

**PICARD KENTZ & ROWE**

Picard Kentz & Rowe LLP  
1750 K Street, NW  
Suite 1200  
Washington, DC 20006

tel +1 202 331 4040  
fax +1 202 331 4011  
akentz@pkrlp.com

**2011 International Trade Update**  
**Georgetown University Law Center**  
**Changes in Dumping and Subsidy Methodology**  
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Andrew W. Kentz  
David A. Yocis  
Nathaniel Maandig Rickard  
Jordan C. Kahn\*

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\* Admitted in California, Nevada, and New York; not admitted in the District of Columbia.

## Changes in Dumping and Subsidy Methodology

Andrew W. Kentz<sup>\*</sup>  
David A. Yocis<sup>\*\*</sup>  
Nathaniel Maandig Rickard<sup>\*\*\*</sup>  
Jordan C. Kahn<sup>\*\*\*\*</sup>

### I. Introduction

On December 28, 2010 the U.S. Department of Commerce (“Department” or “DOC”), pursuant to Section 123(g)(1) of the Uruguay Round Agreements Act,<sup>1</sup> sought comments on a proposal to revise its practices and regulations governing the calculation of the weighted-average dumping margin in certain reviews of dumping orders (“Weighted-average Dumping Margin Proposal”).<sup>2</sup> The Department intends through this proposal to implement the rulings and recommendations of the World Trade Organization (“WTO”) Dispute Settlement Body (“DSB”) in certain WTO disputes addressing the use of “zeroing”.<sup>3</sup> On December 16, 2010 the Department sought: comments on proposed revisions to the selection of respondents in antidumping proceedings (“Respondent Selection Proposal”);<sup>4</sup> and additional criteria for

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\* Partner, Picard Kentz & Rowe LLP.

\*\* Counsel, Picard Kentz & Rowe LLP.

\*\*\* Counsel, Picard Kentz & Rowe LLP.

\*\*\*\* Associate, Picard Kentz & Rowe LLP. Admitted in California, Nevada, and New York; not admitted in the District of Columbia.

<sup>1</sup> 19 U.S.C. § 3533(g)(1) (2000).

<sup>2</sup> See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings, 75 Fed. Reg. 81,533 (Dec. 28, 2010) (“Weighted-average Dumping Margin Proposal”).

<sup>3</sup> See id. at 81,534.

<sup>4</sup> See Proposed Methodology for Respondent Section in Antidumping Proceedings; Request for Comment, 75 Fed. Reg. 78,678 (Dec. 16, 2010) (“Respondent Selection Proposal”).

establishing separate antidumping rates in cases involving non-market economy (“NME”) countries (“Requested Separate Rate Criteria”).<sup>5</sup> These two matters were among fourteen relating to the administration of the antidumping and countervailing duty laws that the Department announced an intention to strengthen in August 2010.<sup>6</sup>

After providing background on the WTO “zeroing” decisions, this paper analyzes the Department’s Weighted-average Dumping Margin Proposal with specific regard to the statutory obligations that constrain the DOC’s discretion and impose requirements to ensure that a proper dumping analysis is conducted. This paper further analyzes the Department’s Respondent Selection Proposal that positively moves towards the use of sampling. Finally, in response to the Department’s Requested Separate Rate Criteria, this paper discusses concerns over the establishment of separate rates in antidumping proceedings involving NME countries.

## II. WTO “Zeroing” Decisions

As an initial matter, the Department’s current practice with regard to “zeroing” in administrative reviews is fully consistent with U.S. law and U.S. WTO obligations. The consistent position of the U.S. Government has been that WTO rulings regarding “zeroing” were wrongly decided, devoid of any basis in the WTO agreements, and improperly create obligations that the United States never agreed to accept.

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<sup>5</sup> See De Facto Criteria for Establishing a Separate Rate in Antidumping Proceedings Involving Non-Market Economy Counties, 75 Fed. Reg. 78,676 (Dec. 16, 2010) (“Requested Separate Rate Criteria”).

<sup>6</sup> See U.S. Department of Commerce, Press Release, *Obama Administration Strengthens Enforcement of U.S. Trade Laws in Support of President’s National Export Initiative* (Aug. 26, 2010), available at: <http://www.commerce.gov/news/press-releases/2010/08/26/obama-administration-strengthens-enforcement-us-trade-laws-support-pr>.

The most recent Republican and Democratic Administrations have both stated this position clearly and repeatedly from the outset of the challenges before the WTO to the use of the “zeroing” methodology. For example, in response to a 2006 WTO Dispute Settlement body decision in the European Union challenge to the United States’ use of the “zeroing” methodology, the U.S. Government stated:

[T]he Appellate Body’s reasoning is fatally flawed. In brief, the Appellate Body erroneously concluded that Members must provide offsets for non-dumped transactions whenever “multiple comparisons” are made, and that only by aggregating the results of those multiple comparisons will a Member determine a margin of dumping for the “product as a whole”. This conclusion finds no basis in the text of the Anti-Dumping Agreement. This conclusion also fails to take into account important context for the terms that are in the text of the anti-Dumping Agreement and the General Agreement on Tariffs and Trade 1994 (“GATT 1994”). . . .

The meager analysis found in *US – Zeroing (EC) (AB)* stands in stark contrast to the reports in *US – Zeroing (EC) (Panel)* and *US – Softwood Lumber V (Article 21.5)*. These two reports, which were drafted by panelists with extensive experience in the trade remedies area, came to the conclusion that with the exception of average-to-average comparisons in investigations, the GATT 1994 and the Anti-Dumping Agreement do not preclude zeroing. In reaching a different conclusion, the Appellate Body simply erred, both as a matter of interpretation and as a matter of the applicable standard of review.<sup>7</sup>

A year later, the Bush Administration again expressed its frustration with the WTO Appellate Body Report that disregarded the texts of the WTO Antidumping Agreement to create new obligations on members:

The United States continues to be deeply troubled by the Appellate Body Report’s evaluation of the issue of “zeroing”. The Report’s reasoning presents serious problems both from the perspective of treaty interpretation and from the practical perspective of WTO Members endeavoring to administer their anti-dumping regimes consistently with their WTO obligations. . . .

In overruling these panels the Appellate Body Report has not identified any agreement text which those panels overlooked. Rather, the Appellate Body

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<sup>7</sup> U.S. Communication, *US – Zeroing (EC)*, WT/DS294/18 ¶¶ 3, 5 (June 12, 2006).

Report assumes its conclusion, draws questionable inferences from the text, and relies on language not from the Agreement, but from its prior reports interpreting the Agreement.<sup>8</sup>

In 2009, the Obama Administration stated its full agreement with the analysis and position of the Bush Administration with regard to the WTO “zeroing” decision:

The United States continued to take a different view of the commitments that Members negotiated, and did not negotiate, concerning the use of zeroing. . . . On both of those questions, the Appellate Body and the compliance Panel had misconstrued US obligations and had read requirements in to the [Dispute Settlement Understanding] that had not been agreed by Members.<sup>9</sup>

There is considerable concern that the WTO is reaching far beyond its scope of authority to create new requirements for members that were never agreed to and even affirmatively rejected. An insight into the failed efforts of other WTO members to prohibit the use of the “zeroing” methodology into the text of the WTO Agreements was provided in a letter written by two of the negotiators of the relevant portions of these texts, the former DOC Assistant Secretaries for Import Administration:

Despite the successful effort to prevent any provision in the Antidumping Agreement that would prohibit “zeroing,” the WTO AB concluded that the Antidumping Agreement does prohibit “zeroing.” This interpretation of the Agreement creates an obligation to which the U.S. did not agree, and, even more disturbing, it imposes upon the U.S. an obligation that the U.S. affirmatively opposed and successfully prevented from being incorporated into the WTO Antidumping Agreement.<sup>10</sup>

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<sup>8</sup> U.S. Communications, *US – Zeroing (Japan)*, WT/DS322/16, ¶¶ 2, 14 (Feb. 20, 2007).

<sup>9</sup> US Statement re: Adopting of Panel and Appellate Body Reports in *US – Zeroing (Japan)* (Art. 21.5, WT/DS322), WT/DSB/M/273, ¶ 72 (Aug. 31, 2009).

<sup>10</sup> Letter from Eric I. Garfinkel, Former Assistant Secretary of Commerce for Import Administration (1989-1991) & Alan M. Dunn, Former Assistant Secretary of Commerce for Import Administration (1991-1993), to the Secretary of Commerce and the U.S. Trade Representative (June 20, 2005).

Despite the language of the Agreements and the stated positions of the U.S. negotiators, the WTO has continued to improperly expand its mandate by adding new obligations on WTO members. Such decisions undermine confidence in the WTO and will continue to have a corrosive effect in its authority. It is regrettable that the Department now proposes to acquiesce to these fundamentally flawed DSB rulings and recommendations. Indeed, some of the complexities that the Department will face in implementing these WTO decisions are a direct result of the legal incoherence of those decisions. The United States does not need to implement these erroneous rulings. Whether they are implemented or not, however, the United States must continue to seek their reversal in the ongoing Doha Development Agenda negotiations.

### III. Any Implementation Of WTO Decisions Must Be Consistent With U.S. Law

If the Department chooses to implement these WTO rulings, it must do so consistently with U.S. law. Courts have held that the Tariff Act of 1930, as amended, (the “Act”) does not unambiguously require the Department to employ “zeroing” in all instances.<sup>11</sup> However, it does not follow that any methodology for calculating dumping margins in administrative reviews without “zeroing” would necessarily be consistent with the Act. The Department must recognize constraints under U.S. law if it implements the proposal to change the default approach for calculating dumping margins in administrative reviews from the existing “average-to-transaction method” to the “average-to-average method.”<sup>12</sup>

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<sup>11</sup> See U.S. Steel Corp. v. United States, 621 F.3d 1351, 1361 (Fed. Cir. 2010); Corus Staal BV v. United States, 395 F.3d 1343, 1347 (Fed. Cir. 2007); Timken Co. v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004).

<sup>12</sup> Compare 19 C.F.R. § 351.414(c)(2) (2010) with Weighted-average Dumping Margin Proposal, 75 Fed. Reg. at 81,535 (proposing new 19 C.F.R. § 351.414(c)).

When Congress implemented the WTO Antidumping Agreement in U.S. law, it expressly intended that “the preferred methodology in reviews will be to compare average [normal value] to individual export prices.”<sup>13</sup> Indeed, while U.S. law permitted the use of average export prices<sup>14</sup> prior to the Uruguay Round Agreements Act, the DOC’s

preferred practice [had] been to compare an average normal value to individual export prices in investigations and reviews. In part, the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal “targeted dumping.” In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.<sup>15</sup>

Thus, when Congress implemented the WTO Antidumping Agreement, it provided that the Department would “normally” use average-to-average comparisons (or, in certain unusual cases, transaction-to-transaction comparisons) in investigations, but that the average-to-transaction methodology would remain available in investigations where “targeted dumping may be occurring.”<sup>16</sup> When the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) upheld the DOC’s decision to grant offsets in average-to-average comparisons in investigations, it specifically referred to this provision by explaining that Congress “gave [the DOC] a tool for combating targeted or masked dumping” by preserving an average-to-transaction methodology,

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<sup>13</sup> Uruguay Rounds Agreements Act Statement of Administrative Action, H.R. Doc. No. 103-316 (“SAA”), at 843 (1994) (emphasis added).

<sup>14</sup> As the DOC has noted, the issues addressed in its proposal do not depend on whether U.S. sales price is based on an export price or a constructed export price methodology. Weighted-average Dumping Margin Proposal, 75 Fed. Reg. at 81,533 n.1. Accordingly, the term “export price” in this article is intended to include both export price and constructed export price, as in the Weighted-average Dumping Margin Proposal.

<sup>15</sup> SAA at 842.

<sup>16</sup> Id. at 843; 19 U.S.C. § 1677f-1(d)(1) (2000).

without offsets for “negative” dumping margins.<sup>17</sup> Thus, the Federal Circuit reasoned, “Congress may . . . have been signaling to [the DOC] that it need not continue its zeroing methodology in situations where such significant price differences do not exist.”<sup>18</sup> In other words, the Federal Circuit concluded that it was permissible – though of course not required – for the Department to use the average-to-average methodology, with offsets, in investigations, in large part because the Department’s interpretation of the statute gave the DOC sufficient flexibility to address situations of masked or targeted dumping.

The same concerns apply with even greater force in administrative reviews. While the statute authorizes the Department to use the average-to-average methodology in investigations (as well as the transaction-to-transaction methodology in limited cases and the average-to-transaction methodology in cases where targeted dumping exists), the statute provides no such flexibility in the case of administrative reviews. Rather, the statute directs the Department in reviews to determine “the normal value and export price (or constructed export price) of each entry of the subject merchandise” and “the dumping margin for each such entry.”<sup>19</sup> That the Department’s calculation of dumping margins in reviews contemplates a transaction-specific approach is confirmed by the Uruguay Round Agreements Act Statement of Administrative Action (“SAA”), which states:

The [WTO Antidumping] Agreement reflects the express intent of the negotiators that the preference for the use of an average-to-average or transaction-to-transaction comparison be limited to the “investigation phase” of an antidumping proceeding. Therefore, as permitted by Article 2.4.2, the preferred methodology

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<sup>17</sup> U.S. Steel Corp., 621 F.3d at 1363.

<sup>18</sup> Id.

<sup>19</sup> 19 U.S.C. § 1675(a)(2)(A) (2000).

in reviews will be to compare average [normal values] to individual export prices.<sup>20</sup>

As noted above, this continuing Congressional preference for an average-to-transaction approach over an average-to-average methodology in reviews is “based on a concern that [the latter] methodology could conceal ‘targeted dumping.’”<sup>21</sup>

Congress clearly assumed the Department would continue to use an average-to-transaction methodology in reviews, as is further confirmed by the provision in Section 777A(d)(2) of the Act. This statute directs the Department, “when comparing export prices . . . of individual transactions to the weighted average price of sales of the foreign like product,” to limit the averaging of prices to one-month periods when calculating normal value.<sup>22</sup> The circumstance in which the Department does not use this preferred average-to-transaction methodology was apparently considered so anomalous that Congress did not provide any guidance for averaging if other methodologies were used. Indeed, the only other circumstances addressed in the SAA are those in which normal value is calculated based on constructed value rather than on prices of the foreign like product, not those in which the Department would vary from the average-to-transaction methodology itself.<sup>23</sup>

Courts have held that the Department’s general statutory discretion to use averages in calculating dumping margins can authorize the use of an average-to-average methodology in administrative reviews, notwithstanding the legislative preference for the average-to-transaction

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<sup>20</sup> SAA at 842.

<sup>21</sup> Id. at 843.

<sup>22</sup> 19 U.S.C. § 1677f-1(d)(2) (2000).

<sup>23</sup> See SAA at 842-43.

methodology. In Floral Trade Council v. United States, the Federal Circuit affirmed the Department’s use of monthly averaging for export prices in the particular circumstance of a highly perishable product, where the DOC reasonably concluded that individual transaction prices might not fully account for perishability.<sup>24</sup> The DOC argued that the use of an annual average export price, as requested by the respondent, would be inconsistent with the statute:

The government argues in its brief that 19 U.S.C. § 1675(a)(2)(A) directs [the DOC] to compare each entry of merchandise subject to the antidumping order, whereas Asocolflores’s annual averaging would violate that mandate by masking individual instances of dumping. Under an annual averaging, dumping would only be found if the annual aggregate sales of a foreign seller were at less than fair value.<sup>25</sup>

The Federal Circuit agreed, reasoning as follows:

Based on the particular factual record before us, we agree with the government that an annual average would mask dumping related to individual sales. Although some dumping would also be masked under a monthly average, [the DOC] chose to use a monthly average as representative of the U.S. price to account for perishability of the flowers. . . . Basing the U.S. price on an annual average in this market would completely eviscerate determining dumping on the statutorily mandated “each entry of merchandise.”<sup>26</sup>

It is worth noting that, while Floral Trade Council upheld the use of an average-to-average methodology with monthly average export prices, the DOC presumably did not make offsets if the dumping margin for any month was negative. Indeed, an average-to-average methodology using monthly average export prices, but with offsets, is much more similar in its results to the average-to-average methodology using annual averages – precisely the approach that the Federal Circuit rejected on the grounds that it would “completely eviscerate” the

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<sup>24</sup> See Floral Trade Council v. United States, 74 F.3d 1200, 1203-04 (Fed. Cir. 1996).

<sup>25</sup> Floral Trade Council, 74 F.3d at 1203.

<sup>26</sup> Id. at 1203-04.

statutory requirement for the Department to calculate the margin of dumping for each entry of the subject merchandise, because it would “mask dumping related to individual sales.”<sup>27</sup>

Thus, the Department’s discretion to use an average-to-average methodology in administrative reviews is not without statutory limits. In particular, where the use of such a methodology results in the masking of dumping without a corresponding justification for the use of a monthly average export price (such as the improved representativeness the DOC found in the case of the highly perishable product at issue in Floral Trade Council), the DOC would be acting inconsistently with U.S. law. Accordingly, the DOC is prohibited from adopting a general methodology, such as an average-to-average methodology with offsets, that fails to recognize and account for masked dumping. To do otherwise would, as the Federal Circuit has stated, “completely eviscerate” the statutory requirements for administrative reviews and plainly frustrate the Congressional preference for the average-to-transaction methodology in administrative reviews.<sup>28</sup>

The Department does not explain how it intends to ensure that it will comply with these statutory requirements if its Weighted-average Dumping Margin Proposal is implemented. To a certain extent, this is understandable; in a Section 123 notice, the Department need only explain how it intends to comply with an adverse WTO ruling; it need not explain how it intends to comply with U.S. law. But comply with U.S. law it must. If the Department does implement this proposal, those representing domestic industries will closely examine how the Department intends to fulfill its statutory obligation to calculate dumping margins in reviews that properly

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<sup>27</sup> Id.

<sup>28</sup> Id.

reflect the margin of dumping on each sale of subject merchandise and ensure that domestic industries injured by dumping do not go without the relief provided by Congress.

#### IV. Respondent Selection In Antidumping Proceedings

The Department proposes to employ sampling as the default approach for selecting mandatory respondents in antidumping proceedings.<sup>29</sup> Although the Department has the option under the statute to select mandatory respondents by sampling or through largest volume,<sup>30</sup> the DOC has to date selected mandatory respondents through volume “in virtually every one of its proceedings.”<sup>31</sup> Sampling is a preferable means of selecting mandatory respondents in administrative reviews because it improves the accuracy of dumping margins and enhances the remedial effect of the antidumping laws.<sup>32</sup> However, in its transition to sampling, the Department should: not allow the proposed exceptions to swallow the rule; retain flexibility in the sampling methodology that it employs, as the proposal presents only one of numerous legally-sound approaches; and address concerns arising from reliance on problematic import data provided by U.S. Customs and Border Protection (“CBP”).

##### A. Sampling improves the accuracy of dumping margins calculated in administrative reviews and enhances the remedial effect of the antidumping laws

Selecting mandatory respondents through sampling improves the accuracy of the calculation of dumping margins in administrative reviews and enhances the remedial effect of

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<sup>29</sup> See Respondent Selection Proposal, 75 Fed. Reg. at 78,678.

<sup>30</sup> 19 U.S.C. § 1677f-1(c)(2) (2000).

<sup>31</sup> Respondent Selection Proposal, 75 Fed. Reg. at 78,678.

<sup>32</sup> Sampling would not appear to be appropriate in investigations. The significantly shorter statutory time period for investigations does not lend itself to sampling. Compare 19 U.S.C. § 1675(a)(3) with 19 U.S.C. § 1673b(b), (c). Moreover, at the investigation stage the Department generally will have only limited experience with the subject industry.

the antidumping laws. Because sampling improves the accuracy of dumping margins calculated in administrative reviews, the use of this respondent selection methodology advances what the Federal Circuit has described as the “overriding purpose of [the DOC’s] administration of the antidumping laws . . . to calculate dumping margins as accurately as possible.”<sup>33</sup>

The Department’s historic reliance on selecting respondents based on largest volumes of exports sacrificed the accuracy of the margins calculated for parties subject to administrative reviews in favor of administrative efficiency. Sampling, on the other hand, permits the Department to include the pricing behavior of smaller exporters and producers in its margin analysis. If these producers behave differently, that differential will be captured in the Department’s results following an administrative review. Conversely, if the size of the company has no effect on the margin, then sampling will have no effect on the review-specific margin applied to the non-selected companies.

In many cases the existence of a large number of exporters means that the volume of sales reviewed has represented less than half of the total sales involved in the review period. Addressing concerns that sampling would result in smaller volumes of sales being reviewed, the DOC in the third administrative review of Certain Softwood Lumber Products from Canada (“Softwood Lumber”) emphasized that the dumping margins calculated would, in fact, be more representative:

We acknowledge that by sampling with stratification the Department may review less total trade volume than it would have by selecting the largest eight exporters. However, the portion of exports that would not be reviewed if we selected the eight largest exporters, approximately 43 percent, is large. Sampling with stratification of the sample pool ensures that we will review some exports by exporters in the small company pool. Moreover, small producers make up by far the great majority of Canadian exporters/producers. By drawing some of these

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<sup>33</sup> Parkdale Int’l v. United States, 475 F. 3d 1375, 1380 (Fed. Cir. 2007).

smaller producers/exporters into our analysis, we believe that the results of our review will be more representative and, hence, improved.<sup>34</sup>

The use of sampling also enhances the remedial effect of the antidumping duty laws. Consistently selecting respondents by the largest volume option allows producers and exporters to game the system. Continual review of the same respondents invites respondents to manipulate their sales and cost data to achieve the lowest possible dumping margin. Exporters, as just one example, may develop previously non-existent home markets that involve sales that meet the Department's bare minimum requirements for viability in order to manage their dumping margins against a manipulated normal value.

At the same time, selection of the same respondents over and over again creates incentives for non-reviewed producers and exporters to increase dumping in the marketplace. Absent sampling, the margin of dumping of the continually unexamined companies is unknown. Non-reviewed exporters and producers, confident that they will not be selected for review, have no incentive to avoid dumping. Worse, because these companies are aware that they will not be held accountable for any dumping at a rate higher than the "all-others" rate, they are, at best, discouraged from correcting sales practices that result in dumped sales and, at worst, perversely encouraged to increase dumping as such behavior will go undetected.

The selection of mandatory respondents in administrative reviews through random, statistically valid sampling techniques further improves the fairness of those reviews. Where the number of producers/exporters covered by an administrative review is large, the Department ordinarily cannot individually examine each producer/exporter. In these cases, random sampling

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<sup>34</sup> Memorandum from David Layton, *et al.*, to Stephen J. Claeys, U.S. Department of Commerce, Case No. A-122-838, Re: Selection of Respondents (Dec. 15 2005) ("Lumber Resp. Selection Memo."), at 11.

ensures that all producers/exporters in a review have at least the opportunity of being assigned an individually calculated rate.

B. The proposed exceptions to the general practice of employing sampling should not be permitted to swallow the rule

The Department is proposing to employ sampling in the selection of mandatory respondents only where resources are available “to examine at least three companies.”<sup>35</sup> This qualification carries the potential of eviscerating the proposal.

Precluding sampling in circumstances where less than three respondents are selected encourages the Department to find that it only has resources to select two mandatory respondents in order to avoid sampling. There is, however, no compelling reason for employing sampling only where agency resources allow for the selection of three or more respondents. Because the selection of two mandatory respondents through sampling can generate sufficient data from which to assign representative rates for non-selected companies, the Department should sample where it has the resources to sample at least two respondents.

The Department need not examine at least three respondents for the sample to be “statistically valid.”<sup>36</sup> In declining to sample in the recent administrative reviews of certain warmwater shrimp from India and Thailand, the Department expressed concern over “potential issues arising with respect to the statistical validity of the sample.”<sup>37</sup> The statutory requirement

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<sup>35</sup> Respondent Selection Proposal, 75 Fed. Reg. at 78,678.

<sup>36</sup> 19 U.S.C. § 1677f-1(c)(2)(A) (2000); SAA at 872-73.

<sup>37</sup> Memorandum from Elizabeth Eastwood, to James Maeder, U.S. Department of Commerce, Case No. A-533-840, Re: 2009-2010 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India, at 6; Memorandum from Elizabeth Eastwood, to James Maeder, U.S. Department of Commerce, Case No. A-549-822, Re: 2009-2010 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Thailand, at 10.

for a “statistically valid sample” mandates that the methodology be designed to achieve a representative result, not that the sample itself be representative.<sup>38</sup> Although the Department may examine more respondents to improve the representativeness of the sample, there is no basis in the statute for sampling to necessarily involve more than two mandatory respondents.

The Department also proposes not using sampling to select mandatory respondents “when characteristics of the underlying population make it highly likely that results obtained . . . would be unreasonable to represent the population.”<sup>39</sup> The Department’s proposal contemplates a short period of ten days in which interested parties may “comment on the existence of significant variation in company characteristics that are likely to have a substantial effect” on the respondent selection decision and may “take into account sampled company margins from previous segments of the proceeding,” if any.<sup>40</sup> The Department proposes to allow five days for rebuttal comments, and then to make its decision on respondent selection.<sup>41</sup> This process has the potential to beneficially inform the Department’s exercise of its discretion not only whether to sample, but how to sample in a particular case. However, this discretion should be used to allow the Department to learn from past experiences with sampling in a given industry; it should not become an avenue to avoid sampling in a particular case altogether and prevent the Department from obtaining such experience in the first place.

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<sup>38</sup> See SAA at 872-73.

<sup>39</sup> Respondent Selection Proposal, 75 Fed. Reg. at 78,678. The Department also proposes not to select mandatory respondent through sampling when “the largest companies by import volume account for at least 75 percent of total imports.” Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

C. The proposed sampling approach is one of numerous legally-sound methodologies and the DOC should retain flexibility in the sampling methodology that it employs

The Department is proposing to select mandatory respondents through random sampling with stratification by import volume using probability proportional to size (“PPS”) samples, with the number of strata equal to the number of mandatory respondents selected.<sup>42</sup> This approach is well within its discretion under the statute that requires “a sample of exporters, producers, or types of producers that is statistically valid based on information available . . . at the time of selection.”<sup>43</sup> Although the term “statistically valid” is not defined, the SAA explains as follows:

The phrase “statistically valid sample” is intended merely to conform the language of the statute with that of the Antidumping Agreement, and is not a substantive change from the current phrase “generally recognized sampling techniques.” [The DOC] will employ a sampling methodology designed to give representative results based on the facts known at the time the sampling method is designed. This important qualification recognizes that [the DOC] may not have the type of information needed to select the most representative sample at the early stages of an investigation or review when it must decide on a sampling technique.<sup>44</sup>

The Department correctly concluded in the third administrative review of Softwood Lumber that the statute does not require a specific number of mandatory respondents or otherwise preclude the use of sampling as a viable alternative to selection by largest volume.<sup>45</sup>

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<sup>42</sup> See Respondent Selection Proposal, 75 Fed. Reg. at 78,678.

<sup>43</sup> 19 U.S.C. § 1677f-1(c)(2)(A) (2000).

<sup>44</sup> SAA at 872-73 (emphasis in original).

<sup>45</sup> See Lumber Resp. Selection Memo. at 11-12; Certain Softwood Lumber Products From Canada, 71 Fed. Reg. 33,964 (Notice of Preliminary Results of Antidumping Administrative Review, Partial Rescission and Postponement of the Final Results) (June 12, 2006) (“Softwood Lumber”).

The U.S. Court of International Trade (“CIT”) has upheld the Department’s selection of mandatory respondents through sampling with stratification and PPS.<sup>46</sup> This methodology positively makes all subject exporters and producers eligible for selection regardless of size, ensures that those selected represent the spectrum of import volume, and correlates the chances of being selected with share of imports. In rejecting an argument that this sampling approach required a large number of mandatory respondents, the Department in Softwood Lumber explained that “neither the statute, the regulations, nor the legislative history specifies that a minimum confidence level attaches to the results to make the sample ‘statistically valid.’”<sup>47</sup>

The sampling experience from Softwood Lumber supports this approach being repeated. In explaining its sampling methodology, the Department stated that use of stratification and PPS yields more accurate results because it “can ensure that some small companies are chosen, thereby achieving a greater degree of cross-sectional representation.”<sup>48</sup> The Department further based its decision to sample using stratification by import volume by pointing to record evidence that “could mean that the dumping margins of small companies differ systematically from the dumping margins of large companies. If not, then stratification does no harm.”<sup>49</sup> Tellingly, the smaller Canadian companies selected for the first time through sampling received individually-

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<sup>46</sup> See Laizhou Auto. Brake Equip. Co. v. United States, 2008 Ct. Int’l Trade LEXIS 68 (June 26, 2008); Brake Rotors from the People’s Republic of China, 71 Fed. Reg. 66,304 (Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/ 2005 New Shipper Review) (Nov. 14, 2006) (“Brake Rotors”).

<sup>47</sup> Lumber Resp. Selection Memo. at 11.

<sup>48</sup> Id. at 13.

<sup>49</sup> Id.

calculated rates that were significantly higher than those for the larger companies that had been previously reviewed.<sup>50</sup>

Softwood Lumber demonstrates that including smaller companies as mandatory respondents through sampling positively enhances the accuracy of margins. Moreover, the fact that companies not expecting to be selected had higher margins than their larger counterparts supports the theory that sampling creates an incentive for all firms to stop dumping. Sampling therefore both facilitates compliance with the antidumping laws and advances the “overriding purpose of [the DOC’s] administration of the antidumping laws” by calculating dumping margins more accurately.<sup>51</sup>

The Department should not restrict itself to any particular sampling methodology. Stratification by the volume of exports into a number of strata equal to the number of exporters/producers to be examined and the use of a PPS methodology to select one exporter/producer from each stratum will likely be an appropriate methodology in many, if not most cases. However, it is not the only such appropriate methodology. The Department did not have strata equal to the number of mandatory respondents in either of the most recent reviews in which stratified sampling was used.<sup>52</sup> In fact, the Department’s discretion to use sampling

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<sup>50</sup> Compare Softwood Lumber, 71 Fed. Reg. at 33,980-81 with Certain Softwood Lumber Products From Canada, 69 Fed. Reg. 75,921, 75,924 (Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review) (Dec. 20, 2004) (weighted average margins for companies selected through largest volume in the second administrative review—Tembec, Tolko, West Fraser, and Weyerhouser—were significantly lower in third administrative review as compared with the other four companies selected for the first time through sampling).

<sup>51</sup> Parkdale Int’l, 475 F. 3d at 1380.

<sup>52</sup> See Softwood Lumber, 71 Fed. Reg. at 33,964; Brake Rotors, aff’d sub nom. Laizou Auto, 2008 Ct. Int’l Trade LEXIS 68, \*3.

without any stratification at all has been upheld by the CIT.<sup>53</sup> A regulatory preference for random sampling according to a particular methodology should not become a rigid mandate from which good-cause deviation is prohibited.

D. Concerns over the DOC's proposed use of CBP data

The Department proposes to increase its reliance on “type 3” CBP data in which importers identify merchandise as being subject to an antidumping order. Although the Department currently uses this data in selecting mandatory respondents by largest volume, it proposes to rely more extensively on this data in sampling “to both define the population, and, if the company is selected, establish a dumping margin for the company.”<sup>54</sup> “Type 3” data, however, can suffer from reliability defects. For example, the CIT has explained that “because CBP entry data do not contain information with respect to company affiliations, when the Department relies exclusively on such data, it is forced to use affiliation related information obtained in the course of prior proceedings. Such affiliation-related data may or may not remain accurate . . . .”<sup>55</sup>

However, the problems associated with CBP data far exceed the lack of affiliation information identified by the CIT. In recently upholding the Department's use of CBP data, the CIT explained that it is the petitioner's burden to provide record-specific evidence that CBP data is unreliable.<sup>56</sup> There are a number of reasons to believe that the petitioner will be able to meet

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<sup>53</sup> See Asociación Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1114, 1121 (CIT 1989), aff'd, 901 F.2d 1089 (Fed. Cir. 1990).

<sup>54</sup> Respondent Selection Methodology, 75 Fed. Reg. at 78,678.

<sup>55</sup> Pakfood, 2010 Ct. Intl. Trade LEXIS 105, \*16 (footnote omitted).

<sup>56</sup> See Pakfood Public Co. v. United States, Consol. Court No. 09-430, Slip Op. 11-6 (CIT Jan. 18, 2011), at 23.

such a burden in future administrative reviews. For example, the petitioner has already detailed the inaccuracy of CBP data in a recent administrative review of certain warmwater shrimp from the People’s Republic of China (“PRC”).<sup>57</sup> In that “review, the Department confirmed that the agency had discovered, through verification of a selected respondent, that U.S. importers had misclassified subject merchandise as nonsubject merchandise and that the ‘entered value of subject merchandise had been under reported by certain importers to CBP . . . .’”<sup>58</sup>

Moreover, merchandise subject to that antidumping order had widely evaded the order under a variety of schemes that rendered CBP data unreliable.<sup>59</sup> The U.S. Government Accountability Office “found that an importer did not pay approximately \$2.2 million in antidumping duties on imported Chinese shrimp that was transshipped through Indonesia” and explained that a federal “investigation found that foreign manufacturers and importers were . . . attempting to circumvent antidumping duties by sending Chinese shrimp to the United States through Malaysia.”<sup>60</sup>

A report from CBP to Congress elaborated on another circumvention scheme as follows:

Based on an allegation from the domestic shrimp industry, CBP conducted a special operation centered on cargo examination and lab analysis to determine whether imports of shrimp from China were being misdescribed . . . so that shipments would fall outside the scope of the AD order. CBP’s operations

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<sup>57</sup> See Case Brief on Behalf of the Ad Hoc Shrimp Trade Action Committee, U.S. Department of Commerce Case No. A-570-893 (April 12, 2010), at 3-11.

<sup>58</sup> Id. at 4-5 (quoting Issues and Decision Memorandum (Cmt. 7) accompanying Third Administrative Review of Frozen Warmwater Shrimp from the People’s Republic of China, 74 Fed. Reg. 46,565 (Sept. 10, 2009)).

<sup>59</sup> See id. at 6-7.

<sup>60</sup> Id. at 6-7 (quoting U.S. Government Accountability Office, Seafood Fraud: FDA Program Changes and Better Collaboration among Key Federal Agencies Could Improve Detection and Prevention, GAO-09-258 (Feb. 2009), at 16).

confirmed the allegation. CBP determined that fourteen importers evaded the AD order, resulting in \$5 million in lost revenue.<sup>61</sup>

These problems identified by federal agencies and the CIT must be addressed by the Department because it proposes to increase reliance on CBP data in selecting mandatory respondents through sampling. The Department should explore alternatives to exclusive reliance on “type 3” CBP data, as well as safeguards that can be put in place to ensure reliability if this data is used to select mandatory respondents.

As an initial step, the Department should expand the CBP information released to parties under protective order in administrative reviews. The Department has provided no justification for limiting the release of such data only to the volume of shipments identified by U.S. importers as “type 3” entries. At a bare minimum, value data related to those entries should be released for review along with the volume data.

Moreover, in circumstances where the relevant Harmonized Tariff Schedule numbers line up with the scope of the orders, the Department should also make data relating to “type 1” entries available under protective order to the parties to review. By correlating data relating to purported “type 1” entries (those identified as not subject to an antidumping order) with data relating to “type 3” entries, interested parties could evaluate whether the “type 3” CBP data is under-representative as a result of misidentification of merchandise by importers.

Where problems with CBP data exist, the Department should issue quality and value questionnaires to all respondents. This would not represent a change in practice, as the Department routinely uses these questionnaires in selecting mandatory respondents – both in

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<sup>61</sup> Id. at 7 (quoting U.S. Customs and Border Protection, Report to Congress on (1) U.S. Customs and Border Protection’s Plans to Increase AD/CVD Collections and (2) AD/CVD Enforcement Actions and Compliance Initiatives, at 11).

conjunction with, and instead of, reliance on “type 3” CBP data.<sup>62</sup> These questionnaires can obtain information necessary to ensure the reliability of CBP data, such as the affiliation matching problem identified by the CIT.<sup>63</sup> The Department could efficiently assess the reliability of “type 3” CBP data in a particular proceeding by comparing it to the questionnaire responses. Significant discrepancies in quantity or value would alert the Department that importers had mislabeled or undervalued entries, thereby rendering the CBP data unreliable.

V. Establishing A Separate Rate In Antidumping Proceedings Involving NME Countries

In NME antidumping proceedings, the Department considers whether there is an absence of *de facto* government control over a company.<sup>64</sup> If that absence of control is demonstrated, the Department may issue a separate antidumping rate for that company.<sup>65</sup> The Department’s inquiry into whether there is an absence of *de facto* control over an applicant’s export activities currently considers four factors:

- (1) Whether the export prices are set by or are subject to the approval of a governmental agency;
- (2) whether the respondent has authority to negotiate and sign contracts and other agreements;
- (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and
- (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.<sup>66</sup>

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<sup>62</sup> See Pakfood, 2010 Ct. Intl. Trade LEXIS 105, at \*12-13 & nn.12, 13.

<sup>63</sup> See id. at \*16.

<sup>64</sup> See Requested Separate Rate Criteria, 75 Fed. Reg. at 78,677.

<sup>65</sup> See id.

<sup>66</sup> Id.; see, e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 75 Fed. Reg. 12,206, 12,211 (Mar. 15, 2010) (Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review).

In practice, the Department has found that these factors support the grant of separate rate status as a matter of course based on assertions made by an applicant with minimal documentary support. The Department's determinations granting separate rate status emphasize the assertions made by applicants,<sup>67</sup> and, at times, these assertions are on their own considered sufficient to establish *prima facie* evidence of a lack of *de facto* governmental control over export activities.<sup>68</sup> The Department's practice, coupled with the fact that separate rate applications are rarely denied due to an applicant's inability to demonstrate a lack of *de facto* governmental control over export activities, gives credence to the following observation in the Department's Requested Separate Rate Criteria:

The Department's current practice focuses on direct government involvement in a firm's export activities and, to that extent, it may not take sufficient account of the government's role in the NME and how that role may impact an exporter's behavior with regard to its export activities and setting prices.<sup>69</sup>

In response to this identified deficiency, the Department "is considering modifying the *de facto* criteria to look beyond direct government control of export activities in assessing whether

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<sup>67</sup> See, e.g., Certain Cased Pencils from the People's Republic of China, 76 Fed. Reg. 2,337, 2,340 (Jan. 13, 2011) (Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review) ("Rongxin has asserted the following: (1) It establishes its own export prices; (2) it negotiates contracts without guidance from any government entities or organizations; (3) it makes its own personnel decisions; and (4) it retains the proceeds of its export sales, uses profits according to its business needs, and has the authority to sell its assets and to obtain loans. Additionally, Rongxin's questionnaire responses indicate that its pricing during the POR was not coordinated with other exporters. As a result, there is a sufficient basis to preliminarily determine that Rongxin has demonstrated a *de facto* absence of government control of its export functions and it is entitled to a separate rate.").

<sup>68</sup> See, e.g., Fresh Garlic from the People's Republic of China, 75 Fed. Reg. 80,458, 80,461-62 (Dec. 22, 2010) (Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review).

<sup>69</sup> Requested Separate Rate Criteria, 75 Fed. Reg. at 78,677.

an entity should be granted separate rate status.”<sup>70</sup> The Department is correctly seeking to improve the *de facto* criteria employed to determine whether separate rate status is appropriately granted, given the fundamental problems with the entirety of the separate rate test currently employed by the DOC.

At base, the objectives of the test utilized by the Department regarding the grant of separate rate status are frustrated. This is because: (1) in practice, the DOC has not applied a presumption of governmental control and, instead, has granted separate rate status on the basis of the submission of minimal supporting documents that bear little relevance to the question of whether the entity’s exporting activities are, in fact, under the control of the government; and (2) the Department has granted separate rate status even where the applicant is owned by the government.<sup>71</sup> Responding to criticism of its separate rate test – particularly to assertions that the agency has not properly applied a presumption of government control in cases involving applicants owned or controlled by State-owned Assets Supervision and Administration Commissions (“SASAC”) in the PRC – the Department recently stated that it intends “to closely follow developments in this area” and will “carefully analyze relevant facts and information that

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Id.

<sup>71</sup> See Qingdao Taifa Group Co. v. United States, 637 F. Supp. 2d 1231, 1242-43 (CIT 2009) (“Qingdao 2009”) (“Indeed, as [the DOC] stated in the *Preliminary Results*, ‘government ownership by itself is not dispositive in determining government control.’ . . . [The DOC] previously has applied separate rates, rather than PRC-wide rates, in instances where a government entity has an ownership interest in the respondent but does not exercise *de facto* control over the respondent’s prices or export activities. . . . [The DOC] has also applied separate rates in instances where a government entity owns shares of the respondent’s stock but does not vote the shares or otherwise exercise operation control over the respondent’s business. . . .” (citations omitted)).

are placed on the recording in future antidumping proceedings . . . .”<sup>72</sup> Nevertheless, the Requested Separate Rate Criteria sidesteps these issues in favor of a consideration of adjustments to the Department’s *de facto* criteria.<sup>73</sup>

The Department undermines the separate rate analysis through its willingness to grant separate rates to companies owned by governmental entities in NMEs and, separately, its unwillingness to consider “macroeconomic border-type controls” in favor of a narrow focus on “export decisions made at the individual firm level.”<sup>74</sup> The Department’s practice stacks the odds of separate rate determinations heavily in favor of the applicant, regardless of the actual facts attached to the applicant’s operations. The absurdity resulting from the Department’s approach has been underscored in litigation relating to the antidumping duty order on hand trucks from the PRC. In that case, the CIT relied upon the Department’s prior determinations that government ownership is not dispositive to find that it would be inappropriate to deny separate rate status even where an applicant falsely provided information that it was not, in fact, government-owned.<sup>75</sup> Similarly, the practice of granting separate rate status to companies owned by the government and the Department’s general reluctance to apply a meaningful presumption

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<sup>72</sup> See Issues and Decision Memorandum (Cmt. 2) accompanying Cut-to-Length Carbon Steel Plate from the People’s Republic of China, 75 Fed. Reg. 8,301 (Feb. 24, 2010) (Final Results of Administrative Review) (“CTL Steel Plate IDM”).

<sup>73</sup> See Requested Separate Rate Criteria, 75 Fed. Reg. 78,676.

<sup>74</sup> See, e.g., Issues and Decision Memorandum (Cmt. 3) accompanying Certain Magnesia Carbon Bricks from the People’s Republic of China, 75 Fed. Reg. 45,467 (Aug. 2, 2010) (Final Determination of LTFV Sales).

<sup>75</sup> See Qingdao 2009 at 1244 (“[The DOC’s] decision to apply AFA to the facts of Taifa’s control because Taifa’s ownership documents could not be verified was apparently based on the flawed assumption that town government ownership alone establishes governmental control sufficient to trigger application of a [PRC] entity rate.”).

of governmental control appears to be, in part, the basis of the CIT's further remand of the DOC's decision to continue to decline separate rate status to that applicant.<sup>76</sup> The decisions repeatedly remanding the Department's decision to deny separate rate status appear to indicate that the DOC's practice of granting separate rates is so permissive that the agency cannot deny separate rate status to a company that submits incorrect and false information regarding its ownership without some specific demonstration that the government entity owning the enterprise, in fact, controls the applicant's export activities.

As currently conceived, the Department's separate rate test does not address what the test purports to address: whether there is an absence of government control over an applicant's export activities. As such, the Department should revisit the test in its entirety and take steps to improve the relevance of the analysis to the question of governmental control over a company's export activities. If the agency's willingness or ability to address this discrepancy is limited only to addressing the *de facto* criteria employed, the Department should, at a minimum, require far more substantial documentary support for the assertions made by applicants and align the information required in response to a separate rate certification more closely with the information required to be provided in response to a separate rate application.

## VI. Conclusion

The Department's Weighted-average Dumping Margin Proposal wrongly and unnecessarily seeks to implement erroneous WTO rulings concerning the use of "zeroing" methodology. If the Department nevertheless implements this change, it must account for

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<sup>76</sup> See Qingdao Taifa Group Co. v. United States, 2010 Ct. Intl. Trade LEXIS 131, \*10-18 (Nov. 12, 2010). The CIT appears to question whether the stated presumption of governmental control is appropriate in the first instance. In response, the DOC has opined: "[T]he Department respectfully disagrees with the implied premise of the Court's remand instruction which shifts the burden of proof in the application of the Department's separate rate test away from the respondent claiming a separate rate." CTL Steel Plate IDM (Cmt. 2).

masked dumping in order comply with the statutory directive. The Department's Respondent Selection Proposal positively makes sampling the default approach for selecting mandatory respondents in administrative reviews, thereby improving the accuracy of dumping margins and enhancing the remedial effect of the antidumping laws. In implementing this change, the Department should: not allow the proposed exceptions to swallow the rule; retain flexibility in the sampling methodology that it employs; and address the reliance on problematic CBP import data. The Department's Requested Separate Rate Criteria correctly identifies concerns over the establishment of separate rates in antidumping proceedings involving NME countries. However, the Department should revisit its analytical framework rather than merely add criteria to its flawed approach.