Congratulations, You Have Now Been Chosen: Evolving Practice and Emerging Issues for Mandatory Respondent Selection in Antidumping Cases *

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Antidumping ("AD") cases have become notoriously complex. Even the seemingly simple question of which companies should be investigated during AD proceedings has become complex. In theory, Commerce should investigate any and all exporters to the U.S. market that are willing to participate. (Indeed, the law has an express preference for this approach). But in practice, Commerce virtually always invokes practical considerations – the lack of resources – to investigate only a subset of the exporters. And so, the simple is no longer so simple after all.

In this article we explore the legal issues that arise when Commerce exercises its discretion under the statute and decides to limit its AD examination to only a subset of known exporters from the targeted country. Such action is referred to as Commerce's "mandatory respondent selection decision."

Before diving into an analysis of the relevant legal issues, we note an important trend in how Commerce has employed the statutory exception and limited the number of exporters examined. Essentially, the statutory exception has become the rule. In virtually every single antidumping case, Commerce has employed the exception and rendered a mandatory respondent selection decision. Moreover, such trend has been going on for quite some time. Regardless of whether you believe Commerce is justified

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or not in a particular case, as a legal matter it is at least noteworthy that, under U.S. law, the "exception" has become the "general rule." And so the legal issues we discuss below are relevant to some degree in almost every antidumping case.

A. Statutory Framework for Mandatory Respondent Selection

Antidumping investigations examine an individual exporter's pricing decisions. Under U.S. law, Commerce will investigate to what extent that an individual foreign exporter's U.S. selling prices are lower than "normal value" which, in turn, is defined as the home market selling prices or costs of production of the individual exporter. Reflecting this focus, section 1677f-1(c) of the U.S. antidumping law explicitly instructs:

> [T]he administering authority {Commerce} shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.[2]

The clear Congressional intent – reflecting U.S. international obligations[3] – therefore, is that a separate AD rate be determined for each known exporter based on that exporter's own sales prices and costs of production. That is what is supposed to happen.

U.S. AD law, however, also contains a practical consideration exception. Section 1677f-1(c)(2) effectively recognizes that Commerce officials believe that they are perpetually overworked and understaffed and therefore might not have the resources to undertake an investigation and calculate an AD margin for each exporter in every case.

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[2] 19 U.S.C. §1677f-1(c)(1) (emphasis added)

[3] Article 6.10 of the WTO Antidumping Agreement imposes this same obligation to investigate every known exporter.

And so, Section 1677f-1(c)(2) of the AD law (which is entitled "exception") sets forth the following:

> If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) {the general rule noted above} because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
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> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
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> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.[4]

In actual cases Commerce implements this statutory exception by rendering a "mandatory respondent selection" decision. Just as it sounds, Commerce's mandatory respondent selection is Commerce's identification of those (few) exporters that must respond to the Commerce's AD questionnaire. Or stated differently, only those exporters selected by Commerce as "mandatory respondents" will be "individually investigated" by Commerce. This limited focus on "mandatory respondents" also means that only the mandatory respondents will obtain a specific AD rate based on their own sales and cost data. When Commerce employs the statutory exception, all other exporters will receive the "all others" AD rate, which typically is an average of the AD rates calculated for the mandatory respondents.

This framework thus sets up a series of separate legal issues: (1) when and how does Commerce decide to invoke the exception; (2) how does Commerce choose between

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[4] 19 U.S.C. § 1677f-1(c)(2)

the two options for the exception; (3) how does Commerce apply the "largest exporters" exception; and (4) how does Commerce apply the "statistically valid sample" exception. We address each of these issues below.

B. Legal Issues in Commerce's Decision To Employ The Exception Rather Than The General Rule

The first legal issue in Commerce's mandatory respondent selection decision is whether Commerce satisfied the statutory criteria in deciding to employ the statutory exception. The very language of the statutory exception suggests that, in order to employ the exception, Commerce needs to determine (a) whether there is "a large number of producers or exporters involved" and (b) whether "it is not practicable to make individual" AD margin decisions for all known exporters (or producers) as is required by the statutory general rule.

In virtually every case in which Commerce applies the exception and renders a mandatory respondent selection decision Commerce *effectively* reverses these two arguably seriatim inquiries. In virtually every case, Commerce effectively employs the following logic:

- Commerce staff is extremely busy with work in other cases;
- Because Commerce staff is extremely busy with other work, Commerce can only investigate at most two exporters in this new case; and
- Given that the Customs data indicate there are more than 2 exporters, Commerce deems any number larger than "2" to be a "large" number.

The astute reader will notice that we highlighted the word "effectively." The reason is that, on paper, Commerce appears to decide first that there are a large number of "known producers and exporters," and then subsequently decides that it is not practicable

to review them all. Indeed, in every case, Commerce's mandatory respondent selection decision memorandum is structured in identical fashion. Section 1 of the decision memorandum is entitled "Limited Examination" and enumerates the number of producers or exporters. And Section 2 of the decision memorandum is then entitled "Selection of Mandatory Respondents" and explains how absolutely swamped the Commerce staff is with other work. The decision memorandum then has a "Recommendation" that contains Commerce's legal conclusion that it is not practicable to investigate all the known producers and exporters because the number is too large.

Commerce never addresses, however, whether the actual number of known producers and exporters actually meets the statutory definition of "large." Rather, Commerce effectively takes the position that "large" is completely a relative term that changes depending on Commerce's workload.

This very issue was the focus of the few Court of International Trade ("CIT") cases that have addressed the meaning of the statutory exception in 19 U.S.C. § 1677f-1(c)(2). And these decisions have been highly skeptical of Commerce's perfunctory analysis of what is a "large" number of exporters.

In *Zhejiang Native Produce & Animal By–Products Import & Export Corp*, 637 F. Supp. 2d 1260 (Ct. Int'l Trade 2009), the Court addressed an appeal of Commerce's fifth antidumping administrative review determination for honey from China. Given the petitioner's post-initiation withdrawal of its request for administrative review for the vast majority of Chinese companies named in its request, there were only four Chinese companies still subject to the administrative review by the time Commerce rendered its

mandatory respondent selection determination.[5] Citing "significant workload" by its staff in other AD cases, Commerce determined that it was only practicable to investigate two of the four companies.[6] In its final determination, Commerce then assigned an AD rate equal to 104.8% to the two companies who were not chosen as mandatory respondents.[7] Not surprisingly, the two companies subject to this very high rate were upset. One of these two companies appealed, challenging Commerce's mandatory respondent selection determination and the company's exclusion from individual review.

In court the plaintiff Zhejiang argued that, under the AD law, Commerce was required to investigate and calculate a company-specific AD rate for Zhejiang.[8] Commerce defended its mandatory respondent selection decision by arguing that, under the law, Commerce was entitled to interpret "large" in context of "the various administrative circumstances" Commerce was confronting during the review, including other antidumping review and investigations.[9]

The CIT rejected Commerce's statutory interpretation. The Court ruled:

> The court rejects Commerce's conclusion. The statute focuses solely on the practicability of determining individual dumping margins based on the large number of exporters or producers involved in the review at hand. *See* 19 U.S.C. § 1677f–1(c)(2). Accordingly, Commerce may not rely upon its workload caused by other antidumping proceedings in assessing whether the number of exporters or producers is "large," and thus deciding that

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5 *Zhejiang*, 637 F. Supp. at 1261-62.

6 *Id.* at 1262.

7 *Id.* at 1263.

8 *Id.*

9 *Id.*

> individual determinations are impracticable. Commerce cannot rewrite the statute based on its staffing issues.[10]

Indeed, the CIT explicitly stated that "Commerce . . . has no authority to limit the number of mandatory respondents it reviews unless there is a large number of exporters or producers."[11] The CIT ruled that the existence of "large number of exporters" was a precondition to employing the statutory exception. Finally, the CIT went on to rule that "four does not appear to satisfy the requirement that the number be 'large' under any ordinary understanding of that word."[12] And so, the CIT ordered a remand.

Soon after the decision in *Zhejiang*, the CIT was again presented with a challenge to Commerce's interpretation of 19 U.S.C. § 1677f-1(c)(2), but this time it was brought by petitioners in the underlying AD investigation of stainless steel bar from India. *Carpenter Technology Corporation, et al. v. United States*, 662 F. Supp. 2d. 1337 (Ct. Int'l Trade 2009), illustrates that both petitioners and respondents have equal interest in how Commerce determines whether and how to employ the statutory exception.

In the underlying Commerce AD proceeding in *Carpenter* Commerce had initiated an administrative review of twelve Indian exporters/producers of stainless steel bar from India.[13] After Commerce rescinded its review with respect to four exporters/producers for having no sales or entries during the period of review ("POR"), eight respondents remained subject to the review.[14] In its respondent selection

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10 *Zhejiang* at 1263-64 (emphasis added).

11 *Id.* at 1264.

12 *Id.* at 1264.

13 662 F. Supp. 2d at 1339.

14 *Id.*

memorandum Commerce announced that, due to its limited resources, it would be impracticable for it to make individual dumping margin determinations for the eight respondents and that therefore Commerce would "examine a maximum of two" respondents.[15] Relying on quantity and value information, Commerce selected the two respondents with the highest volume of exports during the POR.[16] In the Final Results, Commerce determined a 2.01% dumping margin for one of the respondents and a *de minimis* rate of 0.3% for the other. Commerce assigned to the six non-selected respondents the weighted-average AD margin that it determined for the remaining mandatory respondent, of 2.01%.[17]

On appeal petitioner plaintiffs claimed that Commerce's methodology for selecting the mandatory respondents was in violation of the agency's statutory obligation to calculate dumping margins as accurately as possible.[18] Since there were only eight respondents in the case, plaintiffs argued that it was unreasonable to apply the review-specific rate to the non-reviewed respondents, particularly as three of those respondents previously had rates exceeding 19%. In response Commerce argued that its selection of two respondents was reasonable, as the statute did not limit Commerce's authority to select the number of companies reviewed individually to those situations where there was a smaller pool of total potential companies to consider.[19]

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15 *Id.*

16 *Id*.

17 *Id*.

18 *Id.* at 1340.

19 *Id.* at 1342.

The court first considered whether Commerce's decision was consistent with the respondent selection exception under 19 U.S.C. § 1677f-1(c)(2). Since Commerce had decided that, due to resource constraints and workload, it could "examine a maximum of two exporters/producers" of subject merchandise, the court reasoned that "Commerce implicitly construed § 1677f-1(c)(2) such that any number of exporters/producers larger than two was a 'large number of exporters or producers' within the meaning of that term as used in the statutory provision."[20] Analyzing Commerce's construction of the term "large number of exporters or producers involved in the … review," the Court addressed "whether the term plausibly may be construed to encompass any number larger than two."[21]

The Court concluded that Commerce's construction of the term was "at odds with the clearly expressed intent of Congress."[22] And since Congress imposed on Commerce a general requirement to determine individual weighted average dumping margins, Commerce was not "free to invoke th[e] exception [under §1677f-1(c)(b)] unless faced with the prospect of examining individually a 'large number' of exporters and producers, however that term may be defined."[23] The court criticized Commerce's express determination that it could examine "a maximum of two exporters/producers," without

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20 *Id.* at 1342.

21 *Id.*

22 *Id.* at 1343.

23 *Id.*

providing explanation of why examination of any number of exporters/producers in excess of two was not possible,[24] and ordered a remand. [25]

The decision in *Carpenter* followed the rationale in *Zhejiang*, to the effect that Commerce's application of the exception under 19 U.S.C. § 1677f-1(c)(2) must be based on a "large number" of exporters and producers subject to review, and may not be freely invoked in light of the agency's limited resources and burdensome workload. Subsequent decisions have remained consistent with *Zhejiang* and *Carpenter*, but have demonstrated that non-mandatory respondents must participate in the review in order to preserve a viable claim for relief.[26]

In sum, the above cases focused on the interpretation of "large number" as used in 19 U.S.C. § 1677f-1(c)(2) and established that the existence of a "large number" of producers or exporters was a precondition to Commerce's application of the exception to limit the number of individually-reviewed mandatory respondents. At the same time, the Court made clear that Commerce's burdensome workload from other proceedings was not a valid basis for limiting the number of mandatory respondents in light of the Congressional intent that all known producers or exporters under review receive an

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[24] *Id.*

[25] *Id.* at 1346. The court reviewed authority supporting a narrow construction of statutory exceptions, such that "an exception to 'a general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy],'" *Id.* at 1344, citing *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995), and explained that "a construction of § 1677f-1(c)(2) under which limiting the number of individually examined respondents is intended to be the exceptional circumstance, not the norm." *Id.* at 1345.

[26] *See Asahi Seiko Co., Ltd., v. United States*, 751 F. Supp. 2d 1335, 1341 (Ct. Int'l Trade 2010) (finding that "Commerce exceeded its statutory authority in severely limiting the number of respondents for individual examination based on its own general resource constraints," but declining to grant relief sought for failure to exhaust administrative remedies); *Schaeffler Italia et al. v. United States*, 781 F. Supp. 2d 1358 (Ct. Int'l Trade 2011) (holding that Commerce interpreted 19 U.S.C. § 1677f-1(c)(2) contrary to law, but declining to grant relief sought for failure to exhaust administrative remedies).

individual weighted average dumping margin.[27] None of these decisions were appealed to the Court of Appeals for the Federal Circuit ("CAFC") and to-date remain good law.

Notwithstanding that these CIT cases have expressly concluded that Commerce may not use its workload in other cases to influence its finding that there are a "large" number of known exporters and producers, by all accounts Commerce is still following its same approach for mandatory respondent selection as it did in the underlying proceeding in *Zhejiang*. Indeed, Commerce has become rather rigid about its "no more than two rule" for mandatory respondents. The authors were counsel in an AD investigation for which Commerce made its mandatory respondent selection determination in the spring of 2013. In that case Commerce determined that it had to employ the statutory exception and limit the number of individually examined respondents to just two, even though the petition stated that there were only three subject producer exporters and such fact was confirmed by the ITC's preliminary injury determination.[28] Accordingly, it is likely that the CIT will see this issue again in future cases.

C. Legal Issues in Commerce's Selection of Mandatory Respondents

Assuming that Commerce is justified in employing the exception because there truly is a large number of known producers or exporters, the next issue is whether

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[27] 19 U.S.C. § 1677f-1(c)(1).

[28] *See Antidumping Duty Investigation of Diffusion-Annealed, Nickel Plated Flat-Rolled Steel Products from Japan: Respondent Selection Memorandum*, A-588-869, dated June 4, 2013. *See also Diffusion-Annealed-Nickel-Plated Flat-Rolled Steel Products from Japan*, Inv. No. 731-TA-1206 (Preliminary) U.S. International Trade Commission Publication 4395 (May 2013).

Commerce's approach for selecting which exporters to review in its "limited examination" comports with the statute.

Under the statutory language set forth in Part A, the statute gives Commerce a choice in determining how to limit its AD examination. Commerce can limit its AD examination to "a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection."[29] Or Commerce can choose to limit its AD examination to "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined."[30]

The statute does not express any preference between these two options, leaving Commerce with discretion. Historically, Commerce has jumped past the first option to use a "statistically valid sample" option, and has instead simply invoked the "largest volume" option. But given the court decisions seeking to give the statutory limit "large number" real meaning, Commerce has recently been exploring more seriously the use of "statistically valid" sample.

We address each option in more detail below.

1. Largest volume of exporters under § 1677f-1(c)(2)(B)

To-date, in the overwhelming majority of cases in which Commerce has decided to employ the statutory exception to individual review, Commerce has chosen to utilize the option of limiting its AD examination to those exporters accounting for the "largest volume" of subject merchandise imports into the United States. On the surface, it would

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[29] 19 U.S.C. § 1677f-1(c)(2)(A).

[30] 19 U.S.C § 1677f-1(c)(2)(B) (emphasis added).

seem that that there should not be much controversy in Commerce deciding to limit its examination to the two or three largest exporters. However, we believe that there are three aspects of how Commerce undertakes this analysis to make its mandatory respondent selection decision that could well provide fertile ground for subsequent CIT litigation.

The first aspect concerns the data source that Commerce utilizes to determine the universe of "known exporters" of the subject merchandise. Commerce's standard practice previously was to issue in every case a "quantity and value (Q & V) questionnaire" (sometimes called "mini-Section A") which requested all exporters to submit the actual quantity and value of their U.S. sales of the very subject merchandise during Commerce's chosen investigation period. Commerce would then utilize these Q & V questionnaire responses to determine the number of "known exporters" and which of these known exporters was the largest (should Commerce want to employ the exception).

Around 2007, for reasons of "administrative convenience", Commerce began implementing a change in policy as to how it would determine the largest volume of exporters in antidumping investigations and administrative reviews.[31] Today, Commerce has largely abandoned its old practice of issuing Q & V questionnaires, and instead prefers to utilize official Customs import statistics to determine the number of known exporters and which exporters had the largest volume during the investigation period.

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[31] *See e.g., Lemon Juice from Argentina*, 72 Fed. Reg. 20,820 (Dep't Commerce April 26, 2007) (preliminary determination of sales at LTFV and affirmative preliminary determination of critical circumstances in original investigation); *Wooden Bedroom Furniture from the People's Republic of China*, 73 Fed. Reg. 12,392 (Dep't Commerce March 7, 2008) (notice of initiation of administrative review).

The difficulty, as every trade lawyer knows, is that official import statistics are often rather unreliable as an accurate depiction the actual quantity of the very subject merchandise sold in the U.S. market during the investigation period. One common problem is that the subject merchandise has a very particular definition but the applicable HTS number is a broader basket category of products. Another common problem is that importers are often sloppy in identifying the actual producer or exporter of the merchandise. In many cases, the U.S. importer simply inserts the name of a trading company as the producers. In other cases, because of confusion in identifying the proper English name of foreign exporters in countries that do not use a Roman alphabet, the same exporter may appear as multiple entities.

Notwithstanding these known problems, in recent years Commerce has been downright stubborn in insisting on utilizing official Customs import statistics as the source data for determining the number of known exporters and which are the largest. A recent example of how stubborn Commerce can be is evident from the *Non-Oriented Electrical Steel from Japan* ("NOES") case, for which Commerce just rendered its final determination in October 2014.[32] In that case, soon after the ITC's preliminary affirmative injury determination, Commerce made available to the parties the quantity and value of all import transactions under the applicable HTS numbers during the investigation period. Commerce obtained such data from Customs. As is in all cases, the

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[32] *Non-Oriented Electrical Steel from Germany, Japan, the People's Republic of China, and Sweden: Final Affirmative Determinations of Sales at Less Than Fair Value and Final Affirmative Determinations of Critical Circumstances, in Part,* 79 Fed. Reg. 61,609 (Dep't Commerce October 14, 2014) ("NOES from Japan").

Customs data detailed the total quantity of imports from Japan during the investigation period for each "manufacturer" identified from Customs import documentation.

As it does in all cases, Commerce then invited comments from the parties on the Customs data and on how Commerce should make its mandatory respondent selection decision. In *NOES from Japan*, Petitioner submitted detailed comments noting, essentially, that although the Customs data suggested there were multiple Japanese NOES producers, in fact, it was common knowledge that there were just two steel companies that accounted for virtually all of the NOES production in Japan. (Petitioner's comments included various supporting documentation.) Petitioner argued vigorously that Commerce should choose these two steel companies as the mandatory respondents for the *NOES from Japan* AD case. However, Commerce rebuffed Petitioner's argument and determined that (a) the Customs data indicated that there were multiple Japanese producer exporters, (b) because of Commerce resource constraints, Commerce could only investigate two companies, and (c) therefore, Commerce chose as the mandatory companies the names of the two Japanese companies that the official Customs data indicated were responsible for the largest volume of imports during the investigation period. Commerce effectively brushed aside Petitioner's argument as not demonstrating "conclusively" that the Customs data was wrong.[33]

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[33] *See Antidumping Duty Investigation of Non-Oriented Electrical Steel from Japan: Respondent Selection Memorandum*, A-588-872, dated December 16, 2013, at 4 ("NOES Respondent Selection Memorandum") ("In its comments regarding respondent selection, Petitioner identified two groups of companies which it claimed were composed of affiliated companies, and requested that the Department select these two groups of companies as the mandatory respondents in this AD investigation. The Department disagrees that this would be appropriate for purposes of respondent selection. The Department's practice is not to make affiliation or collapsing decisions or even to examine which company

It is the authors' view that Commerce's refusal to accept *Petitioner's* real world understanding of which Japanese companies were the true players in the U.S. market is rather strong evidence that Commerce is extremely wedded to not departing from sole use of Customs data when rendering mandatory respondent selection decisions.

Commerce's reliance on Customs data for its mandatory respondent selection determination has been challenged before the CIT. *Pakfood Public Company Limited, et al., v. United States*, 724 F. Supp. 2d 1327 (Ct. Int'l Trade 2010), was decided at about the same time when Commerce was just beginning to utilize CBP data for determining the largest volume of exporters. The plaintiff, Ad Hoc Shrimp Trade Action Committee ("AHSTAC"), contested Commerce's reliance on Type 3[34] entry data obtained from the United States Customs and Border Protection ("CBP") in selecting respondents for individual examination in the third administrative review of the AD order on frozen warmwater shrimp from Thailand.[35] Commerce argued that its reliance on CBP data was not arbitrary and capricious because "'although [the Department] has relied upon [data from] quantity and value ["Q & V"] questionnaires in certain proceedings, … Commerce's 'current practice is to select respondents using CPB [entry] data.'"[36]

The court found that Commerce did not employ a consistent practice, supported by adequate reasoning, for selecting mandatory respondents based on Customs import

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first had knowledge of a sale to the United States when determining which entities to examine.") (Internal citation omitted).

[34] "Type 3" refers to consumption entries of merchandise subject to AD duties.

[35] *Pakfood I* at 1333.

[36] *Id.*, citing *Certain Frozen Warmwater Shrimp from Thailand*, 74 Fed. Reg. 47,551 (Dep't Commerce September 16, 2009) (final results and partial rescission of AD duty administrative review) and accompanying Issues & Decision Mem., A-549-822, ARP 07-08 (Sept. 8, 2009), Cmt. 2 at 9-10.

data that was consistent with 19 U.S.C. § 1677f-1(c)(2) because Commerce continued to use Q & V questionnaires in some administrative proceedings and CBP entry data in others.[37] Petitioners in cases where Commerce exclusively relied on CBP entry data bore additional burdens, reasoned the court, because CBP data do not include accurate affiliation information for the relevant POR.[38] Therefore, any affiliation information would only be available from prior proceedings or through voluntary disclosure by the companies subject to the review. As a result, petitioners in such cases would bear the burden of analyzing and updating potentially outdated affiliation information in administrative reviews, whereas petitioners in cases where Q & V questionnaires were issued and verified bore no such burden.[39] The court held that, "[r]egardless of the reasonableness of using CBP entry data to select mandatory respondents, [ ] the Department's apparently arbitrary and inconsistent employment of this methodology is not, without more adequate explanation, consistent with the basic principles of the rule of law."[40] The court remanded with instructions that Commerce provide an adequately reasoned explanation for its reliance on CBP data in this case, or else apply a methodology consistent with similarly situated cases[41]

Most recently, in *Ad Hoc Shrimp Trade Action Committee v. United States*, 992 F. Supp. 2d 1302 (Ct. Int'l Trade 2014), plaintiff AHSTAC appealed Commerce's

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37 *Id.*

38 *Id.* at 1336-37.

39 *Id.* at 1337.

40 *Id.* at 1337 (citations omitted).

41 *Id.* at 1338. The court reviewed Commerce's remand redetermination in *Pakfood Public Co. Ltd., v. United States*, 753 F. Supp. 2d 1334 (Ct. Int'l Trade 2011), and upheld the redetermination based on an expanded explanation.

determinations in the sixth administrative review of certain frozen warmwater shrimp from China.[42] AHSTAC challenged the selection of the mandatory respondents as not supported by substantial evidence due to a discrepancy of 15 to 18 percent between the volume of sales reported in questionnaire responses of one of the selected mandatory respondents and the Type 3 CBP data.

The court rejected AHSTAC's claim. Based on the record before it, and given Commerce's "broad discretion in allocating [its] investigative and enforcement resources," the court found that the selection of mandatory respondents was reasonable.[43] The court found that Commerce had sufficiently accounted for the flaws in the CBP data in the explanation that it provided in the respondent selection memorandum.[44] Moreover, the court agreed that the record revealed that the magnitude of the discrepancy was far outweighed by the magnitude of that respondent's sales during the POR relative to the remaining respondents.[45] Therefore, the "discrepancy did not impugn the accuracy" of Commerce's finding that the respondent was one of the two largest importers by volume and so the Court affirmed Commerce's findings in this regard.[46]

Although these cases have affirmed Commerce's exclusive reliance on CBP data in selecting mandatory respondents under the limited examination exception of the statute, we believe this issue will continue to be litigated based on particularly egregious facts in future cases.

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42 *AHSTAC*, 992 F. Supp. 2d at 1304.

43 *Id.* at 1312, citing *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995).

44 *Id.* at 1311.

45 *Id.*

46 *Id.*

The second aspect of Commerce's approach that is controversial is Commerce's refusal to consider affiliations among individual exporters when determining which are the largest exporters. This issue can be illustrated by a simple example: Assume there are seven known individual exporters: A, B, C, D, E, F and G. Assume further that this list of exporters is set forth in descending order of volume of subject merchandise imports into the United States, such that A's volume is greater than B's, which is greater than C's etc. Finally, assume that E, F and G are all 100 percent owned subsidiaries of the same corporate parent.

At the outset we note that, under standard Commerce AD calculation methodology, it is certain that E, F and G would all be considered "affiliated." This means that if Commerce chose to examine any one of these three (E, F or G), it is certain that Commerce would require that all three provide sales and cost data in order to allow Commerce to collapse the data of all three when calculating the AD margin. Essentially, standard Commerce methodology would require that Commerce calculate a single AD rate for all three exporters, E, F and G.

Notwithstanding that it is certain that Commerce would collapse all three exporters E, F and G, should any one of the three be examined, Commerce has an established practice of ignoring the affiliation of E, F and G when making its mandatory respondent selection decision. And so, even if Commerce is presented with *bona fide* documentation that E, F and G are affiliated, Commerce will ignore such fact, even if the combined volume of imports of E, F and G are far larger than A. Indeed, in most of its recent mandatory respondent selection decision memoranda, Commerce reiterates the following conclusion:

> The Department's practice is not to make affiliation or collapsing decisions or even to examine which company first had knowledge of a sale to the United States when determining which entities to examine.[47]

Rather, in this example, should Commerce decide that it was "not practicable" to investigate more than two exporters or producers (which is Commerce's prevalent definition of practicable), it would choose only A and B as the mandatory respondents. What this means is that E, F and G would be assigned the "all others" rate even though there is no question that, combined, their volume of imports would have been the largest.[48]

It is our view that, in those cases in which Commerce has evidence about affiliations among exporters at the time it renders its mandatory respondent selection decision, Commerce's practice is not lawful. Very simply, Commerce has a statutory obligation to base its AD decision on substantial evidence on the record. And so, in our view, Commerce is not permitted to ignore the evidentiary record when it renders a decision just because analyzing the evidentiary record may be more time consuming.

Our understanding is that, to-date, the CIT has not yet been presented with this particular issue. However, we believe that it could well see this issue soon.

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[47] *See, e.g.*, NOES Respondent Selection Memorandum, at 4. (citation omitted).

[48] Although we presented this controversial Commerce practice as a hypothetical, for ease in explanation, there are bona fide real-world examples of Commerce employing this practice in very similar scenarios and over the objection of some interested parties. *See Hardwood and Decorative Plywood from the People's Republic of China: Final Determination at Less Than Fair Value*, 79 Fed. Reg. 58,273 (Dep't Commerce September 23, 2013) (declining to consider requests to collapse companies at the respondent selection phase of the investigation) ; *Sugar From Mexico: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 Fed. Reg. 65,189 (Dep't Commerce November 3, 2014).

The final aspect of Commerce's practice of choosing the largest volume exporters as mandatory respondents concerns the actual number of mandatory respondents chosen. We note that this issue is different from the issue (addressed above) as to whether there is a sufficiently "large" number of known exporters in order for Commerce to have justification for employing the exception. Rather, this issue addresses whether, in limiting its AD examination to the largest volume exporters, Commerce has some obligation to select a sufficient number of exporters to account for some minimum percentage of total imports.

In the past, Commerce's mandatory respondent selection decision memoranda would explicitly note the percentage of total imports accounted for by the selected mandatory respondents. And the rough understanding was that Commerce typically chose a sufficient number of mandatory respondents in order to cover 60 percent of total imports during the investigation period. This practice led Commerce in some cases to choose a fair number of mandatory respondents. For example, in *Color Television Receivers from China*, Commerce chose four mandatory respondents[49]; in *Softwood Lumber from Canada*, Commerce chose six mandatory respondents[50]; in *Wooden Bedroom Furniture from China*, Commerce chose seven mandatory respondents[51]; in

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[49] Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 68 Fed. Reg. 66,800 (Dep't Commerce November 28, 2003) (receiving 12 section A questionnaire responses from Chinese producers or exporters and selecting four companies for individual review).

[50] Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada, 66 Fed. Reg. 56,062 (Dep't Commerce November 6, 2001).

[51] Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Wooden Bedroom Furniture From the People's Republic of China, 69 Fed. Reg.

Honey from China, Commerce chose four mandatory respondents[52]; and in *Certain Frozen and Canned Warmwater Shrimp from Vietnam*, Commerce chose four mandatory respondents.[53]

However, Commerce's recent practice is, essentially, to ignore any notion of seeking a minimum coverage of imports. Rather, Commerce's more recent practice is only to select two mandatory respondents in every single case, regardless of how many known exporters there are. It is the authors' view that it is uncertain whether such practice is lawful.

2. Statistically valid sample under § 1677f-1(c)(2)(A)

Although Commerce usually makes its decision based on the "largest volume" provision of the statute, Commerce has another option: to select respondents based on a "statistically valid" sample.[54] Although this option is actually listed first and given equal weight under the statute, Commerce has rarely used this alternative method. Notwithstanding the statutory authority to do so, Commerce has invoked this method in only a handful of cases over the past forty years.

35,312 (Dep't Commerce June 24, 2004) (receiving quantity and value responses from 137 Chinese producers or exporters and selecting seven companies as mandatory respondents).

[52] *Notice of Preliminary Determination of Sales at Less Than Fair Value: Honey From the People's Republic of China*, 53 Fed. Reg. 14,725 (Dep't Commerce March 20, 1995) (receiving questionnaire responses from 28 Chinese exporters and subsequently selecting four exporters for individual review).

[53] Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam, 69 Fed. Reg. 42,687 (Dep't Commerce July 16, 2004).

[54] 19 U.S.C. § 1677f-1(c)(2)(A).

That situation has been changing. Commerce recently adopted a new policy to address selecting respondents in antidumping proceedings that specifically addresses sampling,[55] and this new policy seeks to flesh out and formalize this concept of a "statistically valid" sample. The core motivation behind the new policy has been to ensure that the respondents selected for a proceeding are not always just the largest companies, but rather include a mix of different companies of different sizes. But like so many issues in antidumping proceedings, the issue of sampling has now become a contentious battleground between petitioner interests arguing that smaller exporters should not be predictably immune from reviews and respondent interests arguing that it is not fair for larger companies not to be chosen for individual examination in administrative review when they invested substantial resources to "control" their U.S. sales in order to minimize dumping. The early indications are that Commerce will now be more proactively exploring these ideas in ongoing proceedings.[56]

To better understand these new developments regarding sampling, this section will review the evolution and current operation of the new policy on sampling. This section will first briefly describe how Commerce has addressed sampling over time. This discussion will then review both the historical background to this new policy, and summarize Commerce's statement of the new policy. We then turn to some of the key

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[55] Announcement of Change in Department Practice for Respondent Selection in Antidumping Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings, 78 Fed. Reg. 65963 (Nov 4, 2013)(hereafter "New Sampling Policy")

[56] As discussed below, Commerce currently views the policy as applying only to administrative reviews, noting that original investigations pose different issues. New Sampling Policy, 78 Fed. Reg. at 65967.

issues that are likely to arise under the new policy, many of which are likely to end up in disputes before U.S. courts, the WTO, or both.

a. evolution of the new policy

These issues regarding sampling have been around for some time. Congress gave Commerce authority to engage in sampling using "generally recognized sampling techniques" as far back as 1979[57] and expanded that authority in 1984,[58] although this original authority appears to have been limited to sampling of sales or adjustments within a participating respondent, and not sampling to determine what company should be the respondent. Notwithstanding the apparently limited scope of the original statute, Commerce interpreted this provision as allowing any type of sampling, including sampling to choose respondents, and the courts agreed.[59]

A key statutory change occurred in 1994 as part of implementing the Uruguay Round changes to U.S. law. In light of a new provision in international law allowing authorities to limit their examination of respondents in an antidumping investigation to a "reasonable number" of companies "by using samples which are statistically valid,"[60] Congress amended U.S. law to provide Commerce that same discretion.[61] The provision

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[57] Then Section 773(f) of the Tariff Act of 1930, added by the Trade Agreements Act of 1979. This provision authorized the use of "generally recognized sampling techniques," but only in the context of determining foreign market value.

[58] Then Section 777A of the Tariff Act of 1930, added by the Trade and Tariff Act of 1984. This provision again authorized the use of "generally recognized sampling techniques," but expanded the authority to apply to both determining foreign market value and determining U.S. price.

[59] *See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States*, 704 F. Supp. 1114 (Ct. Int'l Trade 1989), *aff'd,* 901 F.2d 1089 (Fed. Cir. 1990).

[60] Article 6.10 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereafter "AD Agreement").

[61] Section 229 of the URAA, implemented in current law at 19 U.S.C. § 1677f-1.

that had previously only expressly addressed sampling within an already selected respondent's data base was thus expanded to explicitly authorize sampling to determine who would be the respondent. The interplay between Commerce's exercise of discretion under the old statute and the new international rules on this issue lead to a formal grant of statutory authority.

There have been only a few cases since 1994 that actually used sampling to select respondents. Commerce itself has acknowledged that it used the "largest exporter" provision in "virtually every one of its proceedings."[62] But there were a few exceptions where the number of potential respondents ran into the hundreds of companies and Commerce engaged in various types of sampling. In a case involving sweaters from Hong Kong, Commerce engaged in a type of sampling by taking the largest companies based on their allocated export quotas.[63] In a case involving softwood lumber from Canada, after two administrative reviews based on simply picking the largest exporters, Commerce in the third administrative review applied sampling based on a "probability proportional to size" method to select a mix of respondents.[64] Commerce used the same "probability proportional to size" method in another case involving brake rotors from

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[62] *Proposed Methodology for Respondent Selection in Antidumping Proceedings; Request for Comments*, 75 Fed. Reg. 78678, 78678 (Dec. 16, 2010) (hereafter "Proposed Policy"). When finalizing this new policy, Commerce rephrased the "virtually all" to "the Department has, to date, generally used" the largest exporter approach. New Sampling Policy, 78 Fed. Reg. at 65964.

[63] *See generally National Knitwear & Sportswear Association v. United States*, 779 F. Supp. 1364 (Ct. Int' Trade 1991).

[64] *See generally Alitibi Consolidated Inc. v. United States*, 437 F.Supp.2d 1352 (Ct. Int'l Trade 2006).

China.[65] But in these cases, sampling had proven controversial and so Commerce generally has just focused on selecting the largest exporters in each case.

After fifteen years and limited experience with sampling, Commerce finally in late 2010 proposed a new methodology.[66] The stated rationale was to address the situation whereby smaller exporters were never being selected to receive individual examination. Building upon its experience in the disputes involving *Softwood Lumber from Canada* and *Brake Rotors from China*, Commerce decided to adopt stratified sampling to capture a wider variety of exporters. Acknowledging the statutory requirement for "statistically valid" samples, Commerce therefore announced a proposal to (1) take a random sample, (2) from a stratified sample, (3) that used "probability-proportional-to-size" or "PPS" samples.[67] In plain English, Commerce proposed to create three groups of roughly equal size – large, medium, and small – and then randomly select one or two companies from each group, with the likelihood of being selected adjusted based on the size of each company within its group. In other words, if the largest company in the group "medium" had sales that were 10% of the total value of sales within that group, that company would have a 10% chance of being selected.

In late 2013 that proposed methodology was finally confirmed in a formal change of policy announcement.[68] After considering various comments on technical and policy

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65 *See generally Laizou Auto Brake Equipment Co. v. United States*, 32 C.I.T. 711 (2008).

66 Proposed Policy, 75 Fed. Reg. 78678, 78678 (Dec. 16, 2010).

67 Proposed Policy, 75 Fed. Reg. at 78678.

68 New Sampling Policy, 78 Fed. Reg. 65963 (Nov 4, 2013).

issues,[69] and taking another three years to consider the issues, Commerce basically adopted its proposed method to take a random sample, from each of three stratified sample groups, and use the "probability-proportional-to-size" technique to adjust for the size of each company within each of the three groups.

The new policy has several key elements. First, Commerce has now articulated a specific set of criteria for deciding when to sample. Commerce will consider whether the following four conditions have been met: (1) a request by one of the parties to sample; (2) whether Commerce has the resources to examine at least three companies, one for each stratum; (3) the largest three exporters account for less than 50% of total import volume; and (4) whether Commerce has a "reasonable basis to believe or suspect" that average export prices and/or dumping margins among the largest exporters and the other exporters are different.[70] Of these conditions, the last one is the most interesting and goes to the core of why Commerce is now sampling: are the likely margins going to vary for smaller exporters compared to the larger exporters? Although in theory this could be a limiting factor, the use of the relatively low "believe or suspect" standard means that it should not be very hard for any reasonably diligent petitioner to make the necessary showing.

Second, Commerce has now described a specific sampling methodology that it will use. The basic framework is taken from prior Commerce proceedings that used such techniques – (1) random sampling, (2) from stratified samples, and (3) using PPS

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69 New Sampling Policy, 78 Fed. Reg. at 65966.

70 *Id.* at 65965.

sampling. Commerce has defended its resulting sample of only a small handful of companies as being "statistically valid" because the companies are chosen based on "statistically valid" techniques.[71] Commerce applies this sampling method to import volume reported by U.S. Customs and Boarder Protection ("CBP"), as applied to all those companies that actually had shipments of subject merchandise during the period of review.[72]

Third, Commerce has also announced procedures it will follow. Parties must request sampling and provide the necessary factual information within seven days of release of the CBP data to the parties. All other parties then have ten days to comment, and a five day rebuttal period.[73] Commerce then waits until the 90-day period for withdrawing requests for the administrative review has passed, and then conducts its sampling. These time periods are rather short, and the process is rather complex. The sampling process in some recent administrative reviews has taken more than six months to complete,[74] significantly delaying the start of the actual administrative review.

Fourth, Commerce has announced a new "sample" rate that will apply to those companies not actually investigated. Each of the investigated companies will receive their own individual antidumping rate. For all of the other exporters, they will receive a weighted average rate based on the (1) the rates for each of the investigated companies,

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71 *Id.*

72 *Id.*

73 *Id.* at 65965-66.

74 Commerce initiated the 9th administrative review of the AD order on shrimp from Vietnam on April 1, 2014 and did not finalize its sampling its methodology until early September and did not actually select respondents for that review until October 3, 2014.

but (2) weighted based on the share of total imports represented by each of the three groups.[75] In general, the groups will have been constructed to equal about one-third of total import volume,[76] but the precise weighting will depend on actual proportions.

Fifth, Commerce will be implementing its new policy only for administrative reviews, at least for now. Given the enforcement concerns motivating the new policy, it is not surprising that Commerce had expressly stated the new policy is only for antidumping administrative reviews, and not for antidumping investigations or countervailing duty proceedings.[77]

b. emerging issues to consider

As Commerce implements this new sampling policy, disputes among the interested parties are inevitable. Sampling has been contentious in the past, and there is no reason to think it will be less contentious in the future. Like many other issues under the antidumping law, these issues are likely to be tested in U.S. courts, before the WTO, and perhaps both. It is useful, therefore, to review some of the issues that might arise over the coming years.

When will Commerce sample? As discussed above, Commerce has specifically set forth four criteria it will apply when deciding whether or not to sample.[78] Instead of predictable metrics, Commerce has instead listed criteria that almost seem designed to maximize the uncertainty. The only really clear metric is the criterion that the top three

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[75] New Sampling Policy, 78 Fed. Reg. at 65965.

[76] Proposed Policy, 75 Fed. Reg. at 78679.

[77] New Sampling Policy, 78 Fed. Reg. at 65965 n.9. *See also id.* at 65967 (responding to comments on this issue).

[78] New Sampling Policy, 78 Fed. Reg. at 65965.

exporters alone do not constitute more than 50 percent of the import volume under review. The factor just restates the basic rule for selection based on the largest exporters and whether they collectively represent enough of the market. The other three factors are very unpredictable. Does an interested party make a request or not? It will be impossible to predict what one or more interested parties might do in the particular proceeding. Does Commerce have the resources to examine at least three companies? Only Commerce will be able to answer this question, and it reflects Commerce's increasingly bureaucratic focus to its conduct of antidumping proceedings. Is there a "reasonable basis to believe or suspect" prices and/or margins "differ" among different exporters? Rather than require any specific information or set any specific guidelines, Commerce adopted the weakest possible evidentiary standard and expects only some difference of unspecified magnitude.

The most likely disputes will be complaints by petitioners that Commerce should have sampled in those cases where Commerce decides not to sample, but we doubt there will be many such disputes. Since the statute gives Commerce the discretion to sample, but does not require sampling, Commerce will have wide leeway in how it exercises this discretion. Moreover, even if a petitioner believes it has provided a reasonable basis to believe or suspect, Commerce is likely to invoke the "we don't have the resources" rationale on a regular basis. It is hard to image a reviewing body second-guessing the agency's decision about its own resources

Statistically valid manner, or statistically valid outcome? Commerce takes the position that the statutory language "statistically valid" refers to "the manner in which the

respondents are selected, and not to the size of the sample under review."[79] This issue is likely to be tested in the coming years.

Commerce's legal argument for this conclusion rests on a weak foundation. Commerce cites the Statement of Administrative Action "SAA," and claims that "statistically valid" sample in the current statute means the same thing as "generally recognized sampling techniques" in the prior statute.[80] But in making this argument, Commerce overlooks another part of the prior statute. The current language "statistically valid samples"[81] replaces what was previously the statement that any samples "shall be representative of the transactions under investigation."[82] Even if one might read "statistically valid" as referring to the sampling process, not the resulting sample itself, the earlier language about the sample itself being "representative" strongly suggests the resulting sample must be "statistically valid," and not just the sampling techniques.[83]

Moreover, the SAA also notes that the change in the statutory language was "intended to conform the language of the statute with that of the Antidumping

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[79] New Sampling Policy, 78 Fed. Reg. at 65965 (citing *Brake Rotors from the People's Republic of China*, 71 Fed. Reg. 66,304 (Nov 14, 2006), and accompanying Issues and Decision Memorandum at Comment 1A, page 6. Note the New Sampling Policy citation to 77 Fed. Reg. is a typographical mistake; the correct citation is 71 Fed. Reg.

[80] *Brake Rotors from the People's Republic of China*, 71 Fed. Reg. 66304 (Nov 14, 2006), and accompanying Issues and Decision Memorandum at Comment 1A, page 6, citing SAA at page 872.

[81] 19 U.S.C. §1677f-1(b) (version codified in 1994 Act).

[82] *Id.* This earlier version can also be found in the Historical and Statutory Notes section of U.S.C.A. for this provision.

[83] In this regard, we note that parties have not always argued this point well, and that some courts have embraced the far too simplistic conclusion that a valid process necessarily leads to a valid results. *See Laizou*, 32 C.I.T. 711 at 10 ("Suffice it so say that the point of requiring selection from a statistically valid pool of respondents is to arrive at a statistically valid dumping rate.") As discussed below, that will not always be the case.

Agreement."[84] So the Commerce legal argument ignores the meaning of the phrase "statistically valid" in Article 6.10 of the Antidumping Agreement and the need for the U.S. law to conform to this new standard. If "statistically valid" means something more – either on its face, or as interpreted by the WTO – then the SAA actually says that the U.S. statute should "conform" to that meaning. This argument has particular weight, because the phrase "statistically valid" is used in both Article 6.10 and the U.S. statute in the context of selecting respondents. The phrase "generally recognized sampling techniques" in the prior statute, in contrast, was used in the context of taking a sample of the total sales, if there is a large number of sales. Taking a subset of a few hundred sales out of tens of thousands of sales for a single respondent raises very different issues than taking a subset of three or four respondents out of a population of several hundred responding companies. Commerce's legal argument really does not do justice to the nuanced issues involved in proper legal interpretation of this key phrase "statistically valid."

Commerce has also pushed the concept to an extreme level by limiting its sample size in every case to just three companies. Even if "statistically valid" and "generally recognized" mean the same thing, which as discussed below is certainly debatable, "generally recognized sampling techniques" do not ignore the size of the sample under review. Regardless of the sampling technique used, the size of the sample is perhaps the most important of the "sampling techniques" and directly affects the validity of the sample. Indeed, Commerce apparently does not recognize the internal inconsistency of

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[84] SAA at 872.

how it is treating these issues. In the context of sampling, Commerce argues basically that sample size does not matter[85] and its method of selecting three companies is statistically valid.[86] Yet just a few months later, in the context of its new policy on differential pricing, Commerce relies heavily on the so-called "Cohen's d test," which Commerce calls a "generally recognized statistical measure."[87] Yet Professor Cohen in his academic work on which Commerce has drawn was quite emphatic that the reliability of a sample "is always dependent on the size of the sample."[88] Lest his reader miss this key point, Professor Cohen went on:

> Moreover, and most important, whatever else sample reliability may be dependent upon, it *always* depends on the size of the sample.[89]

Indeed, the major thrust of Professor Cohen's academic career has been to push for a more explicit recognition of the fundamental trade-off between the size of a sample and what conclusions can reasonably be drawn from the sample. It is thus rather stunning that Commerce, at approximately the same time that it was embracing Professor Cohen's work for its differential pricing methodology, would argue that size does not matter, and that the size of the sample has nothing to do with the "sampling techniques" being considered.

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[85] New Sampling Policy, 78 Fed. Reg. at 65965 (statistical validity does not refer to the "size of the sample").

[86] New Sampling Policy, 78 Fed. Reg. at 65965 (this methodology "satisfy the requirements for statistically validity").

[87] Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26720, 26722 (May 9, 2014).

[88] Jacob Cohen, Statistical Power Analysis for the Behavioral Sciences 6 (2d ed., Lawrence Erlbaum Associates 1988) (1969) ("Cohen").

[89] Cohen at 7 (emphasis in original).

What does "statistically valid" mean? Regardless of whether it refers to the sampling techniques or the outcome, the meaning of "statistically valid" is another issue likely to be tested in the coming years. Putting aside any particular problems that might come up in specific cases, Commerce may face some difficulty defending its concept of three companies constituting a "statistically valid" sample.

What does "statistically valid" mean? The phrase is used most often in the fields of science and statistics, where the concept "validity" has a well understood meaning:

> In science and statistics, validity is the extent to which a concept, conclusion or measurement is well-founded and corresponds accurately to the real world. The word "valid" is derived from the Latin *validus*, meaning strong. The validity of a measurement tool (for example, a test in education) is considered to be the degree to which the tool measures what it claims to measure.[90]

So "statistical validity" is fundamentally about using the techniques of statistics (a well recognized field of knowledge) to answer the question of whether something is "valid." In the context of sampling to determine the respondents in an antidumping review, the purpose of the "statistically valid" sample is (in Commerce's own words) to determine "the export trade-weighted average dumping margin across all firms."[91] Put another way, Commerce is trying to determine a "statistically valid" sample to determine the average dumping margin. So the question becomes: how well does the new Commerce policy function to determine this average margin? Or to paraphrase the definition above, does the tool actually measure what it claims to measure?

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[90] http://en.wikipedia.org/wiki/Validity_(statistics).

[91] New Sampling Policy, 78 Fed. Reg. at 65965.

The Commerce rationale for its new policy covers some issues, but misses the most important issue. In a paragraph apparently designed to create the impression of statistical sophistication, Commerce defends its use of stratified samples, and its use of probability proportional to size sampling.[92] Yet in doing so, Commerce misses the key point of sample size. It is worth repeating the statement from Professor Cohen:

> Moreover, and most important, whatever else sample reliability may be dependent upon, it *always* depends on the size of the sample.[93]

Essentially, Commerce has focused on the "whatever else" part of this statement, and simply ignored the size of the sample.

So the real issue is assessing the meaning of Commerce's decision to limit its sample to just three (or a small handful of) companies. No matter how many respondents, Commerce will consider just three. To keep the analysis simple, let's assume Commerce has reasonably developed stratified samples, and has reasonably applied PPS sampling. Those are complex issues, and what Commerce does in a particular case may or may not be reasonable. But for now, let's stay focused on the key issue of sample size: what does a sample of three or four companies actually tell us?

First, the sample is not really three or four companies, but often just one company. Commerce wrote with confidence and sophistication about its new method: "Each stratum mean is estimated on the basis of the PPS-based sample mean,"[94] and then elaborating that "the sample mean for a stratum is the simple average of the dumping

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[92] New Sampling Policy, 78 Fed. Reg. at 65965.

[93] Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences* (2d ed. 1988), at page 7 (emphasis in original).

[94] New Sampling Policy, 78 Fed. Reg. at 65965.

margins of the sampled respondents from the stratum."[95] But whoever wrote this explanation apparently forgot that Commerce's new policy requires only one company per stratum. At most, Commerce might have two companies per stratum. But given Commerce's concerns about its resource limitations, the idea of Commerce selecting six companies (two per stratum) seems highly unlikely in most cases. Most of the time there will be one company per stratum. By adopting stratified sampling, Commerce is essentially saying that the dumping margin for a large company is not a reliable way to estimate the correct dumping margin for a small company. But that means that the sample for "large," "medium," and "small" companies each has only one company to estimate the true dumping margin for that category.

Second, a sample size of one or two tells Commerce very little about the true characteristics of the group being sampled. Professor Cohen's classic text *Statistical Power Analysis for the Behavioral Sciences* directly addresses this issue in the context before Commerce: how to determine the average of a group, and with what "validity" has one actually determined that average based on a sample. Professor Cohen's discussion focuses on the difference between two means (the same context Commerce considered in its new "differential pricing" policy), but the same logic applies to determining a single mean. Perhaps most tellingly, in the tables he calculated to show the "power" of different scenarios – the extent to which the statistically test was actually finding something – Professor Cohen did not even bother to do the calculations for

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[95] *Id.* at 65965, n.14.

sample sizes less than eight. In other words, for samples sizes less than eight, there simply was no point in bothering to assess the "power" of the test.

When adopting its new policy on sampling, Commerce is making a rather extreme set of assumptions. Commerce describes its "PPS-based sample mean" as "an unbiased estimator of the stratum mean."[96] But even if this estimate is "unbiased," what does it really tell us about the true average margin of dumping within the stratum? If there are 100 companies in this stratum, what does a dumping margin for one or two companies say about the true average for this stratum? Or put differently, can one even say that the average margin of dumping is more than zero? Using Professor Cohen's logic, a sample size of 1 or 2 simply does not have enough "power" to say anything at all about the true average margin of dumping.

Note this discussion may suggest that establishing a "statistically valid" sample is difficult, and may not be realistic in many situations. That is probably true. And that is probably why the statute discussed "statistically valid" sample first, and then sets forth another exception that is much easier to meet. Congress recognized that statistical validity is hard to establish, and therefore gave Commerce another path. Commerce's stated "potential enforcement concern"[97] does not justify asserting the statistical validity of a method that is not statistically valid in any meaningful sense of that statutory phrase.

There are likely to be serious disputes about these issues in the coming years. When Commerce predictably focuses on the largest respondents, those companies can

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[96] New Sampling Policy, 78 Fed. Reg. at 65965.

[97] New Sampling Policy, 78 Fed. Reg. at 65964.

prepare for the burdens of administrative reviews. But now Commerce proposes to pick out companies that have never gone through the process, and have not been preparing for the process. It is likely that such companies will struggle with the process, and either give in or fail to meet the very demanding standards. The resulting high dumping margins may please petitioner interests, but that outcome does not justify the method being used. If Commerce wishes to use sampling, it must respect the statutory requirement of doing the work to create a "statistically valid sample." If Commerce cannot do so, then it should limit itself to the other option under the statute to select the largest companies.

Concluding Thoughts

Commerce has been struggling with these issues of respondent selection, and has been looking for ways to investigate fewer respondents than ever before. Commerce seems determined to limit its work load, and wants to base more decisions on fewer respondents. It is the authors' view that this approach makes a mockery of the basic rule that each exporter should at least have the chance to have its own dumping rate based on its own facts. And adversely affected exporters are likely to continue challenging various aspects of these Commerce decisions in the Court of International Trade.

Our final comment is about the premise underlying the very topic for which this paper was prepared. Our panel's topic is "Avoiding The Bread Line: Trade Remedy Fixes Within Shared Resource Constraints." The underlying premise, of course, is that there are *bona fide* resource constraints facing Commerce.

The irony of this situation, however, is that Commerce has largely created its own workload. The work to investigate an individual exporter has grown significantly over

time largely because of Commerce's own choices. Time and time again Commerce chooses to undertake the maximum degree of examination, supposedly in the pursuit of enhanced accuracy, without really assessing how much accuracy is achieved from the extra effort.

In short, notwithstanding its broad discretion to do so, Commerce rarely chooses to simplify its antidumping policies. Past efforts to organize "simplification" efforts have all failed. And so over time, the antidumping regime is like an ocean going ship that never, ever scrapes away the barnacles that accumulate over time. So the ship just slows down. Instead of making three trips a month, it makes just two, or just one. Perhaps if Commerce devoted some of its energy to simplification, it could find the time to go back to investigating a more reasonable number of mandatory respondents.

*This is a draft of an article that is forthcoming in 23 Tul. J. Int'l & Comp. L. (2015). Reprinted with the permission of the Tulane Journal of International and Comparative Law.