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“On Average: Pricing Comparisons Under the Revised Antidumping Law”

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**ON AVERAGE:
PRICING COMPARISONS UNDER THE REVISED ANTIDUMPING LAW**

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I. INTRODUCTION

The methodology used to make price comparisons is perhaps the most fundamental element of any antidumping calculation.¹ Over the fifteen years prior to the enactment of the Uruguay Round Agreements Act, the U.S. Department of Commerce developed fairly standardized methods for comparing prices. The central element of the Department's dumping analysis was the comparison of weighted average home market (or third country)² prices to individual (or "transaction-specific") U.S. prices (the "average-to-transaction" approach). Section 777A (d) of the Uruguay Round Agreements Act³, however, may overturn many of the settled aspects of antidumping pricing comparisons. For the investigation phase of antidumping proceedings⁴, the URAA price averaging provision limits the use of the average-to-transaction approach to exceptional cases, and generally

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¹ Another central element of the antidumping calculation is the treatment of adjustments to prices in both markets. In this paper, the terms "prices," "home market prices," and "U.S. prices" are used to represent net prices (i.e., prices after adjustments), as normally used by the Department of Commerce in its pricing comparisons.

² Throughout this paper, the terms "home market sales" and "home market prices" should be taken to construe either home market or third country sales or prices, depending upon market viability as determined by Section 773 (a)(1) of the Tariff Act of 1930, as amended. All of the arguments herein with respect to home market-to-U.S. pricing comparisons apply equally to third country-to-U.S. pricing comparisons.

³ Section 777A (d) of the Uruguay Round Agreements Act (the "URAA"), H.R. 5110, 103d Cong., 2d Sess., reprinted in H.R. Doc. 316, 103d Cong., 2d Sess. (1994) [hereinafter the "price averaging provision"].

⁴ Section 777A(d)(2) of the URAA explicitly limits the use of the average-to-average approach to investigations. This limitation of the average-to-average approach from application in annual reviews has already come under fire and is likely to be the subject of a World Trade Organization appeal. See "Enacted and Rejected Amendments to the Antidumping Law: In Implementation or Contravention of the Agreement?", Alan F. Holmer, Gary N. Horlick, and Terence P. Stewart, in The International Lawyer, Vol. 29, No. 2, (1995) 483, 492-3.

requires the comparison of average home market prices to average U.S. prices (the "average-to-average" approach).

Whereas the number of different averaging methods applied by Commerce under the old law were limited, the URAA allows for many different price averaging methods. Moreover, as illustrated in this paper, the *method* of price averaging can have a major impact on the margin of dumping. Neither the World Trade Organization Antidumping Agreement,⁵ the implementing legislation, the legislative history, nor the Statement of Administrative Action⁶ provide much guidance for choosing among the alternatives. Thus, given its importance to the outcome in many cases, the basic mechanics of price averaging will receive new attention over the next several years.⁷

This paper reviews the development of price averaging methods prior to the enactment of the URAA, and suggests issues and methods of analysis which are likely to become important under the new law. A whole new host of analytical methods, including statistical analysis of computerized sales files, may be used to determine the appropriate method for averaging prices in each case.

II. PRICE AVERAGING UNDER THE OLD LAW

Prior to the enactment of the URAA, the Department of Commerce had settled upon fairly standard and predictable methods of comparing U.S. prices to home market prices. Commerce policy had evolved over time to the point that in nearly every case, prices of individual U.S. sales, regardless of customer, region, or date, would be compared to the average home market prices of the identical, or most similar product, at the same level of

⁵ Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994 [hereinafter "Antidumping Agreement"], reprinted in H.R. Doc. 316, Vol. I, *supra*.

⁶ The Uruguay Round Agreements Act Statement of Administrative Action 167, in Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, reprinted in H.R. Doc. 316, Vol. I., *supra* 656, 842 (1994) [hereinafter "SAA"].

⁷ Further contributing to the importance of price averaging are the revised sales below cost provisions of the URAA (Section 773 (b)), which, in comparison to the pre-URAA investigations, should result in fewer instances of Normal Value being based on Constructed Value.

trade.⁸ With respect to the mechanics of the pricing comparison, the major areas for maneuver and argumentation under the pre-URAA antidumping regime were as follows:

A. Product Matching

Since standard Departmental practice was to compare only sales of home market products which were identical or most similar to the product sold in the U.S.⁹, interested parties often engaged in extensive arguments on the definitions of "identical," as well as the most appropriate method of determining "most similar."

B. Level of Trade

A fairly recent development was the Department's decision to try to match U.S. sales and home market sales by level of trade.¹⁰ In some cases, parties came up with highly creative definitions of levels of trade, in order to optimize pricing comparisons.

C. Temporal Period Over Which to Average Prices:

1. Standard Pre-URAA Practice

With respect to the temporal period for price averaging prior to the URAA, the Department applied two basic methods. In investigations, the Department generally compared individual U.S. sales to home market averages calculated over its standard six month Period of Investigation ("POI").¹¹ In annual reviews, the Office of Compliance usually compared individual U.S. sales to monthly average home market prices, the actual month of the home market comparison sale(s) being that which was closest to the month of

⁸ For a thorough explanation of pre-URAA methods of calculating antidumping calculations, See Antidumping Manual, Rev. 7/93, Chapter 6, Import Administration, available in Room B099, Department of Commerce, Washington, D.C. Although the Department may not recognize the Antidumping Manual as an authoritative source, it nevertheless is an excellent summary of Departmental pre-URAA methodological practices.

⁹ Antidumping Manual *supra* Chapter 8, 3-8.

¹⁰ See "Import Administration Policy Bulletin 92/1: Matching at Levels of Trade" (July 9, 1992) available in Room B099, U.S. Department of Commerce, Washington, D.C.

¹¹ See Antidumping Manual *supra*, Chapter 6, 6.

the U.S. sale, as determined by the so-called "90/60" rule.¹² Both methods reflect the Department's general reluctance to average U.S. prices, based on a belief that averaging U.S. prices over multiple sales would inappropriately offset dumping margins on individual U.S. transactions.

The oft-cited criticism of the Department's temporal matching methods under the pre-URAA law was that it is inherently biased in favor of creating dumping margins.¹³ By comparing transaction-specific U.S. prices to average home market prices, and allowing no offset for cases where the U.S. price exceeded home market price, the old law methods could create dumping margins when in fact prices in both markets at any given moment in time were equal. For example, in a market with changing prices and/or exchange rates, the comparison of an average home market price to a transaction-specific U.S. price would always create dumping margins, even if the prices in both markets at any discrete point in time were identical.¹⁴ In addition, because buyer knowledge in the real world is always imperfect, a certain level of price fluctuation is inevitable.¹⁵ The comparison of

¹² The "90/60" rule works as follows: First, for each product sold in the U.S., the Department determines the comparable home market product, defined as the identical or most similar home market product sold during the Period of Review. The Department then tries to match the U.S. sale to the home market sale of the same product in the same month. If, within a particular month in which there is a U.S. sale, there is no home market sale of the comparison product, the Department matches the U.S. sale to the home market sale of the comparison product, in the prior month. If there is no sale in the home market of the comparison product in the prior month, the Department searches for a comparison product sale in the previous month. In total, the Department's program searches in monthly increments for a sale of the comparison product in the home market according to the following pattern:

$$\begin{array}{ccccccc} \text{Home Market Sale} = & \text{Month } t & \text{-----}> & \text{Month } t-1 & \text{-----}> & \text{Month } t-2 & \text{-----}> \\ & \text{Month } t-3 & \text{-----}> & \text{Month } t-1 & \text{-----}> & \text{Month } t+2 & \end{array}$$

If, after having cycled through all six months as illustrated above, the Department finds no matching home market sale it compares the U.S. sale to constructed value. Note that, in a global market of increasing prices, this matching method is biased in favor of lower dumping margins, as it searches the home market for sales in prior, lower-priced months before turning to subsequent, higher-priced months.

¹³ See, e.g., "The Economic Implications of the Administration of the U.S. Unfair Trade Laws," Richard Boltuck, Joseph F. Francois, and Seth Kaplan, in Down in the Dumps, ed. by Richard Boltuck and Robert E. Litan, The Brookings Institution, (1991), 152, 155-157, 160.

¹⁴ A numerical example showing the bias is set forth in Down in the Dumps, *supra*, 37.

¹⁵ A large part of the problem in reaching agreement on the appropriate method of averaging prices is that there has been virtually no empirical investigation of "normal" pricing behavior. Clearly, there are a number of problems in trying to reach some conclusions on "normal" behavior with respect to pricing. For example, what is "normal" for one product may be "abnormal" for another. Nevertheless, without any empirically-based definitions of normal price fluctuations, it is impossible to design averaging principals on anything other than arbitrarily-determined thresholds.

individual, sporadically changing prices in one market to average prices in another market always creates dumping margins. The standard defense of the average-to-transaction matching method was that it was necessary to uncover "targeted," or "surgical" dumping (i.e., the alleged practice of selectively dumping to gain U.S. sales).¹⁶ Despite its apparent bias, the comparison of average home market prices to transaction-specific export prices found acceptance in other countries, including the European Community.

2. Exceptions to the Standard Practice

Prior to the enactment of the URAA, there were a few instances in which the Department would deviate from its standard temporal matching methods. In investigations, the Department calculated home market prices over a period shorter than the POI (generally on a monthly average basis) whenever it found that prices in one or both markets were consistently changing over time. The three most common circumstances in which the Department calculated home market prices on the basis of monthly averages (or some period shorter than six months) were for hyperinflationary economy countries,¹⁷ seasonal products,¹⁸ and high-tech products with rapidly falling prices.¹⁹

¹⁶ See, e.g., "Administration of the Antidumping Law: A Different Perspective", by Terence P. Stewart in Down in the Dumps, *supra*, 288, 306-307.

¹⁷ Antidumping Manual, *supra* Chapter 8, 61-65. Note that the Department's recently-redrafted standard questionnaire suggests a reduction in the hyperinflationary threshold from 50 percent to 25 percent. See "United States Department of Commerce, Import Administration; Office of Antidumping Investigations, Request for Information" (Standard Version) Section A, question 6.c., available from the U.S. Department of Commerce, Washington, D.C., USA.

¹⁸ See Fresh Kiwifruit from New Zealand, 57 Fed. Reg. 13695 at 13699 (Final 1992), (The Department divided the twelve month POI into six pricing periods for purposes of calculating home market price). In Fresh and Chilled Atlantic Salmon from Norway, 56 Fed. Reg. 7661 at 7674 (Final 1991), the Department stated with regard to pricing:

We noted two discernable trends. First, there was a significant increase from month to month in FMVs from September through December, with another notable increase in January 1990, continuing in February. For this reason, *i.e.*, because the time of sale is closely connected to the price charged, the Department agrees with respondent that a "narrower" window should be used for fair value comparisons, and accordingly weight averaged FMVs by month.

¹⁹ See, e.g., Erasable Programmable Read Only Memories (EPROMS) from Japan, 51 Fed. Reg. 39680, 39682 (Final 1986); Dynamic Random Access Memory Components (256K DRAMs) from Japan, 51 Fed. Reg. 9475, 9476 (Final 1986) "[W]here foreign market value was based on home market prices, we calculated a foreign market value . . . for each month of the period of investigation, due to sharp declines in monthly prices."

In annual reviews, the Department infrequently averaged prices over a period shorter than the period of review ("POR"), whenever it was faced with a large number of transactions, and it determined that prices were constant throughout the POR.²⁰

Finally, in the case of "highly perishable" products (both investigations and reviews), the Department would average home market and U.S. prices over a monthly period, in order to eliminate margins caused by "distress" sales.²¹ The development of the "perishable product" exception is worth reviewing in some detail, in that it is reflective of the Department's increasing reluctance during the pre-URAA years to average U.S. prices. In a 1983 case involving Fall Harvested Round White Potatoes from Canada, the Department determined that potatoes, which clearly had a shelf life extending beyond a few days, were a "perishable" product, and eligible for the monthly average price exception.²² A few years later, the Department further separated fresh agricultural products into those which were "perishable" and "highly perishable." In Fresh Kiwifruit from New Zealand, the Department concluded that kiwifruit, which has a shelf life comparable to that of potatoes, was not "highly perishable", and therefore ineligible for monthly average U.S. prices.²³ The Department explicitly disavowed itself of its earlier finding in Fall Harvested Round White Potatoes from Canada that monthly average prices in both markets should be used for agricultural products which could be stored over several months.²⁴ By the time of the enactment of the URAA, the only products found to be eligible by the Department for monthly averaging treatment in both markets were cut flowers such as carnations and roses, which have shelf lives measured in days.²⁵

²⁰ See, e.g., Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof from Japan, 57 Fed. Reg. 4975, 4977 (Final 1992); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et. al, 57 Fed. Reg. 28360, at 28368-70 (Final 1992).

²¹ See, e.g., Fresh Cut Roses from Colombia, 60 Fed. Reg. 6980, 6988, 6989 (Final 1995); Fresh Cut Flowers from Colombia, 52 Fed. Reg. 6842 (Final 1987); Fresh Cut Flowers from Mexico, 53 Fed. Reg. 6361 (Final 1987); Frozen Concentrated Orange Juice from Brazil, 52 Fed. Reg. 8947 (Final 1987); Fall Harvested Round White Potatoes from Canada, 48 Fed. Reg. 51669 (Final 1983) The use of monthly average prices for highly perishable products has been upheld by the court. See Floral Trade Council v. United States, 775 F. Supp. 1492, 1500-2 (CIT 1991).

²² 48 Fed. Reg. 51669.

²³ 57 Fed. Reg. 13695, 13699-13700.

²⁴ *Id.*, 13700.

²⁵ In its very early years, the Department applied a "one-off" alternative method of measuring dumping for perishable products. In Certain Winter Vegetables from Mexico, 45 Fed. Reg. 20512 (Final 1980) the Department was faced with measuring price discrimination between the U.S. and the Canadian markets on a product where prices were highly volatile from day-to-day and occasionally from hour-to-hour. Rather than directly comparing prices, the Department used regression analysis to determine if price fluctuations in the

3. Methods Used to Determine Temporal Matching Periods Prior to the URAA

Although the pre-URAA antidumping proceedings in which the Department explicitly considered issues of temporal matching methods are extremely few in number, they provide a useful insight into some of the analytical issues which are bound to arise in post-URAA dumping investigations. Perhaps the most systematic analysis of averaging was developed in the annual reviews involving bearings. In the late 1980s, the Department found itself responsible for conducting reviews annually on millions of sales of different types of imported bearings from dozens of companies.²⁶ In its quest to simplify these annual reviews, the Department considered methods to streamline the dumping calculations. One of the simplification methods ultimately adopted was a test to determine if the standard and somewhat cumbersome "90/60" rule could be replaced by the use of a POR average to-transaction approach. To determine if POR averages could be used for FMV, Commerce developed a two-prong test of the relationship of prices and time. In Antifriction Bearings, the Department described the two statistical methods it applied to determine if annual, as opposed to monthly, averages would be appropriate:

Before deciding whether or not to calculate an annual average FMV, we measured the correlation between prices and time. In addition we compared the monthly weighted average price to the annual average price to determine if the variance in price was significant.²⁷

For the price variance test, the Department determined that annual averages would be representative of FMVs over the entire POI if more than 90 percent of the home market sales were made at monthly average prices within 10 percent of the annual average price.²⁸

U.S. market in comparison to those in the comparison market (Canada), were random or systematic. A very good legal and methodological analysis of the Winter Vegetables case is found in "Applying Agricultural Products to Perishable Agricultural Goods," by Stefan B. Herpel, Michigan Law Review, Vol. 80, No. 3 (1982), 524. Although the Department's method ultimately was upheld by the court (Southwest Florida Winter Vegetable Growers Assoc. v. United States, 584 F. Supp. 10 (CIT, 1984)), it was never again applied in any administrative proceeding. Nevertheless, the methodologies developed in Fresh Winter Vegetables could be useful in determining whether or not it is appropriate to compare average-to-transaction prices, under Section 777A(d)(1)(B). See discussion in III.B.2., below.

²⁶ The Department's final determination in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. 18992, 18998 (Final 1989) lists 25 bearing manufacturers alone which were subject to review in the original investigation.

²⁷ Antifriction Bearings, *supra* 57 Fed. Reg. 28300, 28369.

²⁸ *I.d.*, 28368. The relevance of the price variance test to the temporal period for averaging is unclear. An argument can be made that averages should be calculated over shorter periods whenever there is a strong correlation between prices and time, regardless of frequency of individual price variance test. In fact, the price variance test may be more appropriate to determining when, rather than how, to average U.S. prices,

In the price correlation test, using statistical regression techniques, the Department tested to determine if there was a statistically significant upward or downward trend in home market prices over the POR. While this method was used primarily in bearings annual reviews, it occasionally found its way into other annual reviews.²⁹ The same test was also applied in at least one investigation to justify the use of monthly average prices in cases where prices and time were correlated, and prices exhibited a certain level of volatility.³⁰ Even though Section 777A(d)(2) of the URAA eliminates the price variance test in annual reviews,³¹ it nevertheless may find a new life in investigations, as the Department develops methods for determining how to average prices.

III. PRICE AVERAGING UNDER THE NEW LAW

Section 777A(d)(1)(A) of the URAA provides that dumping margins in investigations now will be calculated on the basis of comparing either weighted-average home market prices to weighted-average U.S. prices, or transaction-specific home market prices to transaction-specific U.S. prices. The law also allows, as discussed in more detail below, the use of the old average-to-transaction approach in certain limited cases.

A. General Rules for Comparing Average Prices in Both Markets

Both the URAA and the SAA clearly indicate that the average-to-average-approach is to be the standard method for comparing prices.³² The Commerce Department has been provided with virtually no guidance, however, for determining when and how to average home market and U.S. prices. Neither the House nor the Senate Report cast any additional light on the how to choose among the averaging alternatives.³³

under Section 777A(d)(2) of the URAA.

²⁹ See Bicycle Speedometers from Japan, 58 Fed. Reg. 42289 (Preliminary 1993); Industrial Belts and Components; Whether Cured or Uncured, From Japan, 56 Fed. Reg. 57513 (Preliminary 1991).

³⁰ See Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea, 58 Fed. Reg. 15467, 15476 (Final 1993). In Ferrosilicon from Venezuela, 58 Fed. Reg. 27522, 27526, (Final 1993), the Department stated that because of time constraints, it would only test for price variance in investigations when the issue is raised by an interested party.

³¹ Section 777A (d)(2) requires the use of monthly average prices in annual reviews.

³² The clause describing average-to-average and transaction-to-transaction pricing comparisons (Section 777A(d)(1)(A)) is labelled "General" and the clause describing average-to-transaction pricing comparisons (Section 777A(d)(1)(B)), is labelled the "Exception." See also, SAA, 842-843.

³³ See Senate Report No. 103-412, URAA, November 22, 1994, 79; House Report No. 103-826, Part I, URAA October 3, 1994, 98-99. The language in the House and Senate reports relating to price averaging is limited to a very general discussion of the change from the average-to-transaction approach to the multiple

The only clue to the intent of the government negotiators or implementing legislation framers is provided by the SAA, which states:

In determining the comparability of sales for purposes of inclusion into a particular average, Commerce will consider factors which it deems appropriate, such as the physical characteristics of the merchandise, the region of the country in which the merchandise is sold, the time period, and the class of customer involved.³⁴

This reference to the alternative factors which Commerce should consider in determining the calculation of a "particular average" strongly suggests that the Administration intended that averaging be approached on a case-by-case basis. The statement also raises a number of possible averaging methods which run counter to pre-URAA practice.

1. Averaging Prices Across Products.

The possibility that the Department may average prices across unspecified product ranges clearly is at odds with the evolution of Departmental matching methods, which has consistently moved in the direction of greater product specificity.³⁵ A strong case for cross-product averaging, however, can be made in situations where time or region is a more important determinant of price than minor physical differences.³⁶

2. Averaging Prices Over Time

Although the SAA states no specific or any preferred time period over which to average prices, the Department, in its first post-URAA determination in an investigation, expressed its intent to generally average prices in both markets over the Period of

approaches under the new law. It is important to note that neither report expresses any defense or support for inclusion of the price averaging provision in the URAA, reflecting, undoubtedly, the objections of many U.S. industries to price averaging.

³⁴ SAA, 842.

³⁵ In its early days of administering the antidumping law, the Department generally left the definition of unique product for matching purposes up to the responding companies. Companies would sometimes choose multiple models for comparison to a single U.S. model. As Commerce gained experience, however, it began to assert its own rules for matching and now routinely issues very narrow and precise instructions for determining identical and most similar products for matching purposes. See *Antidumping Manual, supra*, Chapter 4, 5-6.

³⁶ For example, a chemical product may be produced in a large number of different specifications to meet the specific requirements of different customers. The differences in physical characteristics and costs associated with the differences in specifications, however, could be quite small. If general price levels for the product are changing rapidly, then the timing of the sale could be a much more important determinant of price comparability than exact product specification.

Investigation.³⁷ As the POI in investigations normally will be one year,³⁸ the Department's decision in Polyvinyl Alcohol from Taiwan implies the use of annual average prices, which in the past have only been used in an extremely limited number of annual reviews involving large numbers of transactions.³⁹

As the period over which to calculate averages is likely to be the hottest issue in the average-to-average methodological debate, it is discussed in more detail in Section IV. below.

3. Averaging Prices By Region

Intra-regional price averaging raises some very interesting possibilities. The calculation of averages on a regional basis would only make sense for products with low value-to-weight ratios, where regional pricing differences can exist. Should Commerce decide to average prices on a regional basis, it could easily calculate region-by-region dumping margins. In regional injury cases, the U.S. International Trade Commission ("ITC") might find regional dumping margins to be highly useful, particularly since the URAA now directs the ITC to consider the magnitude of dumping margins in its injury determination.⁴⁰ Further, the regional dumping margins could be used as the basis for region-specific cash deposits and assessment, which are allowed under the URAA.⁴¹

4. Averaging Prices By Customer

In virtually every market, prices will vary by customer. A foreign producer, for example, may price more aggressively to large versus small end-users. Such differences in price levels may not necessarily be neutralized by matching home market and U.S. sales by level of trade. Before resorting to the average-to-transaction approach (discussed in more

³⁷ Polyvinyl Alcohol from Taiwan, Fed. Reg. 60 Fed. Reg. 52651, 52653, (Preliminary 1995).

³⁸ Section of the URAA generally requires that in cases involving allegations of below-cost sections, Commerce compare prices to costs over a one-year period. Given that below cost investigations are the norm rather than the exception, the POI in many, if not most cases, will be one year, as it was in Polyvinyl Alcohol from Taiwan, *supra*.

³⁹ See discussion in II.3.C. above. Note that the use of annual averages in reviews is explicitly prohibited under Section 777A(d)(2) of the URAA. Pre-URAA investigations where the Department extended the POI to one year were generally limited to seasonal agricultural products, in which case the Department used shorter-than-POI FMVs, or capital equipment, in which case the Department based FMV on Constructed Value.

⁴⁰ Section 771(7)(C)(iii)(V).

⁴¹ See Section 736(d) of the URAA.

detail at III.B.2 below), the Department may compare weighted average home market prices to U.S. prices averaged by customer, in cases where there are significant differences in prices charged to different customers.

B. Methods of Averaging in Exceptional Cases

In what are supposed to be limited instances, the pricing provision of the URAA allows two other methods of matching home market to U.S. prices: a transaction-to-transaction approach, as well as the old average-to-transaction method. The statute and legislative history are basically silent, however, with respect to determining when these exceptional methods should be applied. Thus, the Department has been left with the responsibility of defining the circumstances for applying these two alternative methods.

1. The Transaction-to-Transaction Approach

The rationale for including this option in the Uruguay Round antidumping text is unclear.⁴² For most cases, this method raises many conceptual problems and enormous methodological difficulties. For example, in cases involving large numbers of transactions, what criteria should be used for choosing the individual home market sale for comparing to each U.S. sale? If there are multiple home market sales of the same product at the same level of trade on the same day as the U.S. sale, how should the Department choose the one which is most comparable? Does it base its comparison on smallest quantity differences? Smallest price differential? Largest price differential?

Besides being incredibly difficult to design, the computer programming for transaction-to-transaction matching would require enormous processing time. For these reasons, the transaction-to-transaction approach probably will be limited to cases, as noted in the SAA, where there are very few sales in each market of custom-built products⁴³; or, in cases where there is only one sale of the most comparable sale in the home market.

2. The Average-to-Transaction Approach Under the New Law

The pricing provision of the URAA allows the Department to apply its old average-to-transaction approach in cases where "there is a pattern of export prices or constructed export prices) for comparable merchandise which differ significantly among purchasers,

⁴² According to at least one source, the U.S. negotiators apparently claimed that the "transaction-to-transaction" approach described U.S. practice with respect to annual reviews. See Holmer, Horlick and Stewart, "Enacted and Rejected Amendments to the Antidumping Law," *supra*, 492. If that is the case, then clearly U.S. negotiators (as are many people who deal with antidumping matters on general, theoretical, or policy levels) were not familiar with the specifics of antidumping calculation methods.

⁴³ SAA, 842

regions, or periods of time"⁴⁴ and, where such differences cannot be accounted for by adjusting the methods by which it averages U.S. prices.⁴⁵

The exception to the general average to average approach is intended to allow the Department to capture "targeted dumping" in its calculations.⁴⁶ Undoubtedly, the Department will be faced with a number of issues on applying the average-to-transaction approach under the new law, not the least of which is the procedures for assessing the applicability of the exception provision. Will an analysis of significant price differences require a special allegation on the part of Petitioners?⁴⁷ If so, what type of evidence would have to be presented?⁴⁸ Or, will the Department adopt as standard practice the analysis of pricing patterns in each investigation, as it currently does with respect to the arm's length test for related party sales?

Whatever its ground rules on investigating price fluctuations, the Department will have to define conditions under which it will apply the average-to-transaction approach. Both the Antidumping Agreement⁴⁹ and the URAA make it very clear that alternative averaging techniques are to be considered before the Department resorts to the comparison of average home market to individual U.S. prices. Most pricing differences resulting from differences in customers, regions, or time can be addressed by adjusting averaging techniques, as discussed above. For example, if the Department finds that a respondent is

⁴⁴ Section 777A(d)(1)(B)(i).

⁴⁵ Section 777A(d)(1)(B)(ii). Note that the exception clause also supports the position that the Department is not to apply the same averaging methods in each case, but must either apply the old average-to-transaction approach, or it adjusts its averaging methods, whenever there are significant, non-random, price differences within the POI.

⁴⁶ See Senate Report 103-412, *supra*, 79:

The exceptions are intended to permit Commerce to examine and take into account whether "targeted dumping" is occurring, which otherwise might be masked by the use of weighted average export prices (or constructed export prices).

⁴⁷ The legislative history states that the Department should make available to interested parties the data necessary to analyze pricing patterns, which implies a requirement for a specific allegation on the part of domestic interested parties. *Id.*, 79.

⁴⁸ For example, the existence of price differentials in themselves is not a sufficient condition for finding "targeted" dumping. Price volatility may be a normal characteristic of the market (as in the cases of perishable goods and fashion products), or changes in prices over time may reflect changing exchange rates. Perhaps the most concrete indication of targeted dumping is documented evidence of particular sales lost by U.S. companies to foreign imports because of aggressively low prices.

⁴⁹ Antidumping Agreement, *supra*, Article 2.4.2.

selling to particular customers at very low prices, it could calculate customer-by-customer average prices, or even calculate weighted average dumping margins as the sum of customer-specific, and "all other customer" dumping margins⁵⁰.

In developing its policies for applying the exception to the average-to-average approach, the Department may find that it may not be possible to develop standardized thresholds for "normal" price volatility that can be applied to all products. For example, as the Department has learned in past cases, prices for many agricultural and other perishable products are highly volatile due not only to the short shelf-life of the product (a supply factor), but also to large changes in the quantity sold associated with holidays (a demand factor)⁵¹. One possible way to separate "normal volatility" from "targeted dumping" on a case-by-case basis would be to compare statistically price volatility in each market. The assumption is that the level of price volatility in the home market is "normal" for the particular product, as a company cannot "dump" in its own home market.⁵² In some instances, Commerce could take greater price volatility in the U.S. as compared to the home market as evidence of targeted dumping.⁵³

IV. AVERAGING OVER TIME: A TEST CASE

A. The Relationship of Prices, Volumes, and Dumping Margins

It is intuitively obvious that if prices and exchange rates within both markets are constant throughout the POI, then the choice of the period over which to average prices should have no impact upon the magnitude of the dumping margins. If, however, prices

⁵⁰ From a programming standpoint, it is not particularly difficult for the Department to calculate weighted average dumping margins based on a combination of customer-specific average prices for some customers and average prices for all other customers. The Department would only have to program the computer to calculate some U.S. prices by specific customer codes, and all other prices for the remaining customer codes, and then calculate overall weighted average dumping margins in the conventional manner.

⁵¹ See, e.g., Fresh Cut Roses from Colombia, *supra*, 6988-6990.

⁵² See fn. 25, *infra*.

⁵³ Note, however, that evidence of higher U.S. price volatility alone may not always be sufficient proof of targeted dumping. For example, evidence was presented in Fresh Cut Roses from Colombia, *supra*, 6990-6992, that prices in Europe for cut roses were much less volatile than in the U.S. due to differences in consumption patterns and market maturity. Overall per-capita consumption of flowers in Europe was much higher and constant throughout the year. In the U.S., on the other hand, flower demand was highly correlated with certain holidays, and was lower overall. If relative price volatility is to be considered as evidence of targeted dumping, it may be appropriate to limit such consideration to markets of comparable demand patterns and maturity.

and/or exchange rates are changing, then different methods of averaging over time may produce significantly different results. If prices are changing, and the Department's intent is to measure the average level of price discrimination prevailing over the whole POI, then the dumping margin will be sensitive to the period chosen for averaging prices to the extent that:

- Prices or exchange rates, are changing with time; and,
- The temporal distribution of sales volumes in both markets are not parallel.

As shown in Table 1 below, in cases where pricing patterns in both markets are parallel, but sales volume distribution patterns are not, the dumping margins can be significantly different, depending upon the period over which average prices are calculated.

TABLE 1
Effect on Dumping Margin of Different Sales Volume Distributions

| CASE 1 | | | | | |
|-------------------|------------|------|--------------|------|----------------------------|
| Month | Monthly HM | | Monthly U.S. | | Monthly Dumping Margin |
| | Price (\$) | Qty. | Price (\$) | Qty. | |
| 1 | 1.50 | 1.00 | 1.395 | 1.00 | 7.5% |
| 2 | 1.45 | 1.20 | 1.349 | 1.00 | 7.5% |
| 3 | 1.40 | 1.40 | 1.302 | 1.00 | 7.5% |
| 4 | 1.35 | 1.60 | 1.256 | 1.00 | 7.5% |
| 5 | 1.30 | 1.80 | 1.209 | 1.00 | 7.5% |
| 6 | 1.25 | 2.00 | 1.163 | 1.00 | 7.5% |
| 7 | 1.20 | 2.20 | 1.116 | 1.00 | 7.5% |
| 8 | 1.15 | 2.40 | 1.070 | 1.00 | 7.5% |
| 9 | 1.10 | 2.60 | 1.023 | 1.00 | 7.5% |
| 10 | 1.05 | 2.80 | 0.977 | 1.00 | 7.5% |
| 11 | 1.00 | 5.00 | 0.930 | 1.00 | 7.5% |
| 12 | 0.95 | 3.20 | 0.884 | 1.00 | 7.5% |
| Annual Avg. Price | 1.156 | | 1.140 | | 1.4% Annual Avg. AD Margin |

Moreover, contrary to popular opinion among practitioners, the phenomenon illustrated in Table 1 is not always biased in one direction or the other. If home market sales volumes are skewed towards low-priced periods and U.S. sales volumes are concentrated in high-priced periods, then the use of annual averages will understate the level of price discrimination which is occurring at any given point in time.

Alternatively, as is shown in Table 2, if home market prices occur disproportionately in high-priced periods, and U.S. prices are distributed more heavily in low-priced periods, then the use of annual averages will overstate the average level of price discrimination over the whole POI.

TABLE 2
Effect on Dumping Margin of Different Sales Volume Distributions

CASE 2

| <u>Month</u> | <u>Home Price</u> | <u>Home Qty.</u> | <u>U.S. Price</u> | <u>U.S. Qty.</u> | <u>Monthly Dumping Margin</u> |
|---------------|-------------------|------------------|-------------------|------------------|-------------------------------|
| 1 | 1.50 | 1.00 | 1.478 | 0.50 | 1.5% |
| 2 | 1.45 | 1.20 | 1.429 | 0.70 | 1.5% |
| 3 | 1.40 | 1.40 | 1.379 | 0.90 | 1.5% |
| 4 | 1.35 | 1.60 | 1.330 | 1.10 | 1.5% |
| 5 | 1.30 | 1.80 | 1.281 | 1.30 | 1.5% |
| 6 | 1.25 | 2.00 | 1.232 | 1.50 | 1.5% |
| 7 | 1.20 | 2.20 | 1.182 | 1.70 | 1.5% |
| 8 | 1.15 | 2.40 | 1.133 | 1.90 | 1.5% |
| 9 | 1.10 | 2.60 | 1.084 | 2.10 | 1.5% |
| 10 | 1.05 | 2.80 | 1.034 | 2.30 | 1.5% |
| 11 | 1.00 | 3.00 | 0.985 | 2.50 | 1.5% |
| 12 | 0.95 | 3.20 | 0.936 | 2.70 | 1.5% |
| Annual Prices | 1.168 | | 1.134 | Annual Margin | 3.1% |

As the above examples demonstrate, different averaging methods in a case where prices are changing and sales volumes are unequal can easily mean the difference between positive and *de-minimis* dumping margins.⁵⁴

B. The Use of Regression Analysis to Analyze Averaging Alternatives

The above discussion demonstrates that relative changes in prices and volumes in both markets should be considered in determining the appropriate period over which to average prices. Simple statistical tests, such as those occasionally applied by the Department in pre-URAA cases, can be employed to determine if prices in both markets are correlated over time. The tests can also be used to determine if the distribution of sales volumes in both markets are parallel. If prices and time

⁵⁴ Section 733(b)(3) of the URAA establishes the *de-minimis* threshold as 2 percent.

are correlated in one or both markets, and sales volumes are not, then the Department should use a shorter time period for averaging prices. However, as shown in the Appendix to this paper, even with very strong positive statistical correlations of prices and quantities between the U.S. and home market, the choice of averaging period will lead to different dumping margins, unless both the magnitude and distribution of sales quantities are virtually identical.

C. The Choice of Exchange Rate

Inextricably tied to the question of the appropriate period over which to average U.S. prices is the issue of the correct exchange rate to convert non-U.S. currency prices to U.S. dollars. Section 773A requires that the Department convert all foreign currencies to U.S. dollars using the exchange rate on the date of the U.S. sale. Under the old law, the choice of exchange rate was simple: since the Department was calculating a dumping margin separately for each individual U.S. transaction, it used the exchange rate prevailing as of the date of sale for that transaction. In a world of averages, however, Commerce is no longer comparing the price of each individual U.S. transaction to a home market price. Consequently there is no "unique" date of sale for an average U.S. price. In effect the "date" of sale becomes a range of dates. In its first decision under the new law, (Polyvinyl Alcohol from Taiwan) the however, Department applied the following method:

First, it calculated annual average Normal Values for each unique product, in the foreign currency of the transaction.

Second, it calculated annual average U.S. prices (in dollars) for each unique product.

Third, it merged the annual average U.S. prices back into the transaction-by-transaction U.S. sales file.

Fourth, it merged the annual average Normal Values, by unique product, into the transaction-by-transaction U.S. sales file, *converted Normal Values to U.S. prices using the exchange rate as of the date of sale of each unique U.S. transaction*, and calculated a separate dumping margin for each transaction.

Under this method, even though annual average prices are the starting point of the pricing comparison, the Normal Value will vary each time there is a different exchange rate for an individual U.S. transaction. In effect, the method of currency conversion applied by the Department in Polyvinyl Alcohol creates an entirely new approach: the comparison of multiple home market prices to average U.S. prices! One wonders if the result of this method reflects the intent of the WTO negotiators, the U.S. Congress, or even Commerce. Applying the Department's proposed conversion method will result in dumping margins in cases where, as is shown in the hypothetical example in Table 3, a foreign producer is not dumping initially, and in a period of dollar devaluation, it raises its U.S. prices in lock-step with the devaluing U.S. dollar. In fact, in a world of floating exchange rates, the comparison of changing NVs to average U.S. prices can create exactly the type of random dumping margins as the old average-to-transaction approach of pricing comparisons.

TABLE 3

Distortions to Dumping Margins Resulting from Proposed DOC Currency Conversion Methodology

| Month | Home Price (foreign) | Home Qty. | Exchange Rate (foreign/\$) | Home Price (\$) | U.S. Price | U.S. Qty. | Monthly Margin | Dumping Calculations | | |
|--------------------|-------------------------|-----------|-------------------------------|--------------------|------------|-----------|----------------|----------------------|------------------|--------|
| | | | | | | | | Normal Value * | U.S. Price | PUDD** |
| 1 | 2.00 | 1 | 1.50 | 1.333 | 1.333 | 1 | 0.0% | 1.333 | 1.519 | 0.000 |
| 2 | 2.00 | 1 | 1.48 | 1.356 | 1.356 | 1 | 0.0% | 1.356 | 1.519 | 0.000 |
| 3 | 2.00 | 1 | 1.45 | 1.379 | 1.379 | 1 | 0.0% | 1.379 | 1.519 | 0.000 |
| 4 | 2.00 | 1 | 1.38 | 1.455 | 1.455 | 1 | 0.0% | 1.455 | 1.519 | 0.000 |
| 5 | 2.00 | 1 | 1.35 | 1.481 | 1.481 | 1 | 0.0% | 1.481 | 1.519 | 0.000 |
| 6 | 2.00 | 1 | 1.33 | 1.509 | 1.509 | 1 | 0.0% | 1.509 | 1.519 | 0.000 |
| 7 | 2.00 | 1 | 1.30 | 1.538 | 1.538 | 1 | 0.0% | 1.538 | 1.519 | 0.020 |
| 8 | 2.00 | 1 | 1.28 | 1.569 | 1.569 | 1 | 0.0% | 1.569 | 1.519 | 0.050 |
| 9 | 2.00 | 1 | 1.25 | 1.600 | 1.600 | 1 | 0.0% | 1.600 | 1.519 | 0.081 |
| 10 | 2.00 | 1 | 1.23 | 1.633 | 1.633 | 1 | 0.0% | 1.633 | 1.519 | 0.114 |
| 11 | 2.00 | 1 | 1.20 | 1.667 | 1.667 | 1 | 0.0% | 1.667 | 1.519 | 0.148 |
| 12 | 2.00 | 1 | 1.18 | 1.702 | 1.702 | 1 | 0.0% | 1.702 | 1.519 | 0.184 |
| Annual Ave. Prices | 2.00 | | | 1.519 | | | | | Total PUDD | 0.597 |
| | | | | | | | | | Total U.S. Value | 18.223 |
| | | | | | | | | | Dumping Margin | 3.3% |

* Weighted average home market price converted to U.S. dollars based on date-of-sale, U.S. transaction.

** Normal value (in dollars) minus U.S. price, times U.S. quantity. If normal value is less than U.S. price, PUDD equals zero, based on standard Department of Commerce methodology.

In a regime of average-to-average pricing comparisons, the statutory requirement of conversion as of the date of sale U.S. may not make much economic sense. The most appropriate way of conversion under an average-to-average approach would be to convert home market prices to U.S. dollars before averaging, using the date of sale of each home market transaction. This is the only method which would ensure that the weighted average home market price, when expressed in U.S. dollars, actually reflected the average dollar value of home market sales over the POI. Such a method, however, probably is precluded by current law, which stipulates the U.S. date of sale for all currency conversions. As a second-best method, the Department should consider using an average exchange rate, weighted by U.S. sales volumes, when comparing average prices in both markets.⁵⁵ In addition, the Department should consider using shorter averaging periods for prices (and average exchange rates calculated over a shorter period) whenever exchange rates are rapidly changing.

⁵⁵ The method is second-best because exchange rates averaged on the basis of U.S. sales volumes will lead to skewed results if the pattern of sales distribution in the home market is different from that in the U.S.

V. CONCLUSION

The price averaging provision of the URAA may turn out to be the most far-reaching change in the way in which dumping margins are calculated. It may compel fundamental changes in the Commerce Department's dumping margin calculations. As a result, practitioners may be forced to dramatically increase their analysis of home market and U.S. sales files, in order to determine the averaging method which best suits the needs of their clients, within the broad parameters established under the law. Finally, policies, practices, and even some statutory provisions, may have to change in order to make the calculations of dumping margins on the basis of averages both fair and administrable. On average, averaging is likely to be a major issue in future antidumping proceedings.

APPENDIX

Table 2 in this paper is a good example of the fact that even when there exists a statistically significant positive relationship between prices and quantities in the U.S. and home markets, the dumping margin calculation can be sensitive to the use of averaging period.

The first regression results below show a positive and statistically significant relationship between the U.S. and home market prices reported in Table 2. The second regression results below show a positive and statistically significant relationship between U.S. and home market quantities reported in Table 2. The R-squared values of "1" mean a perfect correlation between the U.S. and home markets, and the large "t-statistics" mean that the positive correlation is statistically significant at the 99.999% confidence level.

1. Regression Output: (U.S. Price and Home Market Price)

| | |
|---------------------|----------|
| Constant | -3.8E-15 |
| Std Err of Y Est | 6.7E-16 |
| R Squared | 1 |
| No. of Observations | 12 |
| Degrees of Freedom | 10 |

| | |
|------------------|----------|
| X Coefficient(s) | 0.985222 |
| Std Err of Coef. | 1.1E-15 |
| T-Statistic | 8.8E+14 |

2. Regression Output: (U.S. Qty. and Home Market Qty.)

| | |
|---------------------|---------|
| Constant | -0.5 |
| Std Err of Y Est | 3.4E-16 |
| R Squared | 1 |
| No. of Observations | 12 |
| Degrees of Freedom | 10 |

| | |
|------------------|---------|
| X Coefficient(s) | 1 |
| Std Err of Coef. | 1.4E-16 |
| T-Statistic: | 7.1E+15 |