Targeted Dumping: The Next Frontier in Trade Remedy Litigation *

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Although the absolute number of new U.S. antidumping (AD cases) has decreased markedly over the past few years[2], the intensity of the battle has not. Few would disagree that "targeted dumping" will be among the most contentious issues in the foreseeable future, and therefore will be part of the next frontier in trade remedy litigation at the Court of International Trade ("CIT").

The reasons are straightforward. The application of the Commerce Department's targeted dumping methodology is relatively new, as is evidenced by fundamental changes in the Commerce Department's approach over a relatively short time period, and so there is scant historical practice from which to draw guidance. Some recent cases have indicated that whether or not the targeted dumping methodology is applied, its application is often *the* reason between an affirmative or negative dumping determination, resulting in extra incentive for parties to go forward with a court appeal.

This paper provides an overview of targeted dumping as a likely future issue for trade remedy litigation at the CIT. Section A provides a short history of the development of the targeted dumping concept. Section B then describes the rather interesting history of the Commerce Department's evolving approach to its analysis of targeted dumping.

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[2] From 1980 through the end of 1994 (pre WTO period), the United States initiated, on average, 46 AD cases a year; whereas rrom 1995 through 2011 the United States initiated, on average, only 26 AD cases per year. Even more dramatic is the fact that in each of the past two years, 2010 and 2011, the United States initiated fewer than 10 AD cases.

Section C details the current Commerce analytic framework for determining the existence of targeted dumping. And Section D identifies targeted dumping issues that we believe will be the subject of future trade remedy litigation at the CIT.[3]

A. Short History of the Development of Targeted Dumping Exception In U.S. Law

"Targeted dumping" is the trade law term of art that refers to the justification for utilizing an alternative U.S. price-normal value comparison methodology in antidumping calculations. Essentially, when the Commerce Department finds the existence of targeted dumping it can depart from the statutorily preferred average-to-average comparison methodology.

The targeted dumping statute is a product of the United States' position during the 1994 Uruguay Round Agreements negotiations. The exception was born at the very time that the United States was forced to adopt the average-to-average comparison methodology. Prior to the completion of the Uruguay Round, and the creation of the WTO Anti-Dumping Agreement, the United States had a long-stranding practice of employing an average to individual price comparison methodology. That is, the Commerce Department would calculate normal value by calculating an average of home market prices and then compare that average to the prices of individual U.S. sales transactions. Many believed that such comparison methodology was inherently unfair because it demonstrated the existence of dumping when, arguably, it didn't exist. And so, during the Uruguay Round of multilateral trade negotiations, many countries forced the United States to adopt a preference for using average-to-average comparison

[3] To ensure full disclosure, we note that both Dan Porter and Ross Bidlinmaier have been active participants in arguing about Commerce's targeted dumping methodology, both before Commerce and before the CIT.

methodology under which an average of export prices would be compared to an average of home market prices to determine the existence of dumping. Specifically, the WTO Anti-Dumping Agreement provides that the antidumping margin:

> …*shall* normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.[4]

The United States, believing that such an approach might otherwise "mask dumping", insisted on having an exception to the preference for the average-to-average methodology. And so, the WTO Anti-Dumping Agreement adopted an exception to the preferred use of the average-to-average methodology. Paragraph 2.4.2 of the WTO Anti-Dumping Agreement (the same paragraph that sets forth the preference for average-to-average methodology) also provides:

> A normal value established on a weighted average basis *may* be compared to prices of individual export transactions *if* the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

Following the conclusion of the Uruguay Round and the adoption of the WTO Anti-Dumping Agreement, United States antidumping law was modified (by the Uruguay Round Implementation Act ("URAA")) to reflect both the preference for using the average to average methodology and the exception.

[4] Article 2.4.2 of the Anti-Dumping Agreement

The Statement of Administrative Action ("SAA"), "an authoritative expression by the United States concerning the implementation and application of the Uruguay Round Agreements and {the Uruguay Round Agreements} Act," elaborates upon the relevant amendments to the U.S. antidumping statue statute as a result of the URAA, including the targeted dumping exception.[5] First, the SAA confirms the statutory preference in the URAA for use of the average-to-average or transaction-to-transaction comparison methodologies. The SAA recognized that the Department's practice generally undertook a comparison of average normal value to individual export prices in investigations and reviews.[6] The SAA made explicit that the URAA abolishes that preference. Under the new law, the SAA states that, "Commerce normally will establish and measure dumping margins on the basis of a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices."[7] The SAA reiterates that the comparisons are to be made for "comparable sales" of the subject merchandise and like product. The SAA further explains the statute's allowance for the use of the transaction-to-transaction methodology in a normal investigation, but acknowledges the practical reality that average-to-average would be the more common method.[8]

Second, the SAA recognizes the ability of Commerce to use the alternative average-to-transaction methodology when certain conditions are met, explaining that Commerce must request from respondents the information necessary to determine if the

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5 Section 102(d) of the URAA, codified at 19 U.S.C. § 3512(d).
6 SAA at 842.
7 SAA at 842.
8 SAA at 842.

use of the average-to-transaction methodology is more appropriate.[9] The SAA requires Commerce to "provide an explanation" for those instances in which the average-to-average or transaction-to-transaction methodologies "cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, i.e., where targeted dumping may be occurring." The SAA makes clear that Commerce has an affirmative obligation to explain and justify any deviation from the normal calculation methodology.

Third, the SAA expressly limits the methodological preferences to investigation proceedings.[10] The URAA reflects the understanding that the Anti-Dumping Agreement, per Article 2.4.2 of that Agreement, allows that "the preferred methodology in reviews will be to compare average to individual export prices."[11] This elaboration is consistent with the structure of the statute, which places the targeted dumping provision under the "Investigations" subheading, as distinct from the subheading on "Reviews" that immediately follows. The statutory provision on reviews contains no explicit preference for any particular dumping margin calculation methodology,[12] and contains no authority for an allegation or finding of targeted dumping in that segment of an antidumping proceeding.

The Anti-Dumping Agreement, antidumping statute, and the SAA all set forth clear preferences, but do so with exceptionally broad guidelines. This statutory approach left Commerce with considerable gaps to fill in applying the new statutory provisions.

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9 SAA at 843.
10 SAA at 843.
11 SAA at 843.
12 *See* 19 U.S.C. § 1677f-1(d)(2).

B. Commerce Department's Evolving Implementation of the Targeted Dumping Provision

Implementation of the targeted dumping provision of the antidumping statute has followed a rather long and winding path. Commerce initially promulgated regulations to clarify the broad parameters of the targeted dumping statute, providing interested parties with some guidance and predictability on the targeted dumping methodology. Abruptly, however, Commerce withdrew its targeted dumping regulations – providing no notice or opportunity for comments from interested parties – announcing that it would instead develop its targeted dumping methodology through the "experience" gained from ongoing and upcoming investigations. As a result, nearly eighteen years after Congress enacted the targeted dumping provision as part of the U.S. antidumping law, the Commerce Department's application continues to change with virtually every new investigation.

1. Commerce promulgates a specific targeted dumping regulation

Following enactment of URAA, Commerce embarked on an extensive effort to revise its antidumping regulations. The revisions were intended to both codify existing calculation methodologies and to explain Commerce's approach to implementing new changes in U.S. law required by the URAA.[13]

Commerce's new regulations were promulgated following an extensive notice and comment process. For the proposed antidumping regulations alone, Commerce (1) received over 500 written public comments, (2) held a public hearing, and (3) received

[13] *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296 (Dep't of Commerce May 19, 1997).

over one hundred additional post-hearing written comments.[14] The comments addressed all facets of the proposed antidumping regulations.

The Commerce Department's proposed regulations included a specific regulation devoted to analyzing "targeted dumping," Section 351.414(f) of the regulations was entitled "Targeted Dumping" and set forth criteria of determining the existence of targeted dumping and the methodology to employ upon a finding of targeted dumping. And the preamble to the regulations explained Commerce's considerations specifically with respect to the proposed targeted dumping regulation.

The proposed targeted dumping regulation – which was subsequently adopted unchanged – closely tracked the language of the statute, with two notable exceptions. First, to identify targeted dumping, the regulation states that, "the Secretary will use, among other things, standard statistical techniques in determining whether there is a pattern of prices that differ significantly."[15] Commerce's proposed regulations included this provision to reflect the commonsense "suggestion made by several commentators, including both domestic and respondent interests, that the Department employ standard statistical techniques, in identifying targeted dumping."[16] When promulgating the final rule – following additional public comments – Commerce explained further the importance of the requirement. Commerce stated that the use of common statistical methods was necessary "to ensure that the test is applied on a consistent basis and in a

[14] *Id*. at 27296.
[15] 61 Fed. Reg. at 7386 (Dep't of Commerce, Feb. 27, 1996).
[16] 61 Fed. Reg. at 7350 (Dep't of Commerce, Feb. 27, 1996).

manner that ensures transparency and predictability to all parties concerned."[17] Commerce explicitly considered the value of the public comments on the use of standard statistical methods, and included this requirement in the final rule to further the important policy objectives of transparency and predictability.[18]

The second notable addition to the final targeted dumping rule not found in the statute concerns the scope of the average-to-transaction remedy where Commerce makes an affirmative finding of targeted dumping. The statute is silent on this issue.[19] In the proposed rules, Commerce explained that it was dismissing the suggestion of some commentators to use the average-to-transaction methodology for all of a firm's sales. Commerce explained that "in many instances such an approach would be unreasonable and unduly punitive."[20] Commerce observed that, if targeted dumping accounted for only 1 percent of a firm's total sales, there would be no basis to apply the average-to-transaction method to the remaining 99 percent of the sales.[21]

Commerce expanded upon this rationale in the preamble to the antidumping regulations. It explained its position that the targeted dumping statute provides for use of the average-to-transaction methodology only to address targeted dumping.[22] While acknowledging that there may be cases in which the targeted dumping is so pervasive that the alternative method would necessarily apply to all sales, Commerce explicitly

[17] 62 Fed. Reg. at 27347 (Dep't of Commerce, May 19, 1997).
[18] *Id*.
[19] 19 U.S.C. § 1677f-1(d)(1)(B).
[20] 61 Fed. Reg. at 7350 (Dep't of Commerce, Feb. 27, 1996).
[21] *Id*.
[22] 62 Fed. Reg. 27375 (Dep't of Commerce, May 19, 1997).

identified this as an exceptional situation.[23] The general rule would be application of the alternative method to only the targeted sales. Commerce thus undertook an extensive notice and comment process, in which it thoughtfully considered the comments made by interested parties, to arrive at the promulgated targeted dumping rule.

Compared to many of the other new AD regulations, for years the targeted dumping regulation maintained the aura of "all dressed up with no place to go." Unlike other new AD regulatory provisions, the targeted dumping provision was utilized in just one AD case from 1995 until 2006. During this eleven year period, Commerce initiated 288 AD cases; however, in only one did the petitioner allege the existence of targeted dumping.

That one case was *Pasta from Italy*. In that case Commerce determined that the criteria for targeted dumping (as set forth in the targeted dumping regulation) had not been met. The petitioner then appealed to the Court of International Trade, which sent the case back to Commerce for reconsideration of the targeted dumping issue. Following extensive comments from the parties, Commerce filed a remand determination with the Court on August 28, 1998. The Court then sustained Commerce's redetermination.[24] There is little question that Commerce's revised *Pasta* determination set forth a relatively clear test for analyzing the existence of targeted dumping under the targeted dumping regulation.

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[23] *Id*.

[24] *Borden, Inc. v. United States*, Slip Op. 99-50 (Ct. Int'l Trade, June 4, 1999).

2. Commerce changes course

Notwithstanding this fact, in the very next case in which a petitioner alleged the existence of targeted dumping, *Coated Paper from Korea*, Commerce determined that it had to re-think its entire approach to targeted dumping. Rejecting the express request by respondent parties that Commerce adhere to its precedent in the *Pasta from Italy* investigation, Commerce adopted a brand new targeted dumping methodology in *Coated Free Sheet Paper from Korea*. In announcing the new targeted dumping test, Commerce both (1) claimed to satisfy the requirement of "standard and appropriate statistical techniques" and (2) announced that it would seek public comments on the meaning of this standard and the appropriate test for targeted dumping.[25]

Commerce requested comments subsequent to the *Coated Free Sheet Paper from Korea* investigation; in fact, it did so twice over the next eight months. In October 2007, Commerce requested comments on "what guidelines, thresholds, and tests it should use in determining whether targeted dumping is occurring."[26] Commerce stated that it was requesting the comments in light of its limited experience and the supposed limited guidance provided in the regulations or the statute.[27] In response, Commerce received 19 comments totaling 220 pages.[28] Commerce then sought comments again in May 2008, this time seeking input on a specific, new methodology first used in the preliminary

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[25] *Coated Free Sheet Paper from Korea: Final Determination of Sales at Less Than Fair Value*, 72 Fed. Reg. 60630 (Dep't Commerce, Oct. 25, 2007), Issues and Decision Memorandum at 5.

[26] *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 Fed. Reg. 60651 (Dep't of Commerce, October 25, 2007).

[27] *Id*.

[28] *See Import Administration Public Comment Files*, available at http://ia.ita.doc.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index html.

determinations of the *Nails* cases[29] and announced in the post-preliminary determinations.[30]

And then Commerce changed course yet again. Only seven months after announcing the new targeted dumping test, Commerce published notice in December 2008 that it would be withdrawing *all* regulatory provisions governing targeted dumping.[31] Notwithstanding the remarkably large volume of comments received by Commerce prior to promulgation of the regulations, as well as the large volume of comments received by Commerce following the two additional requests for comments, Commerce stated that it needed greater flexibility in developing its targeted dumping methodology. While recognizing that the regulations "establish certain criteria for analyzing allegations and making targeted dumping determinations," Commerce stated that its inexperience on the issue may have produced unduly restrictive regulations.[32] Instead, Commerce would now be "returning to a case-by-case adjudication, until additional experience allows the Department to gain a greater understanding of the issue."[33] Specifically, Commerce removed, among other parts, the requirement that it utilize "standard and appropriate statistical techniques" when determining the existence of targeted dumping. Thus, Commerce removed any semblance of a standard for

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29 *Certain Steel Nails from the United Arab Emirate: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 73 Fed. Reg. 3945 (Dep't of Commerce, January 23, 2008); *Certain Steel Nails from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances and Postponement of Final Determination*, 73 Fed. Reg. 3928 (Dep't of Commerce, January 23, 2008).

30 *Memorandum to David Spooner,* titled *"Post-Preliminary Determinations on Targeted Dumping,"* A-520-802 and A-570-909 (April 21, 2008).

31 *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74930 (Dep't of Commerce, December 10, 2008).

32 *Id*.

33 *Id*. at 74931.

applying the test, and removed any degree of certainty or predictability for future cases. With removal of the regulations, the remarkably broad targeted dumping statute is the only governing provision remaining.

The result of this withdrawal of the targeted dumping regulations has been an ever-evolving test. While continuing to rely on the basic methodology first used in *Nails*, Commerce revised the test first in *Carrier Bags from Taiwan*,[34] then in *Carrier Bags from Indonesia*,[35] then in *OCTG from China*,[36] then in *Coated Paper from China*,[37] then in *Wood Flooring from China*,[38] and then, most recently, in *High Pressure Steel Cylinders from China*.[39] Thus, in less than two years, Commerce revised its targeted dumping methodology five times, eliminating predictability for both petitioner and respondent parties.

Looking back at this history, a natural question is "why?" Why would Commerce want to jettison is own regulation and all of the hard work it had undertaken to develop a analytic framework for determining when it was appropriate to apply an exception to the average-to-average comparison methodology? The answer is simple: Domestic industries no longer wanted targeted dumping to be an exception. They wanted targeted

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[34] *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 Fed. Reg. 14569 (Dep't of Commerce, March 26, 2010).

[35] *Polyethylene Retail Carrier Bags from Indonesia: Final Determination of Sales at Less Than Fair Value,* 75 Fed. Reg. 164312 (Dep't of Commerce, April 1, 2010).

[36] *Certain Oil Country Tubular Goods from China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances, and Final Determination of Targeted Dumping,* 75 Fed. Reg. 20335 (Dep't of Commerce, April 19, 2010).

[37] *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China: Final Determination of Sales at Less Than Fair Value,* 75 Fed. Reg. 59217 (Dep't of Commerce, September 27, 2010).

[38] *Multilayered Wood Flooring from China: Final Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 64318 (Dep't of Commerce, October 18, 2011).

[39] *High Pressure Steel Cylinders from China: Final Determination of Sales at Less Than Fair Value,* 77 Fed. Reg. 26739 (Dep't of Commerce, May 7, 2012).

dumping to be a normal part of the AD margin calculation. And *why* would domestic industries want to transform a clearly intended exceptional circumstance to an every-day event? The answer, as every trade remedy warrior knows, was the end of zeroing.

"Zeroing" refers to an antidumping methodological practice under which Commerce refused to allow non-dumped sales transactions to offset dumped sales transactions when calculating the overall AD margin rate.

	Normal Value	*U.S. Price*	*Dumping*	*Qty U.S. sale*	*Actual Total Dumping*	*Total Dumping w/ Zeroing*
Model A	100	95	5	10	50	125
Model B	120	135	-15	10	-150	0
Model C	115	110	5	10	50	125
Model D	105	105	0	10	0	0
Model E	95	90	5	10	50	125
AD Rate					0%	7%

As can be seen by the above example, by, literally, zeroing the non-dumped sales transactions, the AD rate becomes higher than it would have been without zeroing.

A number of different countries challenged this Commerce zeroing practice before the WTO, arguing that zeroing violated the "fair comparison" provision of the Anti-Dumping Agreement. The United States lost each and every WTO dispute before the Appellate Body. And so, in 2010, Commerce announced that it would no longer employ its zeroing practice in original investigations.

The end of zeroing caused petitioners (and Commerce) to "discover" that, in fact, foreign exporters routinely engage in targeted dumping and therefore Commerce need not abide by the statutory preference for the average-to-average comparison methodology, but rather could employ an alternative comparison methodology that allowed (surprise, surprise) zeroing. The raw data tell the story. From 1994 until the end of 2006 Commerce initiated a total of 288 AD cases, but in only two did Commerce even investigate an allegation of targeted dumping. And then from 2007 through June 2012, Commerce initiated 92 AD cases. And in 47 cases Commerce conducted (or is conducting) an investigation of the existence of targeted dumping.

C. Current Commerce Methodology and Approach for Targeted Dumping

The most recent manifestation of Commerce's targeted dumping methodology incorporates significant changes to the methodology originally employed in the *Pasta* case. No longer restricted by the targeted dumping regulations, Commerce takes the position that it now must only comply with the general provisions contained in the antidumping statute; namely, there must be a pattern of prices that differ significantly among purchasers, regions, or periods of time, and those differences cannot be taken into account using one of the standard methodologies.[40] While basically relying on the revised methodology established in *Nails* as the basis for analysis, the current methodology incorporates some important modifications.

Commerce's current targeted methodology essentially employs an analysis that runs through two different steps.

The first part of the test addresses the issue of "pattern of prices." Commerce asks generally whether the price of each product (as identified by "CONNUMs") to the allegedly "targeted" customer are more than one standard deviation below the prices to

[40] 19 U.S.C. § 1677f-1(d)(1)(B).

all customers. If more than 33 percent of the volume of sales to that customer is below this threshold, which is used to determine the normal range of price variability, there is a "pattern." The Court of International Trade has upheld, as a general matter, the use of this standard deviation for the first part.[41]

The second part of the test addresses the issue of "differ significantly." Commerce employs a three-step test for "differ significantly." Commerce first purports to compare the product-specific average price sold to the alleged "target" to the average price of the next higher average price to a non-targeted customer (the "alleged targeted gap"). This specific price gap is then compared to a constructed average price gap (the "comparison gap"). If the alleged targeted gap is greater by any amount than the comparison gap, then Commerce deems the average price of that product to the target to be "targeted." If the portion of products that are deemed targeted exceeds 5 percent of the volume to that target, Commerce deems the average price to the target to "differ significantly" and makes an affirmative finding of targeted dumping. Although the Court of International Trade has upheld use of the 5 percent test,[42] it has not otherwise addressed the details on the second part of this test.

Commerce also now employs a remedy for targeted dumping that is distinct from the remedy that was used before withdrawal of the targeted dumping regulations in two key ways. First, under its current approach, Commerce now applies its remedy for targeted dumping – using the average-to-transaction methodology – to all of a

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41 *Mid-Continental Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1377-78 (Ct. Int'l Trade 2010).

42 *Id*. at 1378-79.

respondent's sales transactions, rather than limiting the alternative methodology to only those sales transactions that satisfy the targeted dumping test. This new approach serves as a reversal from Commerce's understanding of the statute when it promulgated the targeted dumping regulations, as well as a deviation from the plain language of the regulations themselves. Commerce itself stated that applying the alternative methodology to all sales would in most cases be "unreasonable and unduly punitive."[43] Now, Commerce takes the position that the statute "does not limit application of the alternative A-to-T methodology to certain transactions" where the statutory criteria are satisfied.[44] Instead, Commerce now concludes that it "no longer considers it appropriate to use two different comparison methods within the same weighted-average dumping margin calculation."[45]

Second, Commerce now applies the zeroing practice to all sales when calculating the weighted average antidumping margin. Commerce grants offsets for non-dumped sales when utilizing the average-to average methodology, but has repeatedly stated that the same practice does not apply where the average-to-transaction methodology is used.

Two changes in practice have now led to the application of zeroing to all sales. Commerce now takes the position that the statute permits application of the average-to-transaction methodology to all sales where any targeted dumping is found, and not merely the subset of sales found to have met the targeting dumping criteria.[46]

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[43] 61 Fed. Reg. at 7350 (Dep't of Commerce, February 27, 1996).

[44] *High Pressure Steel Cylinders from China: Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 26739 (Dep't of Commerce, May 7, 2012), Issues and Decision Memorandum at 25.

[45] *High Pressure Steel Cylinders from China: Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 26739 (Dep't of Commerce, May 7, 2012), Issues and Decision Memorandum at 25.

[46] *High Pressure Steel Cylinders from China: Final Determination of Sales at Less Than Fair Value*, 77 Fed.

Interestingly, Commerce does not interpret the statute as *compelling* this practice, but merely as *permitting* so.[47] This is a complete reversal from Commerce's prior position. Two, Commerce applies the zeroing methodology to transactions where the average-to-transaction comparison methodology is used.[48] Commerce asserts that distinctions between the comparison methodologies, i.e., average-to-average and average-to-transaction, justify the distinction in permitting or denying offsets for dumped sales.[49]

While the above overview generally describes Commerce's targeted dumping practice at the time of this article, it is important to emphasize that the methods used and justifications presented continue to evolve with nearly every antidumping investigation. This degree of uncertainty in the analysis was a stated concern of commentators when Commerce announced withdrawal of the targeted dumping regulations, a concern that has been borne out by the changing procedures of the past two years.

D. Expected CIT Litigation Issues

The recent manifestations of Commerce's targeted dumping practice raise a number of issues not yet addressed by the Federal Circuit or the Court of International Trade. To date, the CIT has rendered only two decisions addressing targeted dumping, and both concerned earlier iterations of Commerce's targeted dumping methodology, and, therefore, are arguably less instructive.

In this section, we identify those targeted dumping issues that we believe are likely to be litigated intently before the CIT. For some of the issues, our "prediction" is clear

Reg. 26739 (Dep't of Commerce, May 7, 2012), Issues and Decision Memorandum at 24.

47 *Id*. at 25.

48 *Id*. at 28.

49 *Id*.

because the issues are already before the CIT. Other issues are those that have been raised during the Commerce proceeding and are likely to continued in a court appeal.

1. Withdrawal of the targeted dumping regulation

A key challenge to Commerce's current targeted dumping practice concerns whether Commerce withdrew the targeted dumping regulation in a manner consistent with the Administrative Procedure Act ("APA"). As this article makes clear, withdrawal of the regulation opened the door to a series of enormously significant revisions to the practice, including the methodologies used and the remedy applied. Accordingly, reinstatement of the targeted dumping regulation – which would be the judicial remedy if the withdrawal were found to be improper – would have a substantial effect on the final antidumping determinations now on appeal.

The argument is that Commerce did not comply with the APA when it abruptly withdrew is targeted dumping regulation in 2008. Under the APA an agency can validly change regulations only after notifying the public, soliciting comments, considering those comments, and publishing final rules at least thirty days before they come into force.[50] Commerce's withdrawal, however, invoked a provision of the APA allowing departures from normal rulemaking requirements when "good cause" exists to waive them.[51] Challengers to Commerce's withdrawal procedures argue that the Federal Circuit has consistently held that such waivers apply only in cases of obvious nationwide emergency, and only when narrowly tailored to achieve as much procedural compliance as possible in

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50 5 U.S.C. § 553.

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

the face of real crisis. Otherwise the rulemaking action (which includes the repeal of regulations) is *ultra vires* and void by the APA's clear terms. The argument contends that the withdrawal did not point to anything like a true emergency: the targeted dumping regulation at issue concerns a calculation methodology to be employed during a year-long investigation of dumping that *might* (should the ITC find injury) lead to the imposition of *estimated* AD duties. Furthermore, Commerce made no effort to minimize its deviations from required APA process.

Commerce has responded to this argument with three points. First, Commerce takes the position that it satisfied the notice and comment requirements of the APA. Commerce states that, by soliciting comments on other issues related to targeted dumping, Commerce met the standard in a way that satisfies the "purpose" of the APA. Second, Commerce contends that withdrawal of the targeted dumping regulation fits within the "public interest" exception of the APA. The antidumping statute is intended to provide relief to domestic industries, and withdrawal of the regulation was necessary for industries to benefit from the statutorily prescribed relief. Third, Commerce argues that parties now making these arguments before the Court cannot demonstrate harm from Commerce's procedures. As an initial matter, Commerce takes the position that any party now challenging the withdrawal must have participated in the notice and comment requests held several years prior. Commerce posits that, if the party had not participated in the earlier opportunities to provide comments, then what difference would the opportunity to comment on this particular withdrawal have on the end result? Furthermore, Commerce claims that the withdrawal does not impose any new obligations on the respondent party, and therefore causes no harm. Based on these three alternative arguments, Commerce contends that its withdrawal was in compliance with the APA.

This argument is currently being made in at least two cases at the CIT. Given Commerce's reliance on withdrawal of the regulations as the premise for many of the changes to its practice, the Court's decision on this issue could have widespread implications.

2. Application of the statutory term, "pattern of prices"

As noted above, the statute states that targeted dumping may exist where Commerce identifies a "pattern" of sales at less than fair value.[52] The CIT in *Mid-Continental Nail Corp.* upheld the *general* concept of using a standard deviation and the use of a 33 percent threshold to determine whether enough of the sales were low priced to constitute a "pattern."[53] The Court did not address, however, the fact that in doing so, Commerce does not analyze actual individual prices, but rather analyzes customer specific averages of each produce model (or, in Commerce jargon, "CONNUM"). Commerce then tests whether the *average price* of that particular product model to the targeted customer is lower than the overall *average price* of the product model minus one standard deviation. If so, those sales contribute to the "pattern."

Respondents have raised several concerns with Commerce's approach. First, as a general matter, Commerce's approach seems odd. The entire purpose of the targeted dumping exercise is to ensure that the average-to-average comparison methodology does not mask dumping of individual sales transaction prices. And so it is a bit of a head

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[52] 19 U.S.C. § 1677f-1(d)(1)(B)

[53] *Mid-Continental Nail Corp.*, 712 F. Supp. 2d at 1377-78.

scratcher why Commerce would chose to begin its targeted dumping analysis by averaging sales transaction prices. Or stated differently, paradoxically, the Department ends up doing exactly the opposite of what Congress intended because the Department's tests intentionally "mask" actual market prices.

Second, Commerce's approach appears to defy logic. Consider two customers that each buy one unit of the identical widget on two different days. One pays $40 on both days. The other customer pays $50 on day 1 and $30 on day 2. Is it reasonable to conclude that these two customers had the same pricing experience? No impartial observer would say that their pricing experiences were the same. Yet, according to the Department's methodology, their pricing experiences, for targeted dumping purposes, were identical.

Third, and perhaps most important for the CIT's consideration, some respondents have argued that use of average prices, instead of actual transaction prices, ignores the express language of the statute. The statute only allows a finding of targeted dumping where "there is a pattern of <u>export prices</u>…that differ significantly among purchasers."[54] "Export prices" are then defined as "the price at which" merchandise is sold.[55] Respondents have argued that actual "export prices" are different from an average of prices, a distinction that Congress recognized in the statute, requiring use of "weighted average of the export prices" for purposes of determining dumping margins.[56] The argument follows that the statute requires Commerce to examine the pattern of actual

54 19 U.S.C. § 1677f-1(d)(1)(B)(i) (emphasis added).
55 19 U.S.C. § 1677a(a).
56 19 U.S.C. § 1677f-1(d)(1)(A)(i).

individual prices, not some constructed average of the prices; the statute provides no authority for the use of constructed averages rather than the actual prices themselves.

It is important to note that such argument is not just semantic. With respect to whether a particular price is or is not within one standard deviation can vary dramatically whether average or actual transaction prices are used. This is because a standard deviation essentially measures the spread of prices. Using an average tightens the spread, and therefore makes it more likely that a particular price is outside the spread and therefore is outside one standard deviation and therefore satisfies Commerce's "pattern of prices" test. For example, in one case, *before* applying one standard deviation, Commerce reduced more than 50,000 individual sales transactions to just 12 monthly averages. As a matter of statistics, one standard deviation from 12 average prices will always be smaller than one standard deviation of thousands of sales transaction prices. Or stated differently, by using average prices, Commerce's approach will always make it more likely that the "pattern of prices" criterion will be satisfied.

Commerce has responded to respondent's statutory interpretation argument by maintaining that the statutory language is ambiguous and that Commerce's interpretation and resulting methodology are reasonable. Commerce attempts to discredit the respondent argument by discussing the context of the phrases "export prices" and "weighted average of the export prices." Commerce maintains that, because the two phrases appear in different contexts, Congress' intentions cannot be deduced or presumed. Given this ambiguity, the issue is whether Commerce's approach is reasonable; Commerce argues that respondent parties have provided no evidence or argument on the unreasonableness of the adopted methodology.

As this issue is already before the CIT in two cases, we shall soon see which side has the better of the argument.

3. Application of the statutory term, "differ significantly"

As explained above, Commerce employs a four-step test to determine if prices "differ significantly." To summarize, (1) Commerce compares the average price to the alleged target to the average price of the next higher average price to a non-targeted customer within the same "CONNUM," which becomes the alleged targeted gap; (2) this price gap is compared to a constructed-average price gap, which becomes the comparison gap; (3) if the alleged targeted gap exceeds the comparison gap for that CONNUM, the prices are "differ significantly" and the entire volume of the CONNUM is deemed targeted; and (4) if the volume of CONNUMs deemed targeted is greater than 5 percent of sales to that single customer, this results in an affirmative finding of targeted dumping. The CIT has upheld use of the 5 percent test, but has otherwise not addressed this test.[57]

One challenge to Commerce's methodology concerns Commerce's calculation of the "comparison gap" used for the comparison in step 2. The argument alleges that Commerce unreasonably ignores certain data without explanation or justification. Specifically, Commerce's practice excludes from the comparison gap those non-targeted customers with average prices <u>below</u> the average price to the alleged target. The lower average price is not used in comparisons or to calculate the average price gap.

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[57] *Mid-Continental Nail Corp.*, 712 F. Supp. 2d at 1377-78.

In other words, before undertaking any comparison, respondents argue that Commerce skews the sample by removing any the prices of sales to low-priced, non-targeted customers. To respondents, the purpose of the gap test is to determine whether a targeted customer's average price is lower than the average prices sold to non-targeted customers. By automatically removing all *lower* prices to non-targeted customers, Commerce has essentially pre-determined the result. It would be nearly impossible for a respondent to fail the gap test, rendering it unreasonable under the law. As shown below, assuming the "alleged targeted gap" is $0.30, Commerce's methodology can skew the results of the test:

Calculate the Comparison Gap (Commerce Methodology)										
	a	b	c	d	e	f	g	h	i	j
Non-Targeted Customer	Weighted Average Price	Total Quantity	Previous Weighted Average Price (Previous a)	Previous Total Volume (Previous b)	Previous Plus Current Volume previous (b+d)	Price Gap (c-a)	Price Gap * Previous Plus Current Volume (f*e)	Total Gap Times Two Volumes (h=Sum of Previous g)	Total Previous Plus Current Volume (Sum of Previous e)	Weighted Average Non-Targeted Gap (h/i)
Customer 1	$8.50	200								
Customer 2	$8.30	100	$8.50	200	300	$0.20	60	60	300	$0.20
Customer 3	$8.25	120	$8.30	100	220	$0.05	11	71	520	$0.14
~~Customer 4~~	~~7.5~~	~~600~~								

Alleged Targeted Gap	Comparison Gap	Is the Alleged Targeted Gap Greater?
$0.30	$0.14	Yes

Excluding the prices to Customer 4, results in a comparison gap of only $0.14, and this CONNUM will be deemed targeted. Contrast this with the following, which takes into account all prices:

Calculate the Comparison Gap (taking into account all prices)

	a	b	c	d	E	f	g	h	i	j
Non-Targeted Customer	Weighted Average Price	Total Quantity	Previous Weighted Average Price (Previous a)	Previous Total Volume (Previous b)	Previous Plus Current Volume previous (b+d)	Price Gap (c-a)	Price Gap * Previous Plus Current Volume (f*e)	Total Gap Times Two Volumes (h=Sum of Previous g)	Total Previous Plus Current Volume (Sum of Previous e)	Weighted Average Non-Targeted Gap (h/i)
Customer 1	$8.50	200								
Customer 2	$8.30	100	$8.50	200	300	$0.20	60	60	300	$0.20
Customer 3	$8.25	120	$8.30	100	220	$0.05	11	71	520	$0.14
Customer 4	$7.50	600	$8.25	120	720	$0.75	540	611	1240	$0.49

Alleged Targeted Gap	Comparison Gap	Is the Alleged Targeted Gap Greater?
$0.30	$0.49	No

As you can see, taking into account all prices, results in a comparison gap of $0.49, which results in this CONNUM being found not targeted.

At this point, it is unclear how Commerce will respond to these arguments, as it has not yet been required to address these challenges to the methodology.

4. What to do with differing market realities

Respondents have also argued that Commerce's targeted dumping methodology does not account for those commercial practices and pricing realities of the particular product under investigation. This argument was made particularly forefully in those cases involving consumer products, such as refrigerators and washing machines.

Respondents' argument can be seen by an example. For example, assume Commerce's AD investigation concerns a consumer product where the industry practice is for all producers to release new models at the same time each year. Of course, the new models will cause deep rebates to the model from the prior year. While, on paper, it may appear (because only a single 12 month period is examined) as though this time period has been targeted by the foreign producers, the reality is that prices will always be lower – from year to year – during that period as the producers clear old inventory. Commerce's practice fails to account for the real-world scenario of promotional pricing.

The same is true for "black Friday" (the day after Thanksgiving) sales. Respondents have argued that Commerce's targeted dumping method makes no effort to consider what the biggest sale day of the entire year - Black Friday - might mean for prices that customers pay in November. From Commerce's perspective, the day after Thanksgiving is same as any other day, and the fact that all industry participants engage in Black Friday sales is treated as irrelevant. Thus, in one of the recent consumer products cases, Commerce rendered a preliminary determination that found a foreign exporter had engaged in targeting during November 2011, notwithstanding the existence of Black Friday.

According to respondents, such refusal to take particular market realities into account is contrary to the SAA. According to respondents, the SAA recognizes the importance of considering *industry* differences in industry pricing patterns.[58]

Commerce counters that the targeted dumping statute is broad and does not require the actions advocated by respondent parties. The statute describes a differences among "periods of time" without going into further detail. According to Commerce, this broad design of the statute permits Commerce to determine its methodology so long as it is reasonable, a standard that Commerce asserts is satisfied under this practice. As with other arguments, Commerce relies on the discretion granted under the statute as its primary response to this claim.

5. Application of the targeted dumping remedy

A key issue before the Court will be identifying the proper remedy for instances where Commerce makes an affirmative finding of targeted dumping. No Court has faced the question of whether Commerce has the authority to apply the average-to-transaction methodology, and thereby the zeroing methodology, to all sales, even those found to be non-targeted. Challengers to this new practice claim that the statute -- 19 U.S.C. § 1677f-1(d) -- specifies the methodology for calculating dumping margins, and requires Commerce to apply the exception only to those sales found to qualify for the exception. This provision has several key elements that Commerce has allegedly ignored by applying the exception to all sales. First, Commerce allows the discretionary language in the statute to trump the mandatory. The statute states that Commerce "shall determine"

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58 SAA at 843.

the dumping margin based on either weighted averages or specific transactions, creating a strong presumption in favor of those methodologies.[59] The limited exception provides that Commerce "may" determine dumping using an average-to-transaction comparison under certain circumstances. The argument asserts that Commerce can only apply the exception where the exception applies.

A second argument is that the statute focuses specifically on those transactions that have been found be a "pattern" and that "differ significantly." These two statutory requirements – and both must be met – relate to the sub-set of transactions alleged to be targeted, not the entire universe of transactions. The remedy can therefore only be applied to this sub-set of transactions. A third argument that will come before the Court is that Commerce ignores the need to explain why any differences cannot be taken into account. Even if Commerce explains why the transactions with "such differences" that meet the "pattern" and "differ significantly" requirements cannot be taken into account using the preferred methodologies, that fact does not explain why other transactions without "such differences" cannot be taken into account using the preferred methodologies. In fact, it is hard to imagine any justification to explain why transactions without "such differences" need a special method to address the very differences that do not exist.

In response to both arguments, Commerce argues that the statute does not unambiguously compel any particular action, and therefore the Court should defer to the reasonable approach adopted by Commerce. Commerce asserts that this situation

[59] 19 U.S.C. § 1677f-1(d)(1)(A)(i).

presents a clear *Chevron* "step 2" situation, requiring "tremendous deference" to the methodology employed. It states that respondent parties have not made any compelling argument for why the adopted approach could be considered unreasonable.

Parties before the Court are also challenging Commerce's continued use of the zeroing methodology, relying on the *Dongbu Steel Co. Ltd. v. United States* decision by the Court of Appeals for the Federal Circuit.[60] The argument states that in *Dongbu*, the Federal Circuit effectively held that, because the underlying statutory provision governing the calculation of weighted average antidumping margins, namely, 19 U.S.C. § 1677(35), was the same for all antidumping margin calculations, it was unreasonable (and therefore unlawful under *Chevron*) for Commerce to refuse to apply its zeroing practice in certain situations (e.g. in original investigations in which the average-to-average methodology is employed) but then apply its zeroing practice in other situations (e.g. administrative reviews in which the average-to-transaction methodology is employed). The question in this context is whether it is permissible for Commerce to adopt a different interpretation of 19 U.S.C. § 1677(35) for original investigations involving the average-to-individual transaction comparison methodology (application of zeroing), from original investigations involving an average-to-average comparison methodology (e.g. no application of zeroing). Proponents of this argument, citing *Dongbu*, contend that the answer is no, and that Commerce's use of zeroing, even when utilizing the average-to-transaction methodology, is impermissible.

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60 635 F.3d 1363 (Fed. Cir. 2011).

Commerce has responded to this argument by citing case law that it believes *excepts* targeted dumping from the general proposition argued by respondent parties. Commerce believes that the statute, as reviewed by the Federal Circuit, permits the use of zeroing in a targeted dumping situation, even where zeroing is prohibited in the context of an investigation using the average-to-average methodology. Furthermore, nothing in the statute explicitly prohibits Commerce from doing so, and the Courts should defer to Commerce's discretion in applying the methodology.

With these issues and others only now beginning to be heard by the Court, we can anticipate a long path before resolution of the targeted dumping issue.

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