ARTICLES

2014 COURT OF INTERNATIONAL TRADE REVIEWS OF POST-SALE PRICE ADJUSTMENTS, TARGETED DUMPING, AND ZEROING IN ANTIDUMPING DUTY CASES

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Abstract

By summarizing important 2014 U.S. Court of International Trade reviews of the U.S. Department of Commerce’s analysis and calculation of two types of pricing practices—post-sale price adjustments and targeted dumping—this Article provides some useful lessons for industries involved or potentially involved in U.S. antidumping duty proceedings, as well as guidance for practitioners on the developments and evolution of the Department’s practices related to zeroing, targeted dumping, and post-sale price adjustments.

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I. INTRODUCTION

The fundamental purpose of U.S. antidumping (“AD”) law is to remedy injury caused to a domestic industry by dumped imports—imports sold at prices below their “normal value,” which is their home or third-country market price, cost of production, or constructed value.\(^1\) The ultimate means by which AD law achieves such remedy is the assessment and collection of AD duties on imports covered by a relevant AD order. If accurately calculated by the U.S. Department of Commerce (“Commerce” or “the Department”), such duties should offset the dumping, making subject imports priced “fairly” and the U.S. market playing field “level.”\(^2\) Antidumping law is not designed to block subject imports or punish subject foreign producers or exporters, which could create an unfair advantage for a domestic industry.\(^3\) Thus, the calculation of accurate AD margins is key to ensuring that the application of the law is as remedial as possible without being punitive or counterproductive.

Foreign producers and exporters who want to maintain their presence in the U.S. market and U.S. importers who want to avoid AD liability must attempt to understand how Commerce will likely treat certain pricing practices in AD calculations. The existence and treatment of these pricing practices can determine whether imports are covered by an AD order at all, in the case of an investigation, or whether the AD assessment rate is zero or much higher.\(^4\) In 2014, the U.S. Court of International Trade (CIT) issued roughly thirty slip opinions relating to the Department’s calculation methodologies for AD margins. Most importantly, the CIT reviewed a group of cases concerning the Department’s calculation methodologies for two broad types of pricing practices: post-sale price adjustments and targeted dumping. Post-sale price adjustments are any change in the net price charged for subject merchandise of the foreign like product, such as rebates or discounts.\(^5\) Targeted dumping is a pattern of export prices charged for subject merchandise of the foreign like product, such as rebates or discounts.\(^5\) Targeted dumping is a pattern of export prices charged for subject merchandise of the foreign like product, such as rebates or discounts.


\(^2\) See id.

\(^3\) See id.

\(^4\) Margins can be calculated as high as multiples of 100 percent \textit{ad valorem}. \textit{Ad valorem} is the levying of customs duties in proportion to the estimated value of the goods or transaction concerned.

\(^5\) 19 C.F.R. § 351.102(b)(38) (2014).
ers, regions, or periods of time.” Both types of pricing practices have the potential to reduce dumping margins, whether legitimately or otherwise. Thus, these cases merit review of their implications for future Commerce AD calculations.

By summarizing important 2014 CIT reviews of the Department’s analysis and calculation of these two types of pricing practices, this Article provides some useful lessons for industries involved or potentially involved in U.S. AD proceedings, as well as guidance for practitioners on the developments and evolution of the Department’s practices related to targeted dumping and post-sale price adjustments. Part II of this Article analyzes the Papierfabrik case that led Commerce to announce that it will revise its regulations concerning its treatment of post-sale price adjustments, which could have a significant impact on certain parties’ pricing adjustments and resulting AD margins. After providing a brief historic overview of the Department’s practice of “zeroing” and the targeted dumping statute, Part III analyzes several 2014 CIT cases that provide useful guidance on the Department’s treatment of targeted dumping, including under what circumstances the Department will apply its targeted dumping analysis, what factors the Department will (or will not) consider in its targeted dumping analysis, and what sales the Department may apply its zeroing methodology to once targeted dumping is found.

II. POST-SALE PRICE ADJUSTMENTS

When Commerce calculates a respondent’s AD duty, it makes certain adjustments to normal value and export price, such as brokerage, packing, shipping costs, level of trade differences, and taxes. The Department’s regulations provide for the use of normal values and export prices that are net of price adjustments reasonably attributable to the subject merchandise or foreign like product. The regulations define “price adjustment” as “any change in the price charged for subject merchandise of the foreign like product, such as discounts, rebates and post-sale price adjustments, that are [sic] reflected in the purchaser’s net outlay.” The Department’s general practice was to only grant legitimate price adjustments—adjustments where the terms and conditions were established and known to the customer at the time.

8. 19 C.F.R. § 351.401(c) (2014).
of sale—due to the potential for manipulation of dumping margins through so-called “after-the-fact” adjustments for which the customer was unaware at the time of sale.\footnote{10}

A. Papierfabrik August Koehler AG. v. United States and the Department’s Proposed Fix

In \textit{Papierfabrik August Koehler AG v. United States}, the CIT remanded Commerce’s determination that the Department’s regulations permitted the agency to disregard post-sale adjustments not known to the customer at the time of sale.\footnote{11} The CIT based its interpretation on the regulation’s definition of price adjustment as “\textit{any} change in the price charged for . . . the foreign like product” that “are reflected in the purchaser’s net outlay.”\footnote{12} According to the CIT, it was irrelevant whether the customer was aware of the terms and conditions of the post-sale rebates prior to the sales as long as the rebate payments were in fact made:

\begin{quote}
Under the regulations, the question is not whether the rebates were made according to a “program” that satisfied the various prerequisites Commerce identified . . . but whether the monthly rebates actually were made, \textit{i.e.}, whether there were downward adjustments in the prices charged for the foreign like product that were reflected in purchasers’ net outlays.\footnote{13}
\end{quote}

On remand, and under protest, the Department granted an adjustment for the monthly rebate at issue in the case, which changed the respondent’s calculated AD margin from 3.77\% to 0.03\% (\textit{de minimis}).\footnote{14} Commerce explained that, though it believed the rebate at issue was not legitimate for purposes of price adjustments in this proceeding, the CIT found that the regulations require Commerce to treat the

\begin{footnotes}
\footnote{12. \textit{Id.} at 1251–52 (quoting 19 C.F.R. § 351.102(b)(38) (2014)) (emphasis in original).}
\footnote{13. \textit{Id.} at 1252.}
\footnote{14. See Lightweight Thermal Paper from Germany, Mid Continent Nail Corp. v. United States, Consol. Ct. No. 11-00147, slip op. 14–31 at 11 (Dep’t of Commerce June 20, 2014) (final results of redetermination pursuant to court remand), \url{http://enforcement.trade.gov/remands/14-31.pdf}.}
\end{footnotes}
rebate as a post-sale price adjustment and that “the Department does not have the discretion to consider the legitimacy of, and therefore the possible manipulation of the dumping margin through, such rebates.”

The Department further found that the respondent’s allocation method for its monthly rebates was on as a specific basis as feasible and did not cause “inaccuracies or distortions.”

On December 31, 2014, the CIT affirmed the Department’s remand results in *Papierfabrik August Koehler AG v. United States* (“Papierfabrik II”). On that same day, the Department published a notice of proposed changes to the two regulations on price adjustments at issue in *Papierfabrik*. Specifically, the Department proposed changes “to clarify that the Department generally will not consider a price adjustment that reduces or eliminates a dumping margin unless the party claiming such price adjustment demonstrates, to the satisfaction of the Department, through documentation that the terms and conditions of the adjustment were established and known to the customer at the time of the sale.”

**B. Subsequent Proposals for Clarification**

Several law firms, domestic industries, foreign manufacturers, and exporters submitted comments in response to the Department’s proposed changes raising several interesting issues.

Curtis, Mallet-Prevost, Colt & Mosle LLP noted that there were certain post-sale price adjustments that the Department accepted under its pre-*Papierfabrik* practice, such as “price protections,” post-sale consumer rebates, and quality-upon-receipt discounts, in which the exact terms and amounts of the adjustments were not fixed until after the sale. Curtis proposed a slight modification to Commerce’s proposed regulatory changes—to permit the Department to consider

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15. *Id.* at 10.
16. *Id.* at 10–11.
19. *Id.*
standard business practices regarding post-sale adjustments in a particular industry—so that the Department could continue to allow such post-sale adjustments.  

Kelley Drye & Warren LLP noted that post-sale price adjustments may take forms other than “discounts and rebates,” such as billing adjustments and post-sale decreases to home market prices or increases to U.S. prices. Thus, Kelley Drye proposed that the Department make clear that its final rule changes do not limit the agency’s ability to either grant or deny other forms of price adjustments, depending on the circumstances of the case.

Morris, Manning & Martin, LLP noted that, even when a company’s policies regarding discounts and rebates are known to the customer prior to sale, a company may grant a request for a discount or rebate by a buyer after a sale or over the course of multiple day-to-day transactions to maintain good customer relationships, rather than manipulate dumping margins. Commerce’s final rulemaking regarding post-sale price adjustments will hopefully be promulgated in 2016, but there is no official deadline. As the above comments indicate, it is likely that the Department’s final regulations regarding price adjustments will give the Department more discretion and flexibility to determine how certain types of post-sale discounts, rebates, price protections, and U.S. price increases are treated in the Department’s AD duty calculations. It will certainly be very important to demonstrate, with substantial record evidence, that the terms and conditions of any post-sale adjustment were established at the time of sale. Depending on the final rules, if a customer has no prior knowledge of a post-sale price adjustment, respondents may be able to obtain an adjustment by demonstrating either (1) a standard industry practice regarding the post-sale price adjustment or (2) a bona fide post-sale price adjustment that was not made to merely manipulate margins. Thus, industries involved or potentially involved in AD proceedings should carefully review the final rules and their

22. Id. at 5–6.
24. Id. at 4.
business practices as well as those of their customers to minimize AD duty liability within their commercial realities.

III. TARGETED DUMPING

The Commerce Department’s analysis of targeted dumping—a pattern of prices that differ significantly among purchasers, geographic regions, or periods of time—is a relatively recent development. As such, the Department, courts, and interested parties are still grappling with many of the basic aspects, factors, and methodologies involved in Commerce’s targeted dumping analysis. After providing a brief history of the Department’s practice of zeroing and the targeted dumping statute, this Part of the Article examines the main issues addressed in the CIT’s 2014 reviews of the Department’s targeted dumping analysis. This Part then concludes with several lessons that both companies and practitioners should consider going forward.

A. Historic Overview of Zeroing and Targeted Dumping

The Department’s “zeroing” methodology for calculating antidumping duty margins and assessment rates, whereby the agency includes only positive dumping margins in its calculations of a weighted-average dumping margin, has been the subject of countless CIT and World Trade Organization (WTO) cases. Foreign exporters and U.S. importers view zeroing as a calculation methodology that overstates dumping margins and assessment rates and, thus, violates U.S. international trade obligations. On the other hand, domestic producers view zeroing as necessary to fully offset dumping, including “masked” dumping.

Due to the United States’ implementation of several adverse WTO decisions, zeroing is no longer the Commerce Department’s default methodology for dumping calculations in original investigations or administrative reviews. Instead, the Department now compares home

26. I.e., Commerce does not offset positive margins with negative margins because it assigns a value of zero to negative margins. For a detailed explanation of Commerce’s zeroing practice and its history, see Union Steel v. United States, 823 F. Supp. 2d 1346, 1348–51 (Ct. Int’l Trade 2012), aff’d, 713 F.3d 1101 (Fed. Cir. 2013).

market and export prices on an average-to-average (A-A) basis\textsuperscript{28} without zeroing. The Department, however, will determine “on a case-by-case basis whether it is appropriate to use an alternative comparison methodology”: an average-to-transaction (A-T)\textsuperscript{29} basis using zeroing.\textsuperscript{30}

The statute provides that in an AD investigation, price comparisons can be made on an A-T basis if there is “targeted dumping”:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—

(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and

(ii) the administering authority explains why such differences cannot be taken into account using the A-A methodology or the transaction-to-transaction methodology.\textsuperscript{31}

The Department has also used this statutory provision as guidance in deciding when to apply the A-T methodology, with zeroing, instead of the default A-A methodology in administrative reviews.

In all of the CIT’s 2014 targeted dumping cases, the Court reviewed the Commerce Department’s application of the so-called “Nails” test to determine whether targeted dumping occurred. Under the Nails test, the Department found targeted dumping of a specific product if (1) more than thirty-three percent of the alleged targeted group’s (i.e., customer, region, or time period) sales of that specific product are at

\textsuperscript{28} I.e., Commerce compares monthly average normal values with monthly weighted-average export prices or constructed export prices, as applicable.

\textsuperscript{29} I.e., Commerce compares monthly average normal values with individual export transactions.

\textsuperscript{30} Zeroing Final Modification, supra note 27, at 8,102, 8,104, 8,106-7. See also 19 C.F.R. § 351.414(c)(1) (2014) (“[I]n an investigation or review, the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case.”).

\textsuperscript{31} 19 U.S.C. § 1677f-1(d)(1)(B) (emphasis added). Although the transaction-to-transaction (T-T) methodology is also listed as a preferred methodology, the Department rarely employs this methodology. See 19 C.F.R. § 351.414(c)(2) (2014) (“The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.”).
prices more than one standard deviation below the weighted-average price of all sales under review, (2) the “gap” between the weighted-average sales price to the targeted group and the weighted-average price to the next-highest non-targeted group is greater than the average gap between the non-targeted groups, and (3) more than five percent of total sales of that specific product to the alleged target pass both tests. The Department then compares the sales that passed the Nails test with total U.S. sales to determine if the targeted sales are sufficient to warrant the use of the A-T methodology with zeroing.

Though the Department has developed a new “differential pricing” test in place of the Nails test for its targeted dumping analysis, the targeted dumping statute remains unchanged. Thus, the 2014 CIT targeted dumping cases provide significant guidance on issues that will continue to be relevant to the Department’s new differential pricing test in 2015 and beyond.

B. Review of 2014 CIT Targeted Dumping Cases

1. Department’s Authority to Apply the Targeted Dumping Statute and Zeroing in Administrative Reviews

The CIT confirmed that Commerce may apply its targeted dumping analysis and the application of zeroing in administrative reviews. In 2013, the Federal Circuit held in Union Steel v. United States that the Commerce Department’s decision to use zeroing in administrative reviews, but not in original investigations, was reasonable. The CIT followed in 2014 by affirming the Department’s use of the A-T methodology with zeroing in administrative reviews.

The CIT also affirmed the Department’s application of the targeted dumping statute to administrative reviews. In Timken Co. v. United States (Timken I), the CIT upheld the Department’s authority to engage in a


34. Union Steel v. United States, 713 F.3d 1101, 1102–03 (Fed. Cir. 2013).

targeted dumping analysis in an administrative review. In doing so, the CIT rejected the argument that Section 1677f-1(d) limits targeted dumping analyses to investigations. The CIT explained that Subsection 1677f-1(d) (2), entitled “Reviews,” merely provides that Commerce should use monthly averages when using the A-T methodology and that the Subsection is “otherwise completely silent as to how Commerce should conduct its [dumping determination] in reviews, leaving Commerce substantial discretion as to the methodologies it wishes to employ.”

Similarly, in CP Kelco Oy v. United States, the CIT found that the targeted dumping statute does not preclude the Department from undertaking the targeted dumping analysis in administrative reviews. Relying on the Federal Circuit’s decision in Union Steel, the CIT further found that the Department’s interpretation of the targeted dumping statute as providing a means of choosing between the A-A and A-T calculation methodologies for both original investigations and administrative reviews was permissible. In doing so, the CIT noted that “the targeted dumping inquiry is simply a threshold analysis Commerce conducts before applying A-T to calculate dumping margins” and that “[i]t does not follow that Congress would prohibit targeted dumping inquiries in reviews when the inquiry’s purpose is to help Commerce decide whether to apply A-T in a given case.” Following Timken I and Kelco, the CIT “declared in a swelling chorus of cases” that Commerce’s application of its targeted dumping methodology in administrative reviews was a reasonable exercise of the agency’s gap-filling authority.

At the end of 2014, the CIT confirmed that Union Steel applies equally to market economy and non-market economy (NME) AD administra-

37. Id. at 1286 n.7.
38. Id. (citing Union Steel v. United States, 823 F. Supp. 2d 1346, 1359–60 (Ct. Int’l Trade 2012)).
40. Id. at 1324.
41. Id.
tive reviews in Since Hardware (Guangzhou) Co. v. United States. In Union Steel, the Federal Circuit found that the “greater specificity” provided by A-T comparisons with zeroing in administrative reviews compared to that provided by A-A comparisons without zeroing in original investigations was justified based on the different goals, uses, and reasons for the two types of proceedings. Specifically, Commerce has a stronger interest in calculating more accurate rates in administrative reviews because duties in original investigations are calculated for determining what parties are covered by the AD order and for deposit purposes, while duties in administrative reviews are calculated for deposit and assessment purposes. In Since Hardware, the CIT found this justification was also reasonable in the context of NME administrative reviews and rejected plaintiff’s argument that using the A-T methodology with zeroing in NME reviews did not yield greater specificity because normal values in NME reviews are annual averages rather than monthly averages in market economy reviews:

Union Steel consistently emphasized that zeroing in combination with the A-to-T methodology can increase accuracy and reveal masked dumping because Commerce compares normal value to transaction-specific export prices as opposed to average export prices under the A-to-A methodology used in investigations.

Thus, in 2014 the CIT confirmed that Commerce may apply its targeted dumping analysis and the application of zeroing in both market economy and NME administrative reviews.

2. Lack of an “Intent” Requirement in the Department’s Targeted Dumping Analysis

The CIT made clear that a respondent could be found to have conducted targeted dumping without any knowledge or intent of such targeting by the respondent. Specifically, the CIT confirmed that there is no intent requirement in the Department’s targeted dumping analysis. In Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States, the CIT found that the Commerce Department is not required to

44. Union Steel v. United States, 713 F.3d 1101, 1108–09 (Fed. Cir. 2013).
45. See id.
46. Since Hardware, 37 F. Supp. 3d at 1362 (emphasis added).
consider a respondent’s explanation for why the respondent demonstrated a pattern of targeted dumping. In *Borusan*, the plaintiff argued that, pursuant to the statute and the legislative history, Commerce must consider whether a respondent intended to engage in targeted dumping and the “motive” behind its pricing practices before applying the targeted dumping remedy. The Court flatly rejected this argument, explaining that neither the targeted dumping statute nor the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (“SAA”) include an intent requirement:

The statute is clear. Contrary to [plaintiff’s] claim that targeted dumping connotes purposeful behavior, the language of the statute simply instructs Commerce to consider export sales prices (or constructed export price) in its targeted dumping analysis. *See* § 1677f-1(d)(1)(B). It does not require Commerce to undertake an investigation of the various reasons why a pattern of targeted dumping exists within a given time period. The SAA does not manifest such a requirement either. It reaffirms the language in the statute but adds very little other than what is already expressed in § 1677f-1(d)(1)(B). Therefore, Commerce may make a finding of targeted dumping and apply the targeted dumping remedy based on the pricing pattern described in the statute and specifically articulated in the *Nails* test. The court cannot identify any language in the statute or SAA that might require Commerce to investigate whether a given respondent has a legitimate commercial reason for such a pricing practice. Doing so would add a new element to the targeted dumping analysis, requiring Commerce to also consider whether respondents intended to engage in targeted dumping.

In *JBF RAK, LLC v. United States*, the CIT reached the same conclusion as it did in *Borusan* regarding the lack of an intent requirement in the targeted dumping statute and analysis. In doing so, the CIT rejected plaintiff’s argument that the targeted dumping statute requires Commerce to provide an explanation as to why and how the

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48. *Id.* at 1387.
49. *Id.* at 1389.
alleged targets were selected and caused targeted dumping, and whether the pricing pattern is the result of an intentional targeted dumping strategy.\textsuperscript{51}

These cases are instructive because they demonstrate that Commerce has no obligation to consider whether a respondent intentionally conducted targeted dumping or the reasons for such differences in the respondent’s sales prices to various purchasers, regions, or time periods.

3. Application of the A-T Methodology with Zeroing to All Sales if Targeted Dumping is Found

The CIT confirmed that Commerce has discretion to apply the A-T methodology to not only targeted sales, but all of a respondent’s sales, when targeted dumping is found. Former Section 351.414(f)(2) of the Department’s regulations, known as the “limiting rule,” provided that “normally” Commerce would limit the application of the A-T methodology to sales found to be targeted.\textsuperscript{52} In 2008, Commerce published a Federal Register notice that it was immediately withdrawing the limiting rule and would no longer be bound by it.\textsuperscript{53} In 2013, the CIT found that Commerce violated its obligation under the Administrative Procedure Act to provide notice and opportunity for comment prior to the rescission of the limiting rule, rendering its 2008 Withdrawal Notice invalid.\textsuperscript{54} As a result, Commerce issued a new notice and comment proceeding formally withdrawing the limiting rule.\textsuperscript{55}

Nonetheless, in Mid Continent Nail Corp. v. United States, a challenge to a Commerce original investigation determination, the CIT continued to find that Commerce had improperly withdrawn the limiting rule.

\textsuperscript{51} Id. at 1354–55.

\textsuperscript{52} 19 C.F.R. § 351.414(f)(2) (1997). The Preamble to the limiting rule explained that the Department would consider applying the A-T methodology to all sales, rather than only targeted sales, when, for example, “the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company” or when “the Department recognizes that {} a firm engages extensively in the practice of targeted dumping . . . .” Antidumping Duties and Countervailing Duties, 62 Fed. Reg. 27,296, 27,375 (May 19, 1997).


\textsuperscript{54} Gold East Paper Co. v. United States, 918 F. Supp. 2d 1317 (Ct. Int’l Trade 2013).

with the 2008 Withdrawal Notice. Thus, on remand, the Department was ordered to apply the limiting rule by applying the A-T methodology to only those sales Commerce found were targeted sales. Commerce complied on remand, albeit under protest, which reduced one respondent’s weighted-average dumping margin from 6.09% to 2.68% (using the A-T methodology for targeted sales) and another respondent’s margin from 2.51% to 0.00% (using the A-A methodology for all sales because the dumping margin under both the A-A methodology and the A-T methodology were de minimis).

However, in Apex Frozen Foods Private Ltd. v. United States, a challenge to the results of a Commerce administrative review, the CIT rejected the same arguments successfully made in Mid Continent. Because the limiting rule applied only to investigations and, though the limiting rule technically applied to investigations in 2012, Commerce did not believe that the limiting rule controlled at all when it began applying targeted dumping analyses to administrative reviews. Further, the CIT noted that Commerce had never limited the A-T methodology to targeted sales in a review. The CIT explained that, “Commerce applied A-T across the board to reveal dumping hidden by sales that were neither targeted nor dumped,” an approach that “served the statute’s purpose and warrants appropriate deference.” Accordingly, the CIT affirmed the Department’s application of the A-T methodology to all sales once targeting was found in administrative reviews.

Now that the limiting rule has been properly withdrawn, Commerce is free to apply the A-T methodology to all sales once targeting is found in both original investigations and administrative reviews. Thus, the removal of the limiting rule raises the stakes for Commerce’s targeted dumping analysis, particularly the Department’s “sufficiency” test and

56. See Mid Continent Nail Co. v. United States, 999 F. Supp. 2d 1307, 1321–23 (Ct. Int’l Trade 2014). In Beijing Tianhai Indus. Co. United States, 7 F. Supp. 3d 1318, 1332–38 (Ct. Int’l Trade 2014), however, the CIT found that improper withdrawal of regulation was harmless error as applied to plaintiff in that case.

57. Mid Continent Nail, 999 F. Supp. 2d at 1323.


60. Apex Frozen Foods, 37 F. Supp. 3d at 1303.

61. Id. at 1302.
“meaningful difference” explanation, as discussed below in Part III.B.4 and III.B.5.

4. Clarification of the Sufficiency Test in the Department’s Targeted Dumping Analysis

Over the course of 2014, through a series of appeals and remands, the CIT and Commerce fleshed out the first step of the targeted dumping analysis—whether there are sufficient sales that are targeted for Commerce to find a “pattern” under the statute.

In Timken I, after noting that Commerce had provided inconsistent explanations of whether the “sufficiency” or “de minimis” test was part of the requisite pattern in 19 U.S.C. § 1677f-1(d)(1)(B)(i) or guidance for the Department’s discretion to apply the A-T methodology under 19 U.S.C. § 1677f-1(d)(1)(B), the CIT upheld the Department’s decision to not apply the A-T methodology despite finding targeted dumping under the Nails test.62 In the underlying administrative review, Commerce found that the volume and value of sales that passed the Nails test was insufficient as a percentage of the volume and value of all U.S. sales to warrant the use of the alternative A-T methodology.63 The CIT affirmed the Department’s sufficiency determination as within the Department’s discretionary authority, granted by the word “may” in section 1677f-1(d)(1)(B), to apply the A-T methodology.64 The CIT found this was consistent with the Department’s statements in the Zeroing Final Modification that it would “determine on a case-by-case basis whether it is appropriate to use an alternative comparison methodology” in reviews.65 Noting that nothing in the statute defines a “targeted sale” and that Commerce’s use of the Nails test to define the statutory targeted dumping pattern had been affirmed by the courts as a reasonable interpretation of the statute, the CIT rejected the plaintiff’s argument that the Nails test was only useful for identifying whether targeting occurred, not for identifying targeted sales.66 Finally, the CIT rejected plaintiff’s challenge to Commerce’s use of sales that passed the Nails test as the numerator (rather than all sales to the targeted groups) and all U.S. sales as the denominator in the ratio Commerce used in its sufficiency determination:

63. Id. at 1284.
64. Id. at 1289–90.
65. Id. at 1290.
66. Id. at 1293.
Because the *Nails* test defines what is a “targeted” sale, Commerce reasonably rejected [plaintiff’s] suggestion that all sales to the targeted group(s) be included in the numerator. The sales that did not pass the *Nails* test are by definition not part of the pattern identified pursuant to 19 U.S.C. § 1677f-1(d)(B)(i). In determining whether the identified pattern is sufficient to warrant consideration of the A-T methodology, it would make little sense for Commerce to include sales that did not form part of that pattern in the numerator of the ratio. Commerce’s decision to use only those sales that passed the *Nails* test as the numerator thus was reasonable and in accordance with law.\(^\text{67}\)

In *Timken Co. v. United States* (*Timken II*), the CIT again affirmed the Department’s decision to not apply the A-T methodology despite finding some targeted sales as within the discretion that Congress granted to the Department in section 1677f-1(d)(1)(B).\(^\text{68}\) The CIT noted that, though the Department did not identify a specific sufficiency or *de minimis* threshold percentage of targeted sales for Commerce to use the A-T methodology, “no reasonable person could find the miniscule percentage of sales found to be targeted in this case to be sufficient.”\(^\text{69}\) Thus, the CIT found that Commerce’s explanation for its sufficiency determination was adequate:

> The court does not hold that Commerce is excused from providing an explanation for its sufficient determination. The court holds rather that because Commerce relied on the default A-A methodology, the percentage of sales that were targeted were very small, and [plaintiff] failed to present a detailed argument to the court why the small number of targeted sales in this case should be considered sufficient to require the use of the A-T methodology, Commerce’s explanation was adequate for the court to determine that it acted reasonably.\(^\text{70}\)

In contrast to the two above *Timken* cases, the CIT remanded the Commerce Department’s application of its targeted dumping suffi-

\(^{67}\) *Id.* (internal citations omitted).


\(^{69}\) *Id.* at 16–17.

\(^{70}\) *Id.* at 18–19.
ciency determination in an administrative review in *Kelco*. In *Kelco*, a plaintiff received a 5.86% preliminary margin in an administrative review. For the final results, the plaintiff received a 12.06% margin because the Department applied the A-T methodology after using the *Nails* test to find some of the plaintiff’s sales constituted targeted dumping and found the plaintiff’s sales comprised more than a *de minimis* share of its total U.S. sales. The CIT “return[ed] the under-cooked *de minimis* dish to the administrative kitchen” for Commerce to explain the purpose of the *de minimis* test within the targeted dumping statutory scheme—as part of the *Nails* test to determine whether targeted sales are voluminous enough to constitute a pattern of targeted dumping or as a guide for the Department’s discretion to apply the A-T methodology, or both—and to explain the “quantum of an exporter’s sales that must be targeted to fall above or below the *de minimis* threshold.” The CIT noted that the Department never defined a specific *de minimis* percentage threshold in any other administrative reviews under other AD orders. The CIT distinguished this outcome from that in *Timken I*. First, in *Kelco*, Commerce applied the “exceptional” A-T methodology while Commerce applied the default A-A methodology in *Timken I*. Second, the plaintiff specifically asked Commerce to find its targeted sales were *de minimis* while the plaintiff in *Timken I* did not.

In the remand resulting from *Kelco*, the Department explained that the sufficiency test evaluates the results of the *Nails* test to determine whether the requirement under Section 777A(d)(B)(i) of the Act has been satisfied:

> [S]imply because one or more sales for a given [specific product] pass the *Nails* test, it does not necessarily follow that, considered in relation to the total volume of the respondent’s export sales, the results of the *Nails* test are sufficient to determine that there exists a pattern of prices that differ significantly by purchaser, region or period of time. This approach has been considered part of the Department’s decision making process since the Department withdrew the targeted

72. Id.
73. Id.
74. Id. at 1327–30.
75. Id. at 1328.
76. Id. at 1329 n.14.
dumping regulations and began applying the alternative A-to-T method to all U.S. sales rather than to only those sales which passed the Nails test (i.e., the “limiting” rule of 19 C.F.R. 351.414(f)(2) (1997)).

The Department also reiterated that Congress granted the agency the discretion to use, or not use, the alternative A-T methodology once the statutory targeted dumping criteria were met. In that sense, the Department “includes the consideration of the sufficiency test both as part of its determination whether the requirement under Section 777A(d)(1)(B)(i) has been satisfied, and as part of the exercise of its discretion to apply an alternative comparison method.” In response to the court’s order, on remand the Department announced a five percent of sales by quantity sufficiency threshold. Finally, the Department found that the arguments raised by plaintiffs on remand—regarding the agency’s alleged failure to explain its finding that plaintiff’s targeted sales make a “meaningful difference” in plaintiff’s margin calculation to warrant the A-T methodology—were not part of the remand order. This issue, however, was addressed in several cases discussed below.

5. Department’s Meaningful Difference Explanation in its Targeted Dumping Analysis

The CIT’s 2014 decisions began to clarify the requirements of the Department’s meaningful difference explanation in its targeted dumping analysis. In Beijing Tianhai Indus. Co. v. United States, the CIT remanded Commerce’s final determination of an original investigation due to Commerce’s failure to adequately explain why the normal A-A methodology or T-T methodology could not take into account the difference in pricing, as required pursuant to 19 U.S.C. § 1677f-1(d)(1)(B)(ii). Specifically, the CIT found the Department’s follow-

78. Id. at 14–15 (citing Timken I and Timken II).
79. Id. at 15.
80. Id.
81. Id. at 20. This was affirmed on remand. See CP Kelco OY v. United States, No. 13-79, slip op. 15-24 (Ct. Int’l Trade Mar. 25, 2015).
The Department finds that the pattern of price differences identified cannot be taken into account using the standard A-to-A methodology because the A-to-A methodology conceals differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Thus, the Department finds, pursuant to [19 U.S.C. § 1677f-1(d)(1)(B)(ii)], that application of the standard A-to-A methodology would result in the masking of dumping that is unmasked by application of the alternative A-to-T methodology when calculating [plaintiff’s] weighted-average dumping margin.\footnote{Id. at 1331.}

In doing so, the CIT noted that “any time a pattern of disparate pricing exists, averaging the prices will ‘mask’ the differences in individual prices.”\footnote{Id. at 1332.} The CIT explained that 19 U.S.C. § 1677f-1(d)(1)(B)(i) requires a pattern of targeted dumping, whereas 19 U.S.C. § 1677f-1(d)(1)(B)(ii) requires an explanation of why the pattern of targeted dumping cannot be taken into account using the standard methodologies.\footnote{Id.} In this case, the CIT found that “the Department has supplied a conclusion but not an explanation.”\footnote{Id.}

On remand, Commerce explained that the plaintiff’s dumping margin calculated using the A-A methodology was below the \textit{de minimis} threshold,\footnote{The \textit{de minimis} threshold is 0.5\% for dumping margins and countervailable subsidy rates for administrative reviews. See 19 C.F.R. § 351.106(c)(2) (2011).} but the plaintiff’s dumping margin calculated using the A-T methodology was 6.62\%.\footnote{See High Pressure Steel Cylinders from the People’s Republic of China, Beijing Tianhai Indus. Co. v. United States, No. 12-203, slip op. 14-104, at 5 (Dep’t of Commerce Jan. 7, 2015) (final results of redetermination pursuant to court remand), http://enforcement.trade.gov/remands/14-104.pdf.} Thus, Commerce concluded that the A-A methodology could not account for the price differences.\footnote{Id. at 6. Commerce also explained that it could not use the T-T methodology in this case because it is an investigation of a non-market economy country (in which the Department used the factors of production method to determine normal value and, thus, there was no correspond-}
Similarly, in *Apex Frozen Foods*, the CIT sustained the Department’s explanation for why the A-A methodology could not account for targeted dumping in the final results of the underlying administrative review: the plaintiff’s margin using the A-A methodology was zero percent and using the A-T methodology was 3.49%. In doing so, the CIT rejected plaintiff’s argument that Commerce should have compared the A-A and A-T methodologies without zeroing under either method to ensure an “apples-to-apples” comparison, explaining that the statute does not require zeroing or non-zeroing and that Commerce had significant discretion to decide:

The court holds that the agency’s comparison reasonably achieved the statute’s purpose. As mentioned above, Congress enacted § 1677f-1(d)(1)(B) to combat a type of dumping that is difficult to remedy. When exporters target their sales, those sales may disproportionately affect U.S. producers who sell to particular customers or regions or in specific time periods. Nonetheless, if exporters counterweight their targeting with above-fair-value sales, then A-A, which averages export prices and offsets negative margins, could yield an understated anti-dumping rate. Yet A-T neither averages export prices nor offsets. This approach ensures that the final rate reflects every instance of dumping, even if an exporter balanced its targeted with above-fair-value sales. Hence, by comparing [plaintiff’s] nonzeroed A-A rate to its zeroed A-T rate, the agency found the precise amount of dumping—including dumping from targeted sales—that A-A masked. Commerce could then decide whether that dumping was great enough to merit an exceptional remedy. This method fulfills the statute’s aim and deserves deference.

The CIT also rejected plaintiff’s argument that Commerce’s meaningful difference threshold, crossing the *de minimis* threshold, was arbitrary and result-oriented. Specifically, the CIT noted that it may be unreasonable and arbitrary to find a meaningful difference if the exporter’s rate were 0.45% under the A-A comparison and 0.55%
under the A-T comparison, but that in the case before it the A-T comparison yielded a margin (3.49%) nearly seven times the minimum threshold needed to impose duties.92 Thus, the CIT found that the two comparison methodologies “offered a stark choice”:

Commerce could fully counteract [plaintiff’s] targeted dumping by applying A-T, or it could counteract none of [plaintiff’s] targeted dumping by applying A-A. Because A-T would yield some duties but A-A would yield none, Commerce reasonably decided that the difference between the rates was “meaningful,” and that A-A could not account for dumping from targeted sales.93

The CIT distinguished Kelco,94 which was remanded for Commerce to explain its test to determine if targeted sales comprised more than a de minimis share of total sales (the first step of the targeted dumping inquiry), and Apex Frozen Foods, which examined the use of a de minimis threshold to determine if the A-A methodology could account for the targeted dumping (the second step of the targeted dumping inquiry).95

C. Lessons Going Forward

The CIT’s 2014 cases on Commerce’s application of, and analysis under, the targeted dumping statute provide several salient takeaways for U.S. importers, as well as foreign producers and exporters.

First, Commerce may apply its targeted dumping analysis in either investigations or administrative reviews of market economy and NME countries. Second, the respondent’s intent—or why there may be a pattern of targeted dumping—is not relevant to the analysis under the statute. Thus, a respondent may be found to have targeted sales without any prior knowledge or intent of doing so. Third, without the limiting rule (now properly withdrawn), Commerce may apply its A-T methodology to all of a respondent’s sales once targeted dumping has been

92. Id. at 1299 & n.6.
93. Id. at 1299.
94. Supra Part III.B.4.
95. Id. at 1299. But note that in Kelco, the Department explained that the sufficiency/de minimis test was used for both the first step of determining whether a pattern existed and as a guide for the Department’s discretion to apply the A-T methodology. See Kelco Remand Results, supra note 77 at 15; CP Kelco OY v. United States, No. 13-79, slip op. 15-24 (Ct. Int’l Trade Mar. 25, 2015).
Fourth, Commerce’s five percent *de minimis*–sufficiency test announced in the remand of *Kelco* is used for both determining whether a pattern of targeted dumping exists and as a guide for Commerce’s decision to use the A-T methodology. Finally, there is one bright line for Commerce’s meaningful difference determination—if using the A-A methodology yields a below-*de minimis* margin and using the A-T methodology yields an above-*de minimis* margin. Beyond that, however, it remains unclear what parties must show to demonstrate or refute a meaningful difference between using the two methodologies.

Though there will likely be new issues and challenges that arise from the Department’s differential pricing and other new tests for its targeted dumping analysis, the 2014 CIT decisions under the old *Nails* test should form the foundation of many challenges to the Department’s use of the targeted dumping statute going forward.

**IV. Conclusion**

The above summaries and analysis of 2014 CIT reviews of post-sale price adjustments and targeted dumping demonstrate attempts of the Department and the Court to ensure that the AD law strikes the perfect balance of providing the domestic industry complete relief from dumped imports without punishing U.S. importers, purchasers, or foreign producers and exporters. This Article also illustrates the importance for industry to understand its pricing practices—some, such as targeted dumping, which may be unknown to either the buyer or seller—in light of Commerce rules and practice to minimize exposure to antidumping duty liability and maintain their presence in the U.S. market.

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96. Under the Department’s new differential pricing test for targeted dumping, if less than thirty-three percent of the total sales are targeted, Commerce applies the A-A methodology to all sales; if between thirty-three and sixty-six percent of the total sales are targeted, Commerce applies the A-A methodology to non-targeted sales and the A-T methodology to targeted sales; and if more than sixty-six percent of the total sales are targeted, Commerce applies the A-T methodology to all sales.

97. Under the Department’s new differential pricing test for targeted dumping, Commerce finds a meaningful difference if using the A-T methodology changes a dumping margin from below to above *de minimis* or if the dumping margin changes by more than twenty-five percent.