stewart and Stewart Comments on Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations

We welcome the Department's withdrawal of existing regulatory provisions governing its comparison of weighted-average normal values to the prices of individual U.S. sales ("average-to-transaction method") in antidumping duty investigation, specifically 19 U.S.C. §§ 351.301(d)(5) and 351.414(f) and (g). We also support the Department's professed intent "to analyze extensively the concept of targeted dumping and develop a meaningful practice in this area as it gains experience." See *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74930-31 (Dep't Commerce Dec. 10, 2008) ("*Targeted Provisions Withdrawal*"). The Department explained that it was withdrawing its regulations because it "may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping contrary to the Congressional intent." *Id.*, 73 Fed. Reg. at 74931. It further explained that, in such a case, its regulations "would act to deny relief to domestic industries suffering material injury from unfairly traded imports." *Id.* It concluded that "immediate revocation of the provisions will facilitate the proper and efficient operation of the antidumping law." *Id.*

As we reviewed in our comments of June 23, 2007,¹ we believe that the Department's goals as it develops a methodology for implementing the targeted dumping provisions of the statute should be to: (1) develop a methodology that will permit an identification of all of the types of targeting of concern to Congress (and to U.S. negotiators during the Uruguay Round) and to domestic parties, (2) develop procedures that do not significantly increase the burden on domestic parties concerned about unfair trade practices from having the issue of targeting

¹ Filed in response to the Department's notice, *Targeted Dumping in Antidumping Investigations*, 73 Fed. Reg. 26371 (Dep't Commerce May 9, 2008).

considered in an investigation, (3) develop an approach that is transparent, (4) develop an approach that improves the ability to capture the full measure of dumping occurring through selective pricing (targeting), and (5) ensure that any tests to determine whether modifications to other statutory options (weighted average to weighted average or transaction to transaction) will permit the Department to address the concerns of domestic parties regarding targeted dumping are automatic and based on equivalence of outcome. As the Department is aware, the negotiators added the targeted dumping provision to the Uruguay Round Antidumping Agreement to respond to U.S. concerns that dumping would be masked if weighted averages were compared to weighted averages.² 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.

Our experience to date with the Department's application of its regulations suggest that, in fact, the revoked regulations have had the unintended effect of rendering the targeted dumping provision largely nugatory. We thus believe that the revocation will provide the Department with the opportunity to implement the targeted dumping provision of U.S. law in the manner foreseen by the Congress.

The statute provides for the use of average-to-transaction comparisons 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 This context is critical to the Department's choice of a targeted dumping methodology. The United States agreed to alter its laws to adopt weighted average to weighted average or transaction to transaction comparisons in investigations. As a trade-off, it bargained for a targeted dumping provision to prevent masking. The Department should ensure that it implements that provision in a manner that will address all instances of masked dumping.

19 U.S.C. § 1677f-1(d)(B). Considered in light of the stated statutory goal of avoiding the masking of dumping, the Department can determine whether these requirements have been met in any investigation in a simple and straightforward manner.

The statute, of course, contains no specific numeric values to be used to determine the presence or absence of a particular factor. Thus, the Department should be open to arguments for different values on a case-by-case basis. At the same time, as part of its development of a methodology for addressing targeted dumping, it may adopt thresholds that will constitute *prima facie* evidence of the presence of a particular factor.

We consider the factors below.

(1) A pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time

The first sub-section of the statute incorporates a number of different requirements which may be considered as questions that the Department must ask and answer in order to determine whether to use average-to-transaction comparisons. These are:

- (a) What constitutes a pricing difference?
- (b) When is a pattern of pricing differences to be found?
- (c) When are pricing differences significant?

We consider each of them.

(a) What constitutes a pricing difference?

The Department relies on a 2% difference when it makes a number of different determinations. First of all, when the Department calculates a weighted-average dumping margin for an investigation, it relies on those that are 2% or greater while ignoring those of less than 2% as *de minimis*. 19 U.S.C. § 1673b(b)(3). Also, when it applies its arm's-length test to determine whether related-party sales should be excluded from dumping comparisons, the

Department rejects as distorted sales with prices that are less or greater than the price to unrelated parties by more than 2%. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186 (Dep't Commerce Nov. 15, 2002).

Moreover, the average post tax profit rate for manufacturing companies in the U.S. since 1987 has been 5.1%;³ that for agricultural producers, 4%.⁴ Given these single digit profit values, it is clear that a 2% pricing difference is likely to be significant for domestic producers who may be injured by dumped imports. Thus, the use of pricing differences of 2% or more as a presumptive standard for identifying the existence of pricing differences is supported by antidumping practice as well as business significance.

(b) When is a pattern of pricing differences to be found?

The dictionary provides a great variety of definitions for the term "pattern." For example, "{a}n arrangement or order discernible in objects, actions, ideas, situations, *etc.*"⁵ The

³ Computed by dividing after tax profits by sales. Data source: U.S. Census Bureau, Quarterly Financial Report for Manufacturing, Mining, and Trade, 2008 Third Quarter, at Table H - - Historical Rates of Return. <http://www.census.gov/csd/qfr/xls.html>.

⁴ Computed by dividing net farm revenue by total farm assets. Data source: U.S. Department of Agriculture Economic Research Service, Farm Income: Data Files, at <http://www.ers.usda.gov/Data/FarmIncome/finfidmu.htm>.

⁵ The NEW SHORTER OXFORD ENGLISH DICTIONARY, definition 5(d). The full definition of a "pattern" is:

1. A design, plan, model, etc., from which a thing is to be made. b A paper plan used in making a garment. c a design on which an artificial fly is modeled. Also, a fly of a particular design. 2 An original to be imitated; an exemplar, a model. b An example, an instance, *esp.* a typical one. Now *rare*. 3 A copy of something; a likeness. *Rare*. 4 A matrix, a mould, Only in E16. b a model in wood, etc. of a casting, used to shape the mould in which the casting is to be made. 5 A precedent. 6. A (repeated) decorative design, *esp.* on or in china, carpets, cloth, wallpaper, etc., a style or type of decoration. b decorative figures or markings occurring

statute limits the pattern or order that is relevant to the Department's targeted dumping inquiry to prices to different producers, regions, or during different time periods. However, the examination of any set of data for a pattern is purposeful: one looks for a pattern with a particular goal in mind. A medical doctor attempting to identify the source of a particular infection might look for a pattern of infection among a human population. By identifying such a pattern, the doctor hopes to gain data that will enable him to isolate the source of the infection. He will typically not look for a pattern of, say, hair color among the population because it is not relevant to his inquiry.

The pattern or order that is relevant to the Department's targeted dumping inquiry is a pattern or order that masks dumping. The statute limits the Department's targeted dumping inquiry only to patterns among sales to different producers, regions, or during different time periods. Beyond this, it places no limit on the Department's examination.

A dumping foreign producer or exporter may price imports in many different ways. It may offer different prices to a particular customer, in a particular region, or during a specific period of time. These prices may be for one model, a group of models, or all models. In a case involving subject merchandise that is made up of multiple models or CONNUMs, a foreign producer or exporter may choose to sell a single model or a group of models at low prices to a particular customer. This targeting may not only be to particular customers, but it may be of limited duration during the period of review. In other words, the targeting may not include all of

naturally or by chance. c The arrangement of marks made on a target by the shot from a gun. d An arrangement or order discernible in objects, actions, ideas, situations, etc. e A set sequence of tactical movements in a game; a positional formation or style of play adapted. 7 A specimen, *esp.* one presented as a sample of a larger group; *spec.* a model of a proposed coin, not subsequently adopted for the currency. 8 A sufficient quantity of material for making a garment, *esp.* address; a dress-length. 9 In Ireland: (the festivities marking) the festival of a patron saint.

the sales to a statutory group (customer, region, or during a particular time period). It may involve only a subset of the sales to such a group. For example, a foreign producer may target the sales of only a couple of the many different models sold to a particular customer, and it may do so for only a single week or month or even for just a single sale.

As the Department now computes dumping margins, the extent of dumping determined for one or more U.S. sales will be masked by sales that are not dumped. Thus, any sale or group of sales identified by the Department as at different prices will be relevant to the Department's inquiry.

As there is no limitation in the statutory language, the statutory requirement for a pattern should be interpreted broadly so as to encompass all possible patterns and so to accomplish the remedial purpose of the antidumping duty law. Thus, the Department should not impose arbitrary limitations on the pattern that may be discerned. It should be open to examinations of targeting that involve less than all of the sales to a customer, region, or during a particular time period. It should allow interested parties to identify where among sales to producers, regions, or during different time periods (including any combination of one or more of these) a pattern of pricing differences exists.

(c) When are pricing differences *significant*?

The significance of any attribute of a data population is necessarily driven by the purpose of the examination of the data. Pricing differences in the context of a statutory provision whose purpose is to avoid masked dumping, will be significant to the extent that they result in the masking of dumping. To begin with, if the pattern produces no margin or a *de minimis* margin under the normal methods of margin calculation, but a dumping margin when the average-to-

transaction comparisons are used, then the Department should find that the pattern is *per se* significant.

More generally, the Department should consider the extent of the pricing differences that result in masked dumping. As the SAA notes, the Department should be open to finding that small differences are significant “because small differences may be significant for one industry or one type of product, but not another.” *Uruguay Round Agreements Act, Statement of Administrative Action*, at 843, 103d Cong., 2d Sess., H.R. DOC. NO. 103-316, Vol. 1, (1994), reprinted in 1994 U.S.C.C.A.N. Vol. 6, 4040 (“SAA”). Thus, we recommend that the Department consider whether pricing differences are significant on a case-by-case basis.

At the same time, it may adopt a threshold for finding significance *per se*. As we have reviewed above, the Department should consider a 2% difference as significant in the context of an antidumping duty investigation. Thus, when there is a 2% or more pricing difference, the Department should find the masking of dumping to be significant and thus the pattern of pricing differences to be significant, and so employ the alternate method.

(2) Accounting for differences

As explained in the executive statement that accompanied the Uruguay Round Agreements Act, the statute provides for average-to-transaction comparisons in investigations where “targeted dumping may be occurring.” *Id.* The statute itself provides for the use of the average-to-transaction methodology whenever there is a pattern of pricing that cannot be “taken into account” using weighted-average to weighted-average or transaction-to-transaction comparisons. 19 U.S.C. § 1677f-1. In other words, whenever dumping would be masked by the latter two approaches, the Department may use average-to-transaction comparisons.

Under the Department's former approach to margin calculation, the only potential masking was among the sales of a particular model of a product because the Department did not allow the dumping margins determined for one model to be offset by non-dumped sales of another model. Thus, it was possible that by varying one of the normal methods of comparison (average-to-average or transaction-to-transaction), the Department could prevent masking and so account for the full extent of dumping without resort to the alternate method of comparisons.

Under the Department's present approach to computing dumping margins in investigations, dumping may be masked both among the sales of a particular model and between sales of different models. Thus, even were the Department to vary its normal comparisons by, for example, averaging prices for less than the entire period of investigation, the result would be the same: dumping would be masked. Thus, under the present margin computation methodology, the Department may reasonably presume that any masked dumping may not be addressed using one of the normal comparison methods so that use of the alternate method is justified.

In sum, we believe that if the Department simplifies its analysis of targeted dumping and adopts the standards advocated above, it will be far more capable of achieving the statutory goal of preventing masked dumping and accounting for the full extent of dumping and so provide relief to domestic industries suffering material injury from unfairly traded imports.

Sincerely,

A handwritten signature in cursive script that reads "Stewart and Stewart". The signature is written in dark ink and is positioned above the printed name.

Stewart and Stewart