Comments regarding the
Calculation of Weighted Average Dumping Margins
in Antidumping Duty Investigations

Prepared by the Law Offices of Stewart and Stewart
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These comments have been prepared on behalf of Stewart and Stewart, a law firm with extensive experience representing clients in antidumping duty proceedings at the U.S. Department of Commerce. They are being submitted in response to the notice of the International Trade Administration ("ITA") titled "Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation." 71 Fed. Reg. 11,189 *et seq.* (March 6, 2006). Stewart and Stewart has been a participant on the petitioner's side in a number of antidumping proceedings and is a firm believer in the need for strong domestic trade remedy laws.

The firm presents below its views on (1) why the Department should not alter its method of determining dumping in investigations while negotiating the Doha Round, (2) the statutory imperatives that should guide any action the agency may take, and (3) the approaches that it should take, should it decide to modify its existing margin calculation methodology.

Commerce Should Not Be Considering Any Changes in its Comparison Methodology Given the Current State of the Doha Round of WTO Negotiations

In the Trade Act of 2002, Congress identified a "pattern of decisions by dispute settlement panels of the WTO and the Appellate Body to impose obligations and restrictions on the use of antidumping… measures by WTO members under the

Antidumping Agreement…" and stated that this pattern "has raised concerns."[1] One particular decision identified by the Senate Finance Committee as "wrongly narrowing the discretion of national investigating authorities, and thereby upsetting the carefully negotiated balance of the Antidumping Agreement" was the Appellate Body decision in *EC – Bed Linen*.[2] At the time of the adoption of the *Bed Linen* panel and Appellate Body reports, the representative of the United States was likewise critical, stating that the United States had "grave concerns about whether the Appellate Body had properly applied the special standard of review under Article 17.6(ii) of the Anti-Dumping Agreement."[3]

The *Bed Linen* decision was the intellectual precursor to and, in essence, the basis of the decision in *United States – Softwood Lumber V*. In that dispute, brought by Canada, the Appellate Body found for the first time that U.S. practice in investigations with respect to the use of average-to-average comparisons without offsets is inconsistent with Article 2.4.2 of the Antidumping Agreement.[4] In rendering its decision, the Appellate Body relied, in part, on its reasoning and findings in *Bed Linen*.[5]

In the dispute identified as the impetus for the current request for comments and proposed policy change, *US – Zeroing (EC)*, the panel again relied on and followed the Appellate Body's conclusion from *Bed Linen* and *Softwood Lumber V* "that when a margin of dumping is calculated on the basis of multiple averaging by model type, the margin of dumping for the product in question must reflect the results of all such

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1 19 U.S.C. § 3801(b)(3)(A).

2 S. REP. 107-139, at 7, note 1 (2002).

3 *Minutes of the Meeting Held in the Centre William Rappard on 12 March 2001*, WT/DSB/M/101, para. 80 (8 May 2001).

4 *United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, para. 117, adopted August 31, 2004.

5 *Id.* at para.112 and note 175.

comparisons, including weighted average export prices that are above the normal value for individual models."[6]

It is troubling that the Department has determined to "abandon the use of average-to-average comparisons without… offsets" on the basis of this as yet unadopted report of a WTO panel, which is merely the latest decision in the "pattern" of flawed decisions identified by Congress in the Trade Act of 2002. It is still more troubling that the Department has determined to abandon the possibility of achieving a satisfactory resolution of the offsets/zeroing question through the ongoing Doha Round Rules Negotiations. Previously, at the time of the adoption of the panel and Appellate Body reports in *Softwood Lumber V*, the United States representative stated that the United States:

> regretted the finding on whether Article 2.4.2 of the Anti-Dumping Agreement required an investigating authority to offset non-dumped transactions against dumped transactions in determining an aggregate margin of dumping for a producer or exporter. There was a widespread view among the GATT Contracting Parties – including Canada – that such offsetting had not been required in the years and decades before the WTO Agreement, and they had continued in this view as WTO Members after 1995. Thus, it was surprising to find now that the Anti-Dumping Agreement required it. The United States noted that one member of the original panel had disagreed with this conclusion, finding that Article 2.4.2 contained no such requirement. It was silent on the question of how an aggregate margin of dumping was to be determined. The dissenting panel member stated, "If Members consider that the issue of how to aggregate the results of multiple comparisons is a lacuna that needs to be filled, then they should negotiate such rules in the

[6] *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, Panel Report, WT/DS294/R, para. 7.31 (October 31, 2005).

> appropriate forum." The United States agreed… (emphasis added).[7]

The "appropriate forum" for negotiating such rules is the Doha Round Rules Negotiations, which are not yet concluded. Indeed, the United States has already identified this issue in the context of those negotiations, and should continue to pursue a reversal of the adverse panel and Appellate Body decisions in *EC – Bed Linen*, *US – Softwood Lumber V*, and now *US – Zeroing (EC)*.[8]

Unilaterally and prematurely abandoning a long-standing practice, which has been upheld by U.S. courts,[9] is an inappropriate response to panel and Appellate Body overreaching. Moreover, it is inconsistent with and undermines explicit Congressional mandates. These are two principal negotiating objectives with respect to trade remedy laws that were established by Congress in the Trade Act of 2002:

> (A) to preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, and avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies, or that lessen the effectiveness of domestic and international safeguard provisions, in order to ensure that United States workers, agricultural producers,

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[7] *Minutes of Meeting Held in the Centre William Rappard on 31 August 2004*, WT/DSB/M/175, para. 36 (24 September 2004).

[8] *Submission by the United States*, TN/RL/W/72, p. 2 (Mar. 19, 2003). The U.S. stated that:

> The United States believes the Agreement is not clear as to the manner in which the overall weighted average margins are to be calculated. If there are to be any WTO obligations regarding such calculations, they should be the result of an agreement by the Members. Thus, in the process of clarifying the ADA, this Group should consider clarifying both the obligations already agreed to by the Members in this respect, as well as any areas where agreement could not previously be reached.

[9] *See Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004); *Corus Staal BV, et. al. v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005).

> and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions[10]

Congress reiterated in the 2006 Science, State, Justice, Commerce, and Related Agencies Appropriations Act "[t]hat negotiations shall be conducted within the World Trade Organization consistent with the negotiating objectives contained in the Trade Act of 2002, Public Law 107–210."[11] The Senate further emphasized the importance of the negotiating mandate when it agreed to an amendment expressing "the sense of Congress that—"

> (1) the United States should not be a signatory to any agreement or protocol with respect to the Doha Development Round of the World Trade Organization negotiations, or any other bilateral or multilateral trade negotiations, that—
>
> (A) adopts any proposal to lessen the effectiveness of domestic and international disciplines on unfair trade or safeguard provisions, including proposals—
> …
> (v) outlawing the critical practice of "zeroing" in antidumping investigations (emphasis added)….[12]

Thus, *Bed Linen* and its progeny have been singled out as part of the "pattern of decisions by dispute settlement panels" that has "raised concerns," and the Senate has expressly stated its position that the United States should not agree to proposals outlawing "zeroing" in the Doha negotiations. It logically follows that the Department should also not unilaterally abandon what has been identified as a "critical practice"

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10 19 U.S.C. § 3802(b)(14).

11 Title II, Pub. Law 109-108, 119 Stat. 2306 (Nov. 22, 2005).

12 S. Amdt. 2655 to S. 2020, "To express the sense of the Congress regarding the conditions for the United States to become a signatory to any multilateral agreement on trade resulting from the World Trade Organization's Doha Development Agenda Round," (the "Craig-Rockefeller Amendment"), 151 Cong. Rec. S13135 (daily ed. November 17, 2005) (emphasis added). The amendment was agreed to by voice vote. *Id.* at S13136.

before those negotiations have even been concluded. Therefore, as an initial matter, we urge the Department to abandon its current course, rather than abandoning a long-standing, valid practice that ensures that all unfairly traded imports are accounted for in determining the existence of dumping during investigations.

That being said, however, if the Department is resolved to change its practice, we provide the following recommendations on what procedures it should adopt.[13]

Any Procedures Adopted by Commerce Should Ensure that All Dumped Imports Are Addressed

The presence of a small number of sales at less than fair value can harm a domestic industry. Such sales can represent lost sales for U.S. producers and this can impact the financial health of the particular companies affected. Moreover, such import sales send an inaccurate signal to purchasers that subject merchandise can be sold at the less-than-fair-value price. Even when a particular domestic purchaser does not buy the dumped import, it may use the presence of the dumped price in the domestic market as leverage to obtain an equivalent price from a domestic producer. This will happen even though such a price is discriminatory vis-à-vis prices in the home market and/or does not reasonably represent the cost of producing and selling the product and making some portion of profit for any producer.

The introduction of "offsets" to dumping in the form of fair value transactions whose "negative" margins offset actual margins of dumping increases the potential of injurious lost sales, is not required by U.S. law and is inconsistent with the rights the U.S. has long perceived that it had negotiated to maintain within the GATT and now WTO. It

[13] In so doing, we do not waive any right that we may have to challenge any practice that the Department may adopt.

also introduces a wild card into the U.S. market by eliminating the ability to correct false market signals through pursuit of a trade remedy.

The Antidumping Agreement nowhere speaks of "negative" dumping margins. It states that "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[14]

For as long as anyone can presently recall, the Department has calculated dumping margins so as to ensure that every instance of dumping above a *de minimis* level was accounted for in a determination of dumping. It has done this in both original investigations and in administrative reviews. Before responsibility for administering the law was transferred to the Department of Commerce, Customs determined the extent of dumping for each sale without using fair value sales to mask dumped sales.[15] The Department has defended this practice at the Court of International Trade[16] and at the Court of Appeals for the Federal Circuit.[17] The United States has defended its practice before the Appellate Body at the World Trade Organization.[18]

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[14] Antidumping Agreement at 2.1.

[15] *See* U.S. Administration of the Antidumping Act of 1921, Report by the Comptroller General to the Congress of the United States at 33, ID-79-15 (Mar. 15, 1979) (dumping margins calculated on an entry-by-entry basis; duties assessed when foreign market value exceeded purchase price or exporter's sales price).

[16] *See Corus Staal BV v. Dep't of Commerce*, 259 F.Supp.2d 1253, 1264-65 (CIT 2003).

[17] *See Corus Staal BV, et. al. v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005).

[18] *See United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, paras. 10-18, adopted August 31, 2004.

Despite passage of numerous bills modifying U.S. Trade Laws, Congress has never passed a trade bill or any other legislation affecting the trade laws that required a change in the Department's practice.[19] It is implicit in the statutes governing antidumping proceedings that the Department is to continue its practice of accounting for all unfairly-traded imports. Thus, consistent with its own practice to date and with guidance from the U.S. Congress, the Department must ensure that, to the extent possible, it continues to account for all unfairly-traded imports.

As we review below, if the Department modifies its existing practice, the Department should adopt as its preferred method for calculating margins in investigations the transaction-to-transaction approach. At the same time, whether it modifies its existing approach or not, it should modify its regulations to give teeth to existing provisions of U.S. law that address targeted dumping. These provisions, codified at 19 U.S.C. § 1677f-1(d)(10(B), provide that the U.S. may use a weighted-average to transaction approach to margin calculation when there is a pattern of pricing differences based on purchaser, region, or time period that cannot be addressed via a weighted-average-to-weighted-average or transaction-to-transaction approach. U.S. representatives negotiated during the Uruguay Round for the provision of the Agreement (part of Article

[19] Although it has continued to address all unfairly-traded sales, the Department has made one change in its margin calculation methodology in response to legislation. The Uruguay Round Agreements Act necessitated a change by requiring that in original investigations, dumping comparisons be made either average-to-average or transaction-to-transaction. This was implemented in 19 U.S.C. § 1677f-1(d)(1). Thus, when the department made average-to-average comparisons, the price of one fair value sale among a group being averaged could mask the unfair value of another in the averaged group. However, in its aggregation of margins computed for a group of averages, the Department continued to account for all dumped sales without allowing a fair value average to mask out a dumped average.

2.4.2) that allows Members to address targeted dumping.[20] Yet to date, the agency's approach to this critical aspect of our rights has essentially eliminated the benefit of being able to address targeting in fact.

Below we address both options available to Commerce to modify its practice (if it in fact elects to depart from existing longstanding practice) yet ensure that U.S. rights to capture all dumping is not lost.

The Department Should Adopt a Transaction-to-Transaction Approach

As we have reviewed, we do not think that the Department should alter its current method for determining the extent of dumping in investigation proceedings. If, however, the Department chooses to change, then it should adopt an approach that will ensure that it accounts for all dumped sales in its investigation determinations, as it has since it began to administer the antidumping duty law. The Department should adopt a transaction-to-transaction approach without offsets in investigations to determine the existence of dumping at a level above *de minimis*.

The Department has the specific right to calculate margins in the investigation phase on a transaction to transaction basis under both U.S. law and the Antidumping Agreement. Moreover, the Department has already used transaction-to-transaction comparisons in an investigation. It did so in the softwood lumber case in a manner that captured all dumping found (*i.e.*, without providing "offsets" for export sales that were not dumped). *See Antidumping Measures on Certain Softwood Lumber Products from*

[20] *See Antidumping in* 2 The GATT Uruguay Round: A Negotiating History (1986-1992), 1542 (Terence P. Stewart ed., 1993).

Canada, 70 Fed. Reg. 22,636 (Dep't Commerce May 2, 2005) (notice of determination under section 129 of the URAA) ("*Softwood Lumber"*).[21] The approach taken in that case has been upheld as consistent with the U.S.'s WTO obligations by an Article 21.5 panel.[22]

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[21] As the Department reviewed in its *Softwood Lumber* determination, it may employ a transaction-to-transaction approach under existing law and practice. The statute, of course, provides for either transaction-to-transaction or weighted-average-to-weighted average comparison. 19 U.S.C. § 1677f-1(d)(1). However, the Statement of Administrative Action that accompanied the Uruguay Round Agreements Act (H.Doc. 316, Vol. 1, 103d Cong. 2d Sess. (1994). ("SAA")) specifies that "Commerce normally will establish and measure dumping margins on the basis of a weighted-average of normal values with a weighted average of export prices or constructed export prices" in light of "past experiences" and difficulties in "selecting appropriate comparison transactions." SAA at 842. This reliance on average-to average as the norm is reflected in the agency's implementing regulation. 19 CFR § 351.414(c).

The Department noted that its position relying on average-to-average comparisons was drafted and implemented over ten years ago, "when the Department did not offset for non-dumped sales in its weighted-average-to-weighted-average comparisons in antidumping investigations and when computer technology was inferior to the computer technology of 2005." *Softwood Lumber*, 70 Fed. Reg. at 22,641. Thus, "past experiences" do not require an average-to-average approach. *Id.* Moreover, earlier concerns about selection difficulties "are addressed to a great extent through modern computer technology." *Id.* For the same reasons, the Department stated that its regulation on margin determination for investigations did not preclude the use of a transaction-to-transaction approach. *Id.*

[22] *See United States – Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, Panel Report, WT/DS264/RW (April 3, 2006) ("*Softwood Lumber Panel Report").* The decision notes at Para 5.29:

> Moreover, although the T-T methodology might involve aggregation or summing up of results of comparisons of transaction-specific prices, this should not be confused with averaging. There is no requirement that aggregation under the T-T methodology should result in, or reflect, averages.

It concludes at Para 5.30:

> However, we have demonstrated that the Appellate Body's findings regarding the need to establish margins of

It is also employed by at least one of our trading partners.[23]

There are a number of methods that the Department may adopt to implement a transaction-to-transaction approach. We review several of these in detail below. Each may be accomplished by Commerce without making significant changes to its present approaches. Each may readily be implemented in SAS code.

Under its current practice for investigations, the Department compares weighted-average U.S. prices to normal values calculated using weighted-average home market prices.[24] The Department computes the normal value for a particular product or model

> dumping for "the product as a whole" should not necessarily be applied in the same manner outside the W-W comparison methodology. Those findings may in any event not be isolated from its consideration of the phrase "all comparable export transactions", which phrase does not appear in the relevant text concerning the transaction-to-transaction comparison methodology. This difference in language reflects a fundamental distinction between the nature of the W-W and T-T comparison methodologies. Although both methodologies might involve aggregation, the W-W methodology is based on an analysis of average price behaviour, while the T-T methodology allows an investigating authority to identify transaction-specific instances of dumping. In these circumstances, we conclude that there is no basis to uphold Canada's claim that Article 2.4.2 required the DOC to establish margins of dumping by aggregating the results of all transaction-to-transaction comparisons, offsetting non-dumped comparisons against dumped comparisons.

[23] *I.e.,* New Zealand. *See* Statement of New Zealand's Ministry of Economic Development (http://www.med.govt.nz/templates/Page____3860.aspx#P288_9539): "Non-dumped imports are not averaged with dumped imports." *See also* Para. 23, "Executive Summary of New Zealand's Third Party Submission" included as Annex B-4 to *Softwood Lumber Panel Report.*

[24] At present, the Department typically employs a variety of factors to select the best model match. This practice implements its statutory obligation to match U.S. sales with normal values for "identical" or "like" (*i.e.*, similar) merchandise (19 U.S.C. §

based on the weighted-average price over a selected time period, usually a month. This implements the statute's requirement that normal value be a price at a time that reasonably corresponds to the time of the sale used to determine the export or constructed export price. 19 U.S.C. § 1677b(a)(1)(A).

To make transaction-to-transaction comparisons, the Department must match up each U.S. transaction with a single home market transaction. This means that in most cases, the time period examined for the home market transaction is likely to be individual days rather than months or some other time period. In other words, instead of matching with the weighted-average for a particular time period such as a month, Commerce will match each U.S. transaction to a single sale that occurred on a specific day.

As it has done with temporal comparisons under its present approach, if there is no match on the same day as the U.S. sale, the Department should examine sales made on the days following and those preceding the date of sale of the U.S. sale. As it does now, the Department should examine those days that it considers close enough temporally to the U.S. sale in order for the normal value sale to meet the requirements of § 1677b(a)(1)(A). There will be some instances where the Department will find that there is more than one home market transaction that is identical or equally similar to the U.S.

1677(16)).

The selection factors are normally referred to as model match criteria, and typically include such items as model (for identical matches), physical criteria, level-of-trade, date of sale, etc. They are typically chosen to identify merchandise that is similar in materials and purpose and that is approximately equal in commercial value. Thus, merchandise identified as similar meets the statutory criteria for identifying like merchandise under 19 U.S.C. § 1677(16)(B).

There should be no change in Commerce's approach to selecting these criteria when the Department compares U.S. and home market sales on a transaction-to-transaction basis.

transaction. In such cases, it will have to select one among the group of equal matches. There are a number of ways that, consistent with U.S. law and the Antidumping Agreement, Commerce may do this, including the following.

The Softwood Lumber Approach: Under this approach, the Department first looked for a home transaction of an identical product on the same day as the U.S. sale at the same level of trade.[25] It then looked for a sale of the identical product on a different day within seven days before or after the U.S. sale, looking for a sale in the closest day.[26] If it was unable to find an identical match at the same level of trade, it looked for one at a different level of trade.[27] It then looked for a similar sale based on product characteristics and level of trade in the same way.[28]

If it found sales that were equally similar based on product characteristics and level of trade, it looked for the sale with the smallest difference in variable cost, with the maximum difference set at twenty percent of the total cost of manufacturing in the U.S.[29]

Because it found a number of instances where there were multiple equally appropriate matches, the Department looked at other factors as "tie-breakers" to select a single transaction.[30] The Department selected factors based on commercial considerations, attempting to match sales that were made under the "same market considerations."[31] Finally, for transactions that were equal matches under all criteria, including market conditions, the Department made a random selection, choosing the first transaction in the group of equally comparable sales. As noted, this approach has been

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25 *Softwood Lumber*, 70 Fed. Reg. at 22,637-38.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* at 22,638.
30 *Id.*
31 *Id.*

approved by a panel report of the WTO and is consistent with U.S. law. Hence, it is one of the approaches that the Department may reasonably adopt to implement calculation of dumping based on transaction-to-transaction comparisons.

Random Selection: As with the *Softwood Lumber* approach, the Department would select the sale that was identical, or most similar, to the U.S. sale in product characteristics, picking the closest in time, the closest in level of trade, and the closest in variable cost to the U.S. sale.[32] Unlike *Softwood Lumber,* the Department would not use additional market characteristics as tiebreakers. Instead, where there are multiple home market sales on the same or nearest date as the export sale to be compared, it would randomly select one home market sale from the group of home market sales on the relevant date. It may select a transaction randomly and leave it in the data base for matching with other U.S. transactions, or it may remove it so that another transaction is selected for the next match.

Nothing in the Antidumping Agreement precludes randomly selecting a home market price for the normal value, as long as the selected transaction is comparable and "made at as nearly as possible the same time."[33] Home market sales on the same date that have already been determined to be comparable after considering the model match criteria, level of trade, *etc.*, are, therefore, by definition, equally comparable as amongst each other. It is thus not necessary to engage in the selection process detailed in the Softwood Lumber 129 determination.[34] It would suffice to randomly select one

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[32] In other words, it would use the kind of model match characteristics that it currently develops for investigations.

[33] Antidumping Agreement, Art. 2.4.

[34] *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22,636 (Dep't Commerce, May 2, 2005).

transaction. Indeed, the final criterion applied by the Department in the Softwood Lumber 129 determination was random selection: "After we considered these criteria, a small number of U.S. sales still had more than one equally comparable home market match. In these cases, we programmed the computer to select the first observation on the short list of equally comparable sales."[35] This aspect of the Department's determination was not challenged by Canada or deemed inconsistent with the United States' WTO obligations by the Article 21.5 panel.[36]

Choosing a Representative Sale, the Highest among Equals: Under this approach, the Department would also use product characteristics, time, level of trade, and variable cost to select identical or most similar home market transaction. An individual transaction would be selected from a group of equally comparable home market sales by selecting the one with the highest price.

Such a choice is supported by the history of the GATT. In the original GATT, Article VI(b)(i) allowed the use of the highest price when choosing a normal value based on exports to third countries. Subsequently, the Kennedy Round Antidumping Code modified Article VI's use of the highest export price to third countries by providing that "the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price."

The Tokyo Round AD Code kept the same language, and the Uruguay Round AD Agreement reduced guidance regarding third-country prices to simply requiring that the

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35 *Id.* at 22,638.

36 United States – Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada, Panel Report, WT/DS264/RW (April 3, 2006).

price chosen should be "representative".[37] The Agreement and U.S. law limit the sales to be used for normal value to sales in usual commercial quantities that are made in the ordinary course of trade. Any sale meeting these requirements will be representative, regardless of its price relative to any other sales. Thus, it would be reasonable for Commerce to select the highest price sale in any group of equally-matched home market transactions.

Choosing a Representative Sale, the Sale Closest in Price to the Mean or Median: As with the two approaches above, under this approach, selection of comparable sales would be based on physical characteristics, proximity in time, level of trade, and variable cost. The Department would choose among equally comparable sales by choosing the transaction that is closest in price to the median or the mean of the prices of the transactions that are equally comparable.

As we have noted, in describing the circumstances in which third-country prices may be used to determine normal value, the Agreement specifies that such prices may be used provided they are "representative."[38] By analogy, the transaction chosen from a group of home market sales should also be "representative." Considered on a numeric basis, the mean or median among a group of prices is "representative" of the group. The Department may reasonably choose it as the transaction to be compared to U.S. price among a group of otherwise equally comparable sales.

The Department Should Implement U.S. Rights to Address Targeted Dumping

[37] *See* Article 2.2, Antidumping Agreement.
[38] *Id.*

During the Uruguay Round, the United States negotiated to include language allowing Members to address targeted dumping in the Antidumping Agreement.[39] In addition to adopting a transaction-to-transaction analysis, the Department should provide for actual implementation of the statutory provisions for addressing targeted dumping.[40] So far as we are aware, there are no instances where the Department has actually taken action to respond to targeted dumping. While the Department's regulations specify when in a proceeding allegations of targeted dumping must be made, they do not provide any substantial guidance to interested parties as to the circumstances in which Commerce will act.[41]

The Department should propose and, after a comment period, issue regulations that specify that it will act to address targeted dumping whenever an interested party has demonstrated that there is a pattern of pricing differences among purchasers, regions, or during different time periods that is significant. The Department should set a threshold for determining what will indicate that the pricing differences are significant.

While the Department may adopt a number of different thresholds for identifying significant price differences, we recommend that it define pricing differences in investigations that exceed 2% as "significant." This test is a reasonable one for the Department to use to make such a determination. The Department may not disregard as

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[39] *See Antidumping in* 2 The GATT Uruguay Round: A Negotiating History (1986-1992), 1542, *supra*.

[40] Under 19 U.S.C. § 1677f-1(d)(1)(B), the Department may adopt a weighted-average to transaction approach if: (1) it identifies a pattern of export prices that differ by purchaser, region, or time period, and (2) it determines that this pattern cannot be addressed via either an average-to-average or a transaction-to-transaction approach.

[41] *See* 19 C.F.R. 351.301(5).

de minimis a dumping margin of 2% or greater.[42] Commerce also uses a 2% differential to identify sales to affiliates as sufficiently affected by the affiliation as to warrant exclusion from comparison to U.S. sales. Thus, the Department may reasonably find that such a differential in pricing to different purchasers, customers in different regions or sales in different time periods should be addressed via the targeted dumping provisions of the law.

Once the Department has determined that a pattern of price differences exists, it should analyze the pattern to determine if it may be addressed under a transaction-to-transaction approach. For example, if it finds that there is a pattern of differences based on sales region, it may organize the comparison of transactions so as to only compare U.S. sales to appropriate transactions in the home market. If it finds that there are pricing differences based on time period, it may be able to organize comparisons so that U.S. transactions are only compared to home market transactions that are made within a comparable time period. It may also respond to pricing patterns using sampling techniques that avoid the masking of targeted dumping.

Finally, if it is unable to modify its transaction-to-transaction approach to address targeted dumping, the Department should determine whether the weighted-average-to-transaction approach is the only one that will address pricing differences (*i.e*, targeting), by comparing the results of computing dumping margins via transaction-to-transaction

[42] *See* 19 U.S.C. § 1673b(b)(3).

and average-to-transaction methods.[43] If a higher margin is determined via the latter approach, then it is clear that it must be adopted in order to address the dumping.[44]

As Neither its Constructed Value Nor Its NME Methodology Has Been Addressed by Any WTO Report, Commerce Should Compare U.S. Transactions to CV or NME Normal Values without Offsets.

In most of its non-NME cases, the Department typically uses price-to-price comparisons with some use of constructed value when there are no identical or similar matches for a particular U.S. sale. In its NME cases, all U.S. sales are matched to a single normal value that has been calculated using factors of production and surrogate values. In none of these cases does the Department make any decisions regarding its calculation of U.S. prices based on the source of normal value. If the proceeding is an original investigation, and the agency is comparing a weighted-average U.S. price to normal value, it does so regardless of whether the normal value has been calculated using

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[43] If , for any case, the issue of computing resources becomes significant because of large quantities of sales, the Department may exercise its authority under 19 U.S.C. § 1677f-1 to sample. It may compare the results based on a transaction-to-transaction approach to the results of a weighted-average-to-transaction approach using a sample of U.S. and home market sales –*e.g.,* a month's worth of sales.

[44] A form of this approach has been adopted by the European Union. The EU calculates margins using weighted-average-to-weighted-average, transaction-to-transaction, and weighted-average-to-transaction approaches to determine whether either of the first two does not take into account pricing differences. It makes its determination based on whether the third approach produces a higher margin then either of the first two. If the third approach produces a higher dumping margin, then it concludes that the first two do not take into account pricing differences. *See, e.g.,* Commission Regulation (EC) No. 367/2001, *Polyethylene terephthalate Film* (India, Korea), 2001 O.J. (L 55) 16 (February 23, 2001), at recitals 66-67; Commission Regulation (EC) No. 1091/2000, *Styrene-butadiene-styrene thermoplastic rubber* (Taiwan), 2000 O.J. (L 124) 12 (24 May 2000), at recital 27; Council Regulation (EC) No. 1050/2002, *Recordable compact disks (Taiwan)*, 2002 O.J. (L 160) 2 (June 13, 2002), at recitals 30-33; Council Regulation (EC) No. 312/2002, *Certain magnetic disks (3.5" microdisks)* (Japan, China), 2002 O.J. (L 50) 24 (February 18, 2002), at recital 24; Council Regulation (EC) No. 235/2004, *Certain seamless pipes and tubes of iron or non-alloy steel* (Romania), 2004 O.J. (L 40) 11 (February 12, 2004), at recital 19; Council Regulation (EC) No. 428/2005, P*olyester staple fibres* (China, Saudi Arabia, Korea, Taiwan), 2005 O.J. (L 71) 1 (March 17, 2005), at recitals 44-45, 133-35.

home market prices, constructed value, or a value constructed from factors of production and surrogate values.

No WTO panel or Appellate Body decision has found US methodology in constructed value or NME situations to violate U.S. rights under the antidumping agreement. Thus, the U.S. would not be "conforming" its practice to WTO decisions by making any change to U.S. practice in investigations in either constructed value or NME situations. Accordingly, the Department does not need to address the issue in this rule making. Should Commerce choose to address it, the agency should compare constructed value situations or NME situations to individual export prices in investigations with no provision for offsets.

Respectfully submitted,

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