

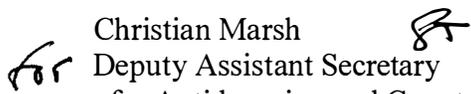


UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

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DATE: January 31, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Administrative Review of the Antidumping Duty Order on Purified
Carboxymethylcellulose (CMC) from the Netherlands

SUMMARY:

We have analyzed the case and rebuttal briefs submitted by interested parties, including comments received from parties regarding the Department's post-preliminary analysis.¹ We recommend that you approve the Department of Commerce's (the Department's) positions, described in the "Discussion of Interested Party Comments" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this review for which we received comments from parties:

I. List of Comments

Issue 1: Targeted Dumping Methodology
Issue 2: Monthly Time Period Allegation
Issue 3: Cost Database

¹ See "Antidumping Duty Administrative Review of Purified Carboxymethylcellulose ("CMC") from the Netherlands: Post-Preliminary Results Analysis Memorandum" from Richard Weible, Office Director, AD/CVD Operations, Office 7, to Paul Piquado, Assistant Secretary for Import Administration, through Christian Marsh, Deputy Assistant Secretary, for Antidumping and Countervailing Duty Operations, dated December 20, 2012 (CMC Post-Prelim Analysis Memo); see also "Antidumping Duty Administrative Review of Purified Carboxymethylcellulose (CMC) from the Netherlands: Post-Preliminary Calculation Memorandum" from Dena Crossland, International Trade Analyst, AD/CVD Operations, Office 7, Import Administration, to The File, through Angelica Mendoza, Program Manager, AD/CVD Operations, Import Administration, dated December 20, 2012 (CMC Post-Prelim Calculation Memo).

II. Background

On August 2, 2012, the Department of Commerce (the Department) published its preliminary results with respect to the administrative review concerning the antidumping duty order on purified CMC from Netherlands.² We preliminarily determined that sales of subject merchandise by Akzo Nobel Functional Chemicals B.V. (Akzo Nobel) were not made at less than normal value during the period of review and CP Kelco B.V. (CP Kelco) had no shipments of subject merchandise during the period of review.

The merchandise covered by this review is purified CMC from the Netherlands, as described in the “Scope of the Order” section in the *Federal Register* notice of the final results. The period of review is July 1, 2010, through June 30, 2011.

On September 4, 2012, and September 10, 2012, respectively, we received comments and rebuttal comments on our *Preliminary Results* from petitioner Aqualon Company, a unit of Hercules Incorporated, and Akzo Nobel. We did not receive any comments from or about CP Kelco. Additionally, there was no request for a hearing.

In response to petitioner’s targeted dumping allegation, the Department conducted a post-preliminary targeted dumping analysis, in which we preliminarily found a pattern of constructed export prices for comparable merchandise that differ significantly among time periods, and that the average-to-average comparison methodology could not account for the observed price differences, resulting in a change in the margin from 0 to 9.03 percent.³ In the CMC Post-Prelim Analysis Memo, we invited comments from the interested parties on our post-preliminary analysis, and received comments from petitioner and Akzo Nobel on January 2, 2013, and rebuttal comments from both parties on January 7, 2013.

III. Discussion of Interested Party Comments

Issue 1: Targeted Dumping Methodology

Petitioner and Akzo Nobel submitted comments and rebuttal comments on this issue. Below is the summary of their arguments.

In its September 4, 2012, case brief, Akzo Nobel states that in the *Preliminary Results*, the Department decided not to conduct a targeted dumping analysis and calculated the preliminary weighted-average dumping margin for Akzo Nobel by applying the calculation methodology

² See *Purified Carboxymethylcellulose From the Netherlands: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent To Rescind*, 77 FR 46024 (August 2, 2012) (*Preliminary Results*).

³ See CMC Post-Prelim Analysis Memo; see also CMC Post-Prelim Calculation Memo.

adopted in the *Final Modification for Reviews*.⁴ Specifically, according to Akzo Nobel, the Department compared monthly weighted-average constructed export prices (CEPs) with monthly weighted-average normal values and granted offsets for non-dumped comparisons in the calculation of Akzo Nobel's weighted-average dumping margin. Akzo Nobel states that in the *Preliminary Results*, the Department noted its intent to continue to consider, pursuant to 19 CFR 351.414(c), whether another method is appropriate in this administrative review in light of parties' pre-preliminary comments and any comments on the issue that parties may include in their case and rebuttal briefs.

Akzo Nobel requests that the Department, in its final results, continue to reject petitioner's targeted dumping allegation and calculate Akzo Nobel's weighted-average dumping margin in accordance with the *Final Modification for Reviews*, for the following reasons: 1) The Department does not have the statutory authority to conduct a targeted dumping analysis in administrative reviews; 2) Petitioner has not provided a sufficient factual basis from which the Department can ascertain whether a targeted dumping analysis is appropriate in this administrative review; 3) even if the Department determines that a targeted dumping analysis is appropriate in this administrative review, it may not use one standard deviation to find a pattern of price differences; and 4) due to its obligations under the World Trade Organization, even if the Department determines that targeted dumping has occurred and that it should calculate Akzo Nobel's weighted-average dumping margin by comparing the weighted-average normal value to the export price of individual transactions for comparable merchandise, it must still offset the results of the comparisons for which export price was less than normal value by the results of comparisons for which export price exceeded normal value.

Akzo Nobel states that the Department lacks the statutory authority to utilize a targeted dumping analysis in administrative reviews, as the antidumping statute that permits the Department to engage in such analysis for original investigations does not provide the Department with similar authority in administrative reviews. Specifically, Akzo Nobel states, 19 U.S.C. § 1677f-1(d), which dictates the process by which the Department is to determine whether subject merchandise is being sold in the United States at less than fair value, is bifurcated between an "investigation" section and a "review" section. Akzo Nobel asserts that while the "investigation" section contains an "exception" clause that provides the Department with the statutory authority to conduct targeted dumping inquiries,⁵ no such clause appears in the "review" section.⁶ According to Akzo Nobel, "it is a well-established principle of statutory construction that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" See Akzo Nobel's Case Brief, dated September 4, 2012, at 6. Hence, Akzo Nobel states, "because Congress included the 'exception' that grants the Department the

⁴ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

⁵ See 19 U.S.C. § 1677f-1(d)(1)(B).

⁶ See 19 U.S.C. § 1677f-1(d)(2).

authority to conduct targeted dumping analyses only in the ‘investigation’ section of the statute, the Department cannot utilize the targeted dumping methodology in administrative reviews, nor can it derive such authority merely because the methodology appears in a closely-related statutory provision.” *Id.*

Furthermore, according to Akzo Nobel, “the Department cannot justify the authority to conduct targeted dumping inquiries in administrative reviews by filling in perceived gaps in the antidumping statute where agency discretion is not explicitly provided.” *Id.*⁷ Akzo Nobel contends that in *Gray Portland Cement*,⁸ “the Federal Circuit denied the Department the authority to adjust fair market value for transportation expenses because one part of the authorizing statute, on the calculation of U.S. prices, expressly allowed for the calculation adjustment, while the part on fair market value did not.” *Id.*⁹ Akzo Nobel further contends that “{t}his came despite the finding of the Court of International Trade that adjustments for transportation costs ‘engenders a more accurate and meaningful comparison and better serves Commerce’s primary goal of comparing apples to apples.’” *Id.* at 6-7.¹⁰

Similarly, according to Akzo Nobel, “if the Department wishes to modify its method of calculating weighted-average dumping margins in part by allowing for a targeted dumping exception upon determination that application of a different comparison method is more appropriate, then it must wait for the Congress to grant it such authority.” *Id.* at 7. Akzo Nobel states that as explained above, the exception clause in 19 U.S.C. § 1677f-1(d)(1)(B) pertains *only* to investigations and the Department cannot transfer its authority to conduct a targeted dumping analysis in investigations to administrative reviews. *Id.* (emphasis in original). Therefore, Akzo Nobel concludes that the Department lacks the authority to engage in a targeted dumping analysis in administrative reviews.

Akzo Nobel states that even if the Department believes it does hold the authority to conduct targeted dumping analyses in administrative reviews, it should not engage in such an inquiry in this instance because petitioner has not provided a sufficient factual basis for initiating one in this instance. Akzo Nobel argues that in its allegation, petitioner simply conducted its own quantitative analysis of Akzo Nobel’s U.S. sales using the Department’s statistical targeted dumping methodology as applied in *Nails*¹¹ and *Wood Flooring*¹² without offering any

⁷ Citing *FAG Italia Sp.A. v. U.S.*, 291 F.3d 806, 816 (Fed. Cir. 2002) (“The Supreme Court has noted that ‘an agency literally has no power to act. . . unless and until Congress confers power upon it.’”) (citations omitted).

⁸ See *The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. U.S.*, 13 F. 3d 398 (CAFC 1994) (*Gray Portland Cement*).

⁹ Citing *Gray Portland Cement* at 403 (“Even if the {antidumping} statute’s ‘primary goal’ may seem to be ill-served by not allowing the deduction from {fair market value}, that conclusion does not justify reading into the statute agency discretion that clearly is not there”).

¹⁰ Citing *Gray Portland Cement* at 402 (citing *The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. U.S.*, 787 F. Supp. 208, 212 (CIT 1992)) (internal quotations omitted).

¹¹ See *Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008); *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Less Than Fair Value*, 73 FR 33985 (June 16, 2008) (*UAE Nails*) (collectively, “*Nails*”).

¹² See *Multilayered Wood Flooring From the People’s Republic of China: Final Determination of Sales at Less*

explanation as to the significance of the time period or how or why Akzo Nobel allegedly targeted this time period. Akzo Nobel further argues that “a targeted dumping inquiry requires such qualitative information in order for the Department to obtain an understanding of the broader industrial context under which an allegation is made, for, as noted in the legislative history to the Uruguay Round Agreements Act, in determining the existence of a pattern of significant price differences, ‘small differences may be significant for one industry or one type of product, but not for another.’” *Id.* at 8.¹³ Akzo Nobel adds that “to determine if any price fluctuations across time periods are “significant” in this instance, the Department should, in particular, gather information related to several factors, including, but not limited to, general price inflation and deflation in the United States and abroad, the prices over time in the purified CMC industry, the prices over time of inputs in the purified CMC industry, market entrance and exit over time in the purified CMC industry, market entry and exit over time of customers of purified CMC, and exchange rate fluctuations.” *Id.*¹⁴ Akzo Nobel avers that without such information, the Department cannot reasonably determine whether any of the observed pricing patterns resulted from an intentional strategy to engage in *targeted* dumping or simply from unrelated factors that resulted in a sale or sales being sold at dumped prices but where the sale was not *targeted* for dumping. *Id.* In fact, according to Akzo Nobel, if the Department were to acquire such information in this instance, it would determine that there is no evidence that Akzo Nobel strategically focused on a certain time period, product or customer. Rather, Akzo Nobel states, while its data does indicate certain sales in various time periods were made at dumped prices under the Department’s methodology, from the evidence on the record it is clear that the cause for the prices related to specific circumstances of those sales in specific time periods and not to an intentional goal to target certain customers or time periods for dumping. *Id.*

According to Akzo Nobel, in all periods alleged by petitioner, the observed pricing patterns did not result from an intentional strategy on the part of Akzo Nobel to engage in targeted dumping, but rather entirely from a variety of other factors, such as exchange rate fluctuations from one quarter to the next and abnormally high freight costs during certain months, as detailed at 9-10 and Tab 1 of Akzo Nobel’s case brief. Citing *Stilbenic Agents from Taiwan*, Akzo Nobel claims that “the Department has already recognized that it may not be prudent to conduct a targeted dumping inquiry merely because a fraction of sales technically satisfies the numeric *Nails* test if those sales are insufficient to establish a pattern of export prices {or CEPs} that ‘differ significantly.’” *Id.* at 9.¹⁵ Akzo Nobel contends that these other factors lead to sales made at prices that indicated dumping under the Department’s dumping margin calculation methodology. However, according to Akzo Nobel, “the evidence on the record explains the reasons for the prices reported to the Department, and in no instance is there any evidence that the resulting

Than Fair Value, 76 FR 64318 (October 18, 2011) (*Wood Flooring*).

¹³ Citing the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H. R. Doc. 103-316, vol. 1 at 843 (1994)

¹⁴ Citing *Thai I-Mei Frozen Foods Co., Ltd. v. U.S.*, 477 F. Supp. 2d 1332, 1357 (CIT 2007) (“In implementing the antidumping statute, Commerce is to calculate antidumping margins as accurately as possible. To ensure compliance with this purpose, Commerce is directed to make case-by-case determinations and consider data unique to the particular case before it.”) (citations omitted).

¹⁵ See *Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027, 17028 (March 23, 2012) (*Stilbenic Agents from Taiwan*).

dumped prices were *targeted* by Akzo Nobel for a specific period of time, region, or customer.” *Id.* at 10-11 (emphasis in original). Thus, according to Akzo Nobel, the Department should not initiate a targeted dumping inquiry in this administrative review and should continue to utilize the methodology applied in the *Preliminary Results*.

Akzo Nobel states that even if the Department determines that the facts in evidence support a targeted dumping inquiry in this review, it should not use one standard deviation to ascertain a pattern of significant price differences. According to Akzo Nobel, “by employing a threshold criterion based on standard deviation in the *Nails* test, the Department both recognizes that some patterns of differences in normal prices may occur due to random chance and assumes that Akzo Nobel’s prices follow a normal distribution.” *Id.* at 11.¹⁶ Furthermore, according to Akzo Nobel, by applying the *Nails* test in this review, “the Department would essentially be asserting that a pattern of price differences for specific customers, regions, or time periods that amount to, for example, *one-half* of the standard deviation in all prices would not be considered as contributing to a price differential pattern that is potentially consistent with targeted dumping, but those amounting to *one* standard deviation would be found so contributory.” *Id.* (emphasis in original). However, according to Akzo Nobel, “the use of a threshold criterion of one standard deviation across all prices is unreliable, because ‘{r}andom errors larger in magnitude than the standard error are commonplace.’” *Id.*¹⁷

Akzo Nobel claims that the *Nails* test merely constitutes an *ad hoc* test of whether sales of a given product to a customer, region, or time period are disproportionately high relative to the proportion expected under the normal distribution. *Id.* at 12. Moreover, according to Akzo Nobel, for products with consistent pricing, the standard deviation calculated under the *Nails* test may be exceptionally small. In fact, Akzo Nobel states, “it is possible for a price variation to exceed one standard deviation due to small shifts in price, perhaps even due to rounding differences (that would produce a price difference of one cent).” *Id.* Akzo Nobel adds that “{e}ven if a small shift in price passes the remainder of the *Nails* test, it is doubtful that a price difference based on a simple rounding error is what the Congress meant by the term ‘differ significantly’ in 19 U.S.C. § 1677f-1(d)(1)(B(i).” *Id.* As such, Akzo Nobel argues, the form of hypothesis testing employed through utilization of the *Nails* test is inconsistent with normal statistical practice and is thus an unreliable methodology. Therefore, Akzo Nobel asserts, if the Department proceeds with a targeted dumping inquiry, it must utilize a different methodology, such as the “t-test.”

Moreover, according to Akzo Nobel, even if the Department determines that targeted dumping has occurred and that it should calculate Akzo Nobel’s weighted-average dumping margin by

¹⁶ Citing *High Pressure Steel Cylinders from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 26739 (May 7, 2012), and accompanying Issues and Decision Memorandum for the Final Determination, dated April 30, 2012, at 29.

¹⁷ Citing David H. Kaye and David A. Freeman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* 3rd, p. 294 (Federal Judicial Center 2011) (*Reference Guide on Statistics*) (“Generally, a random variable will be somewhere around its expected value, but will be off (in either direction) by something like a standard error (SE) or so. If the random variable has a more or less normal distribution, there is about a 68% chance for it to fall in the range expected value - SE to expected value + SE.”)

comparing the weighted-average normal value to the export price of individual transactions for comparable merchandise, it must still offset the results of the comparisons for which export price was less than normal value by the results of comparisons for which export price exceeded normal value. *Id.* at 13. Akzo Nobel claims that the *Final Modification for Reviews*, the previous methodology that did not provide for such offsets, was challenged as being inconsistent with the World Trade Organization (WTO) General Agreement on Tariffs and Trade 1994 (“GATT 1994”) and the Agreement on Implementation of Article VI of the GATT 1994 (“Antidumping Agreement”) in several disputes. *Id.* Specifically, according to Akzo Nobel, the WTO Appellate Body in *US-Zeroing (EC)*,¹⁸ *US-Zeroing (Japan)*,¹⁹ *US-Stainless Steel (Mexico)*,²⁰ and *US-Continued Zeroing (EC)*²¹ “found that the denial of offsets for non-dumped comparisons in antidumping duty reviews to be inconsistent with Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994, either ‘as such’ or ‘as applied’ in certain reviews, or both.” *Id.* at 13-14. Additionally, Akzo Nobel states, “{t}he WTO Dispute Settlement Body adopted the dispute settlement panel reports, as modified by the WTO Appellate Body, which found the denial of offsets for non-dumped comparisons in reviews to be inconsistent with the United States’ WTO obligations.” *Id.* at 14.

Akzo Nobel alleges that the United States Trade Representative (USTR) informed the WTO Dispute Settlement Body that the United States intended to comply with its WTO obligations in these disputes. *Id.*²² Akzo Nobel claims that because of this, the Department revised its methodology for calculating weighted-average dumping margins in administrative reviews to allow, in part, for the granting of offsets for non-dumped comparisons. *Id.* Akzo Nobel asserts that if the Department eliminates all offsets for non-dumped comparisons, in comparing the weighted-average normal value to the export price of individual transactions for comparable merchandise, it would openly flout the international legal obligations of the United States.

Moreover, according to Akzo Nobel, “because of the aforementioned WTO decisions, the Department is prohibited by the U.S. antidumping statute from eliminating all offsets for non-dumped comparisons when calculating weighted-average dumping margins in administrative reviews.” *Id.* In this regard, Akzo Nobel states, “the Federal Courts have determined that the Department’s authority to eliminate all offsets for non-dumped comparisons under the antidumping statute is ambiguous. *Id.*²³ Akzo Nobel further states that “{a}gency interpretations

¹⁸ See *United States-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (US-Zeroing (EC))*, WTDS294/R, WT/DS294/AB/R, para. 263(a)(i), adopted May 9, 2006.

¹⁹ See *United States-Measures Related to Zeroing and Sunset Reviews (US-Zeroing (Japan))*, WT/DS322/R, WTDS322/AB/R, para. 190(c) & 190(e), adopted January 23, 2007.

²⁰ See *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico (US-Stainless Steel (Mexico))*, WTDS344IR, WT/DS344/AB/R, paras. 165(a) & 165(b), adopted May 20, 2008.

²¹ See *United States-Continued Existence and Application of Zeroing Methodology (US-Continued Zeroing (EC))*, WTDS350IR, WT/DS350/AB/R, para. 8.1(e), adopted February 19, 2009.

²² See WT/DSB/M/213 at para. 2 (minutes of U.S. statement at May 30, 2006 DSB meeting), WT/DSB/M/226 at para. 34 (minutes of U.S. statement at Feb. 20, 2007 DSB meeting), WT/DSB/M/251 at para. 9 (minutes of U.S. statement at June 2, 2008 DSB meeting), WT/DSB/M/266 at para. 57 (minutes of U.S. statement at March 20, 2009 DSB meeting).

²³ See, e.g., *SNR Roulements v. U.S.*, 341 F. Supp. 2d 1334, 1345 (CIT 2004) (“{t}he Court holds that the language of 19 U.S.C. § 1673 neither unambiguously requires nor prohibits zeroing under the first step of {Chevron U.S.A.,

of ambiguous statutes that implicate international legal obligations face a higher standard than interpretations of ambiguous statutes that do not implicate such obligations.” *Id.* at 14-15.²⁴ Lastly, Akzo Nobel states that “{i}n such cases, rather than just inquiring as to the reasonableness of an agency interpretation of a statute, courts must also construe the meaning of a statute ‘so as not to conflict with international law or with an international agreement of the United States.’” *Id.* at 15.²⁵

Akzo Nobel argues that as the USTR has acknowledged that adherence to the aforementioned WTO decisions constitutes an obligation of the United States as a member of the WTO, the elimination of all offsets for non-dumped comparisons when calculating weighted-average dumping margins would contravene this obligation and thus should be prohibited under the antidumping statute. *Id.* Accordingly, Akzo Nobel asserts that if the Department were to calculate Akzo Nobel’s weighted-average dumping margin by comparing the weighted-average normal value to the export price (or CEP) of individual transactions for comparable merchandise, it must still offset the results of the comparisons for which export price (or CEP) was less than normal value by the results of comparisons for which export price (or CEP) exceeded normal value.

In its September 4, 2012, case brief, petitioner states that the Department revised its administrative review methodology to calculate weighted-average margins in a manner which provides offsets for non-dumped comparisons while making average-to-average comparisons of normal value with either export prices or CEPs.²⁶ Specifically, according to petitioner, the *Final Modification for Reviews* provides for the application of a different comparison methodology than comparing monthly weighted-average export prices with monthly weighted-average normal values, with offsets, if such a methodology is more appropriate. *See Final Modification for Reviews* at 8102. Petitioner states that similarly, in section 351.414(c)(1) of the Department’s regulations, as amended by the *Final Modification for Reviews*, the Department made clear that “{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 (emphasis in original).” *See* Petitioner’s Case Brief at 3. Petitioner asserts that this language was clearly intended to give the Department the discretion to use “the same criteria that the Department examines in original investigations pursuant to section 777A(d)(1)(A) and (B) of the {Tariff} Act {of 1930, as amended (the Act)}” to determine whether appropriate circumstances exist. *Id.*

Inc. v. Natural Resources Defense Council, Inc. 47 U.S. 837 (1984)}”).

²⁴ *See Hyundai Elec. Co., Ltd. v. U.S.*, 53 F. Supp. 2d 1334, 1344 (CIT 1999) (“*Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter is implicated”); *see also Timken Co. v. U.S.*, 240 F. Supp. 2d 1228, 1240 (CIT 2002) (“The court must determine if the Department’s interpretation is reasonable, as informed by *Chevron* step-two and *Charming Betsy*”).

²⁵ Restatement (Third) Foreign Relations § 114 (1987); *see also Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of {C}ongress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce, further than is warranted by the law of nations as understood in this country”).

²⁶ *See Final Modification for Reviews.*

Petitioner claims that the Department has made clear that its intent in administrative reviews is to analyze whether it is appropriate to use an alternative comparison methodology by examining the criteria set forth in sections 777A(d)(1)(A) and (B) of the Act. Consistent with its argument in the “targeted dumping” allegation that petitioner submitted set forth in sections 777A(d)(1)(A) and (B) of the Act.⁶ In accordance with the Department’s current practice with respect to this same analysis in antidumping investigations, petitioner submitted a “targeted dumping” allegation on May 25, 2012.⁷ As detailed below, the record demonstrates that when the criteria pursuant to sections 777A(d)(1)(A) and (B) of the Act are considered, petitioner argues that there exist for Akzo patterns of export prices for comparable merchandise that differ significantly by periods of time.

Petitioner states that in determining whether the requisite pricing pattern exists under section 777A(d)(1)(B)(i), the Department employs a two-stage statistical test, first announced in *Nails*. Petitioner explains that the first stage consists of a “standard deviation test,” which requires that at least 33 percent of the allegedly targeted sales be at prices more than one standard deviation below the weighted-average price. *See* Petitioner’s September 4, 2012, case brief at 4-5. Petitioner further explains that if the first test is met, the Department performs a second-stage “price gap test,” which requires that the weighted-average price gap between the targeted customer, region, or time period and the non-targeted customer, region, or time period with the next highest price exceed the weighted-average price gap between non-targeted customers, regions, or time periods for more than 5 percent of the targeted sales. *Id.* at 5.²⁷

Petitioner states that applying the *Nails* methodology, as revised in *Flooring from the PRC*,²⁸ certain Akzo Nobel sales pass both the “standard deviation” and “price gap” tests. *Id.*, citing Exhibits 1 and 2 of its May 25, 2012, targeted dumping allegation. Petitioner further states that it ran computer programs identical to the Department’s computer programs for Akzo Nobel from the 2009/2010 administrative review, the most recent administrative review of Akzo Nobel. Petitioner adds that it accepted all price adjustments and movement expenses as reported by Akzo Nobel in its most recently submitted Section C response and, to derive CEPs and export prices, made identical adjustments to gross U.S. prices that the Department made in its most recent administrative review for Akzo Nobel.²⁹

Petitioner states that for CEP sales, the Department makes an additional adjustment to GRSUPRU for CEP profit, the components of which are based on cost and expense data reported in Akzo Nobel’s comparison market and U.S. sales databases. Petitioner explains that to derive CEP profit for the instant allegation, it executed the calculations necessary to derive the U.S. and comparison market components of CEP profit calculations. *Id.* at 6, citing lines 6,322-6,330 and 7,213-7,235 of Exhibit 1 of its May 25, 2012, targeted dumping allegation. Petitioner further explains that in deriving the comparison market components for CEP profit, it relied on Akzo

²⁷ Citing *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 FR 26371, 26372 (May 9, 2008).

²⁸ *See Flooring from the PRC*, and accompanying Issues and Decision Memorandum at Comment 4.

²⁹ *See* Akzo Nobel’s section D response; update to sections B and C sales databases, dated November 16, 2011. *See also* Petitioner’s May 25, 2012, targeted dumping allegation at Exhibit 1, lines 6,148-6,302.

Nobel's most recently submitted Section B response and database. *Id.*, citing Akzo Nobel's update to sections B and C databases, dated November 16, 2011. Petitioner adds that it accepted all price adjustments and movement expenses as reported, and calculated comparison market net prices in a manner identical to that applied by the Department in its most recent administrative review of Akzo Nobel. *Id.*, citing 6,148-6,302 of Exhibit 1 of its May 25, 2012, targeted dumping allegation. Petitioner asserts that as its analysis demonstrates, in applying the Department's *Final Modification for Reviews* methodology, the criteria for finding a pattern of export prices for comparable merchandise that differ significantly among periods of time (*i.e.*, targeted dumping) pursuant to section 777A(d)(1)(B)(i) of the Act are clearly met with regard to Akzo Nobel.

Petitioner states that to determine whether the pattern of price differences identified can be taken into account using the standard average-to-average methodology, the Department's current practice in investigations is to examine the extent to which dumping margins may be "masked" when applying the average-to-average methodology. *Id.* at 7.³⁰ Petitioner further states that the Department determines the extent of such masking by comparing margin results under both the average-to-average and the average-to-transaction methods. *Id.*³¹ Specifically, petitioner states, if "each of the alternative approaches yields no difference in the margins or differences that are so insignificant relative to the size of the resulting margins to be immaterial," then the Department does not apply its targeted dumping methodology. *Id.*³² Petitioner states that if the alternative approaches yield different margins, however, then the Department: 1) concludes that the average-to-average method masks dumping and cannot account for the identified patterns of price differences; and (2) applies the average-to-transaction methodology to all sales. *Id.* at 7-8.³³ As detailed in the OCTG I&D Memo, petitioner states, the Department applies its zeroing methodology, whereby it does not grant offsets for sales that are not dumped to reduce the amount of dumping found on other sales. *Id.*³⁴

According to petitioner, although the record evidence clearly demonstrates targeted dumping, the *Preliminary Results* show that the application of the average-to-average methodology masks Akzo Nobel's targeting and Akzo Nobel's data demonstrate targeted dumping. *Id.* at 8. For example, petitioner states, as detailed on page 66 of the output provided in Exhibit 2 of its targeted dumping allegation, a certain control number (CONNUM) was targeted dumped. Petitioner adds that "Exhibit 3 of its targeted dumping allegation contains the SAS program log

³⁰ Citing *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010), and accompanying Issues and Decision Memorandum, dated April 8, 2010 (OCTG I&D Memo), at Comment 2.

³¹ Citing *See Polyethylene Retail Carrier Bags from Indonesia: Final Determination of Sales at Less Than Fair Value*, 75 FR 16431 (April 1, 2010), and accompanying Issues and Decision Memorandum, dated March 25, 2010 (Retail Carrier Bags I&D Memo), at Comment 1.

³² Citing Retail Carrier Bags I&D Memo at Comment 1.

³³ Citing *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010); OCTG I&D Memo at Comment 2; *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 24885, 24888 (May 6, 2010).

³⁴ Citing OCTG I&D Memo at Comment 2.

and output for an analysis, whereby petitioner calculated the monthly weighted-average U.S. net prices for this CONNUM for the period of review (AVENETPRI_MON) and the net U.S. price (USNETPRI) for individual sales of this CONNUM (*i.e.*, the ‘targeted’ time period).” *Id.* Petitioner states that it “assumed that the average-to-average method yields no dumping, that is, that the NV or CV is identical to the monthly weighted-average net U.S. price.” *Id.*³⁵ Petitioner explains that “to determine the margins when an average-to-transaction method is used, {it} compared the NV or CV (which is identical to the monthly POR weighted-average net U.S. price) to the net U.S. price for individual transactions, and calculated both a unit margin difference (‘UMARGIN’) and a percentage dumping (‘PCTMARG’).” *Id.*³⁶ Petitioner asserts that the average-to-average methodology masks Akzo’s targeting, and fails to account for dumping margins.

Petitioner contends that in prior comments to the Department, Akzo Nobel has attempted to rebut petitioner’s targeted dumping allegation, but has failed to address the bulk of petitioner’s allegation. *Id.* at 9.³⁷ Petitioner also contends that Akzo Nobel has made no attempt to explain to explain the pattern of significant price differences that were revealed by the Department’s test. Petitioner adds that exchange rate fluctuations do not explain these results. Therefore, according to petitioner, given the record evidence that 1) Akzo Nobel’s U.S. sales clearly demonstrate a pattern of export prices and CEPs for comparable merchandise that differ significantly among periods of time and 2) these differences are masked when the average-to-average methodology is applied, the Department should apply a comparison methodology that parallels the WTO-consistent methodology it applies in original investigations. That is, for this administrative review, the Department should calculate Akzo Nobel’s margin using an average-to-transaction methodology and, consistent with its current practice, eliminate all offsets for non-dumped sales. *Id.* at 11.³⁸

In its January 2, 2012 post-preliminary comments, Akzo Nobel requests that the Department, in its final results, reject its post-preliminary analysis results and calculate Akzo Nobel’s weighted-average dumping margin by comparing monthly weighted-average CEPs with monthly weighted-average normal values and granting offsets for non-dumped comparisons, in accordance with the *Final Modification for Reviews*, and as done in the *Preliminary Results*, for the following reasons: 1) the Department does not have a sufficient factual basis to ascertain that a targeted dumping analysis and use of an alternative calculation technology is appropriate in this administrative review, and 2) even if the Department correctly determined that a targeted dumping analysis is appropriate in this administrative review, it improperly used one standard deviation to find a pattern of price differences because its use is arbitrary or, in the alternative, statistically inaccurate.

³⁵ NV_CV = AVENETPRI_MON in the output in Exhibit 3 of petitioner’s May 25, 2012, targeted dumping allegation.

³⁶ See lines 6,691-6,692 of the log in Exhibit 3 of petitioner’s May 25, 2012, targeted dumping allegation (UMARGIN = NV_CV-USNETPRI and PCTMARG = (UMARGIN/USNETPRI) * 100).

³⁷ Citing Akzo Nobel’s June 15, 2012, comments.

³⁸ Citing *Nails from UAE*, and accompanying Issues and Decision Memorandum at Comment 5.

First, Akzo Nobel maintains that the Department should not have done an alternative comparison methodology analysis of its U.S. sales because it had no factual basis to determine whether the pricing patterns alleged by petitioner resulted from an intentional strategy on the part of Akzo Nobel to engage in targeted dumping. According to Akzo Nobel, a proper targeted dumping inquiry requires the Department “to acquire information that will enable it to obtain an understanding of the broader industrial context under which an allegation is made.” See Akzo Nobel’s January 2, 2013, comments at 5. Furthermore, Akzo Nobel reiterates that “such information is important to determine whether engaging in a targeted dumping analysis is appropriate in the first place, for as noted in the legislative history to the Uruguay Round Agreements Act, in determining the existence of a pattern of significant price differences, ‘small differences may be significant for one industry or one type of product, but not for another.’” *Id.*³⁹

According to Akzo Nobel, to determine if any price fluctuations across time periods are “significant” in this instance, the Department must have information related to several factors, such as general price inflation and deflation in the United States and abroad, the prices over time in the purified CMC industry, the prices over time of inputs in the purified CMC industry, market entrance and exit over time in the purified CMC industry, market entry and exit over time of customers of purified CMC, and exchange rate fluctuations. *Id.*⁴⁰ Akzo Nobel argues that petitioner did not explain the significance of the time periods alleged to have been targeted by Akzo Nobel or how or why Akzo Nobel targeted these time periods. Rather, according to Akzo Nobel, petitioner conducted its own quantitative analysis of Akzo Nobel’s U.S. sales using the Department’s statistical targeted dumping methodology as applied in *Nails* and *Wood Flooring*. Akzo Nobel states that as a result, “the Department has no reasonable basis on which to determine that any of the observed pricing patterns resulted from an intentional strategy on the part of Akzo Nobel to engage in targeted dumping rather than simply from unrelated factors that resulted in a sale or sales being sold at dumped, but not *targeted*, prices.” *Id.* at 6 (emphasis in original).

Akzo Nobel asserts that based on the information that is on the record, the Department should determine that Akzo Nobel did not strategically focus on a certain time period, product, or customer. Akzo Nobel states that although its data do reveal that certain sales in a particular quarter were made at dumped prices under the Department’s methodology, the evidence on the record demonstrates that these prices resulted from clearly identifiable, transaction-specific circumstances of those sales and not from an intentional goal to target certain customers or time periods for dumping. Specifically, Akzo Nobel states that any alleged pricing pattern resulted simply from an exchange rate fluctuation from one quarter to the next, except with regard to a sale with an abnormal freight cost. Akzo Nobel argues that “while these price fluctuations may result in a finding of dumping against these sales, there is no indication that this dumping amounts to ‘*targeted* dumping’ by Akzo Nobel that requires the use of an alternative comparison methodology.” *Id.* (emphasis in original). Akzo Nobel adds that “{s}tatistical anomalies in

³⁹ Citing Administrative Action Statement, P.L. 103-465, at 843.

⁴⁰ Citing *Thai I-Mei Frozen Foods Co., Ltd. v. U.S.*, 477 F. Supp. 2d 1332, 1357 (CIT 2007) (*Thai I-Mei*).

pricing data, taken alone do not indicate that Akzo Nobel engaged in the affirmative action of targeted dumping during the period of review.” *Id.* at 6-7.

Additionally, Akzo Nobel argues that the only reason that there appeared to be targeted dumping in a certain month was because one sale in that month had an abnormally high international freight cost relative to other sales, which drove the weighted-average price for that month down greatly. *Id.* at 7. However, according to Akzo Nobel, there is no evidence on the record that would indicate a pattern of sales with such freight costs creating low U.S. net prices, which would be more emblematic of targeted dumping. *Id.* Additionally, according to Akzo Nobel, “this single sale is insufficient to establish a pattern of export prices that ‘differ significantly’ and thereby necessitate the application of an alternative calculation methodology to Akzo Nobel’s sales.” *Id.*⁴¹ Therefore, Akzo Nobel states, “in the periods evaluated by the Department, the observed pricing patterns did not result from an intentional strategy on the part of Akzo Nobel to engage in targeted dumping, but rather from a variety of other factors which lead to sales made at prices that indicated dumping under the Department’s merely quantitative margin calculation method.” *Id.* Akzo Nobel asserts that without any qualitative factual predicate that evidences an intent on the part of Akzo Nobel to engage in *targeted* dumping, outside of prices that simply resulted in statistical anomalies when plugged into a *Nails* test formula, the Department should continue to utilize the average-to-average comparison methodology applied in its *Preliminary Results*.

Next, Akzo Nobel addresses the Department’s use of one standard deviation to find a pattern of price differences. Akzo Nobel argues that “the *Nails* test merely constitutes an *ad hoc* examination of whether sales of a given product to a customer, region, or time period are disproportionately high relative to the proportion expected under normal distribution.” *Id.* at 8. Akzo Nobel further argues that, as it noted in its September 4, 2012, case brief, the use of one standard deviation as the threshold criterion across all prices is unreliable, because “{r}andom errors larger in magnitude than the standard error are commonplace.” *Id.*⁴² Akzo Nobel reiterates that for products with more consistent pricing, the standard deviation calculated under the *Nails* test may be exceptionally small. Akzo Nobel adds that it is possible for a price variation to exceed one standard deviation due to small shifts in price, perhaps even due to rounding differences (that would produce a price difference of one cent). Furthermore, Akzo Nobel reiterates that “even if a small shift in price passes the remainder of the *Nails* test, it is doubtful that a price difference based on a simple rounding error is what the Congress meant by the term ‘differ significantly’ in section 777A(d)(1)(B)(i) of the Tariff Act of 1930.” *Id.* Therefore, according to Akzo Nobel, the testing conducted by the Department using the *Nails* test is inconsistent with normal statistical practice and thus an unreliable methodology for determining the existence of CEPs for comparable merchandise that differs significantly among customers, regions, or time periods. Accordingly, Akzo Nobel maintains, if the Department wishes to proceed with a targeted dumping inquiry, it must do so by utilizing a different methodology.

⁴¹ Citing *Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027, 17028 (March 23, 2012).

⁴² Citing the *Reference Guide on Statistics*.

Akzo Nobel states that if the Department rejects the above arguments and concludes that Akzo Nobel affirmatively targeted certain sales for dumping and this dumping was at a sufficient level to skew the calculation of the antidumping duties owed (when calculated using an average-to-average methodology), then in applying an alternative comparison methodology, the Department must narrowly tailor the comparison methodology to take into account the nature and variety of the subject merchandise sold by Akzo Nobel. Specifically, according to Akzo Nobel, the Department has noted in the *Final Modification for Reviews* that the Secretary has the ability to apply an alternative comparison methodology where it is necessary to address targeted dumping. *Id.* at 10, citing *Final Modification for Reviews*. However, according to Akzo Nobel, the Department also has an obligation to review the application of an alternative comparison methodology on a case-by-case basis any time that it deviates from the preferred methodology of average-to-average comparisons. *Id.*⁴³

Akzo Nobel states that in its post-preliminary analysis, the Department disregarded margin calculations based on a comparison of monthly weighted-average CEPs with monthly weighted-average normal values (an average-to-average comparison) and instead analyzed all price comparisons using an average-to-transaction comparison methodology. Akzo Nobel alleges that this proposed application of an average-to-transaction methodology is too broad to serve the interest of addressing those sales of purified CMC that the Department believes are target dumped. *Id.* Rather, according to Akzo Nobel, the Department should apply a narrower remedy to address the target dumped sales by utilizing the average-to-transaction methodology only on the one control number (CONNUM) where the Department believes targeting existed.

According to Akzo Nobel, a number of the purified CMC products it sold are within the scope of the antidumping duty order, and it reported these different purified CMC products as different CONNUMs. Akzo Nobel adds that these purified CMC products, as reported by CONNUM, have different properties with different uses, and are sold to a variety of customers. Accordingly, Akzo Nobel argues, “while one type of product sold in the U.S. during the period of review (reported to the Department as one specific CONNUM) may have crossed the threshold of the *Nails* test to be considered by the Department as target dumped, it is wholly inappropriate and unsupported to assert that all of Akzo Nobel’s sales should be subject to an average-to-transaction calculation methodology.” *Id.* at 11.

Akzo Nobel argues that where there is no evidence of targeted dumping for specific CONNUMs, the Department should apply its average-to-average methodology when calculating the dumping margins for those CONNUMs. *Id.* Akzo Nobel further argues that “due to the difference in the CMC products that are within the scope of the order for this review, the average-to-transaction methodology should only be applied in the comparison of those products with the same CONNUM as where the Department finds sufficient targeted dumping (which Akzo Nobel

⁴³ Citing *Final Modification for Reviews*; Administrative Action Statement at 843 (noting that the Department should consider differences in industries and products when considering the significance of price differences); and *Thai I-Mei Frozen Foods*, at 1357 (directing the Department make case-by-case determinations implementing the Antidumping Statute in order to calculate antidumping margins as accurately as possible).

continues to believe did not actually occur during the period of review).” *Id.* Akzo Nobel adds that “{s}uch a narrowly tailored application of the alternative comparison methodology would be consistent with the Department’s ability to apply the comparison methodology that best fits the circumstances of a particular review, while at the same time adhering to its obligation to apply the law on a case-by-case-basis.” *Id.*

Akzo Nobel concludes by requesting that the Department, in its final results, reject the alternative comparison methodology utilized in its post-preliminary analysis to calculate its weighted-average dumping margin, and instead revert to comparing its monthly weighted-average CEPs with monthly weighted-average normal values and granting offsets for non-dumped comparisons, in accordance with the *Final Modification for Reviews* as was performed in the *Preliminary Results*. Akzo Nobel states that in the event that the Department does continue to use an alternative comparison methodology, this methodology should be narrowly tailored and applied against only that CONNUM where the Department determined there was sufficient targeted dumping. Akzo Nobel asserts that other CONNUMs of products where there was no targeted dumping should continue to be analyzed by comparing the monthly weighted-average CEPs with monthly weighted-average normal values and granting offsets for non-dumped comparisons.

In its January 2, 2013, post-preliminary comments, petitioner reiterates that as stated in its September 4, 2012, case brief and September 10, 2012, rebuttal brief the application of an average-to-transaction antidumping margin analysis is appropriate in the current review. According to petitioner, the targeted dumping shown in its targeted dumping allegation and the Department’s post-preliminary targeted dumping analysis is significant and exceeds any *de minimis* threshold level. Petitioner states that the Department has the discretion, under 19 U.S.C. §1977f-1(d) to conduct a targeted dumping analysis and apply the average-to-transaction methodology in the instant administrative review. Petitioner argues that it has provided a sufficient factual basis for its targeted dumping allegation, and adds that the pricing patterns it identified cannot be explained away by other factors including exchange rate fluctuations or international freight costs.

Petitioner states that the Department’s established practice of using one standard deviation to find patterns of price differences in targeted dumping inquiries is a reasonable and accurate way to unmask targeted dumping. According to petitioner, the Department has already determined that in reviews, as in investigations, it has the discretion to use the average-to-transaction methodology with zeroing and that the exercise of that discretion is consistent with its international obligations. Petitioner states that in December 2012, the Department set forth legal analysis of the use of targeted dumping in administrative reviews. *See* Petitioner’s January 2, 2013, comments.⁴⁴ Petitioner avers that the same legal principles apply in the instant review, and requests that the Department apply its now established analysis, as set forth in *Ball Bearings* and in the CMC Post-Prelim Analysis Memo.

⁴⁴ Citing *Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011*, 77 FR 73415 (December 10, 2012) (*Ball Bearings*), and accompanying Issues and Decision Memorandum, dated December 4, 2012, at Comment 1.

In its September 10, 2012, rebuttal brief, Akzo Nobel states that the Department should continue to reject petitioner's allegation of targeted dumping in this administrative review, because petitioner has not provided any legal or factual justification for such an analysis. Akzo Nobel maintains that the Department should continue to calculate Akzo Nobel's weighted-average dumping margin by comparing monthly weighted-average CEPs with monthly weighted-average normal values and granting offsets for non-dumped comparisons.

In its September 10, 2012, rebuttal brief, Akzo Nobel states that petitioner bases its targeted dumping allegation on criteria set forth in sections 777A(d)(1)(A) and (B) of the Act. Referring to sections 777A(d)(1) and 777A(d)(2) of the Act, Akzo Nobel contends that the antidumping statute that permits the Department to engage in targeted dumping analyses for investigations does not provide the Department with similar authority in administrative reviews. According to Akzo Nobel, while petitioner claims that the Department has properly utilized its discretion to adopt "the same criteria that {it} examines in original investigations pursuant to section 777A(d)(1)(A) and (B) of the Act" to determine whether appropriate circumstances exist to conduct a targeted dumping analysis, the Department does not have such discretion in this instance. *See* Akzo Nobel's September 10, 2012, rebuttal brief at 4. Akzo Nobel argues that "it is a well-established principle of statutory construction that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id.*⁴⁵ Therefore, according to Akzo Nobel, the Department cannot derive authority to employ a targeted dumping analysis in administrative reviews merely because the methodology appears in a closely-related statutory provision. Akzo Nobel also adds that the Department cannot justify such authority by filling in perceived gaps in the antidumping statute where agency discretion is not explicitly provided. *Id.*⁴⁶

Regarding petitioner's statement that certain of Akzo Nobel's U.S. sales demonstrate patterns of export prices that differ significantly among time periods and which cannot be taken into account using the standard average-to-average methodology, Akzo Nobel maintains that petitioner merely applied the *Nails* test, as revised in *Wood Flooring*, without offering any explanation as to the significance of the time periods or how or why Akzo Nobel allegedly targeted these time periods. Akzo Nobel asserts that without such an explanation, the Department cannot determine if such pricing identified by petitioner is a result of targeted dumping by Akzo Nobel, rather than other identifiable transaction-specific factors unrelated to targeting sales.

Akzo Nobel maintains that the cause for the prices alleged by petitioner relate to specific circumstances of those sales (*e.g.*, exchange rate fluctuations and abnormally high international freight costs) in specific time periods and not to an intentional goal of Akzo Nobel to target certain customers, regions, or time periods for dumping. Further, according to Akzo Nobel, its

⁴⁵ Citing *Nken v. Holden*, 556 U.S. 418, 430 (2009); and *Hamden v. Rumsfeld*, 548 U.S. 557, 578 (2006).

⁴⁶ Citing *FAG Italia S.p.A. v. U.S.*, 291 F.3d 806, 816 (Fed. Cir. 2002) (*FAG Italia S.p.A. v. U.S.*), where the Court stated that {t}he Supreme Court has noted that "an agency literally has no power to act. . . unless and until Congress confers power upon it."

sales data reveal that the alleged pricing patterns in certain months are too insignificant to establish a claim of targeted dumping. Akzo Nobel asserts that the Department has “already recognized that it is not appropriate to employ a targeted dumping analysis merely because a fraction of sales technically satisfies the numeric *Nails* test if those sales are insufficient to establish a pattern of export prices that ‘differ significantly.’” *Id.* at 6. Akzo Nobel argues that as the sales alleged by petitioner are so insignificant, the Department should continue its policy in this instance and not apply a targeted dumping analysis for its final results.

Furthermore, according to Akzo Nobel, because of the limitations involved with relying on quantitative reviews to determine the existence of targeted dumping, petitioner should have also gathered qualitative information for the Department. Akzo Nobel states that “{a}s explained in the legislative history to the Uruguay Round Agreements Act, such information is necessary to properly determine the existence of significant price differences, for ‘small differences may be significant for one industry or one type of product, but not for another.’” *Id.* Akzo Nobel concludes that petitioner relied on a blind application of the *Nails* test, rather than a factual predicate, in its allegation. Akzo Nobel asserts that without qualitative information, the Department cannot reasonably determine that Akzo Nobel engaged in targeted dumping, and thus, should continue to deny petitioner’s request to conduct a targeted dumping inquiry in this administrative review.

Akzo Nobel argues that if the Department agrees with petitioner that targeted dumping has occurred and decides to calculate Akzo Nobel’s weighted-average dumping margin by employing an average-to-transaction methodology with zeroing, it must grant offsets in instances when the export price (or CEP) is found to exceed normal value. Akzo Nobel claims that failure to provide such offsets would be in violation of several decisions of the WTO Dispute Settlement Body, which found that the denial of offsets for non-dumped comparisons in antidumping duty reviews to be inconsistent with Article 9.3 of the Antidumping Agreement and Article VI:2 of the Gatt 1994. *Id.* at 8. Further, according to Akzo Nobel, “because Federal Courts determined that agency interpretations of ambiguous statutes must not conflict with international law or with an international agreement of the United States, the elimination of all offsets for non-dumped comparisons when calculating weighted-average dumping margins would contravene the United States’ WTO obligations and is prohibited under the antidumping statute.” *Id.* Accordingly, Akzo Nobel contends, the Department cannot employ zeroing in any weighted-average dumping margin calculation utilizing the average-to-transaction methodology.

In its September 10, 2012, rebuttal brief, petitioner states that contrary to Akzo Nobel’s prior arguments, the Department has the statutory authority to conduct a targeted dumping analysis in the instant administrative review. Specifically, according to petitioner, nowhere in the Act does it state that the Department cannot or should not conduct targeted dumping analyses in the context of administrative reviews. Petitioner argues that Akzo Nobel has not justified its statutory interpretation, but instead continues to assert that no clause appears in section 777A(d) of the Act that provides the Department with the statutory authority to conduct targeted dumping inquiries.

Petitioner maintains that the Department's current methodology is not based on any unauthorized transfer of authority from investigations to reviews. Petitioner asserts that section 777A(d)(2) of the Act, which pertains to reviews, is not parallel to section 777A(d)(1) of the Act, which pertains to investigations. In fact, according to petitioner, section 777A(d)(2) of the Act only addresses one aspect of the determination of less-than-fair-value sales in administrative reviews, namely the length of the period over which transaction prices are to be averaged "when comparing export prices (or constructed export prices) of individual transactions to the weighted-average price of sale of the foreign like product." *See* Petitioner's Rebuttal Brief at 3. Petitioner argues that Akzo Nobel's interpretation of the statute "would preclude the Department from comparing 'the weighted average of the normal values to the weighted average of the export prices (or construct export prices) for comparable merchandise.'" *Id.* According to petitioner, this is not the meaning or purpose of the statute. Rather, petitioner concludes, section 777A(d)(2) of the Act is merely a limited, special provision meant to clarify the time period for averaging in reviews. *Id.*

Therefore, according to petitioner, the Department has the discretion to adopt reasonable procedures for conducting reviews that do not contradict any law or pertinent regulations. Petitioner states that in the case of targeted dumping, the Department is allowed to fully examine the most appropriate margin calculation methodology, as described in the *Final Modification for Reviews* and 351.414(c)(1) of the Department's regulations. Petitioner states that the information in its targeted dumping allegation demonstrates that the application of the average-to-transaction methodology is the most appropriate under the circumstances of the instant review.

Petitioner also maintains that Akzo Nobel's arguments, including its exchange rate fluctuation argument, do not explain or excuse the targeted dumping revealed in Akzo Nobel's questionnaire responses. With regard to Akzo Nobel's argument that a targeted dumping inquiry is not justified because only a "fraction" of its sales satisfies the numeric *Nails* test, petitioner asserts that the Department has unequivocally rejected the use of any *de minimis* standard in targeted dumping analyses. *Id.* at 5.⁴⁷ Thus, petitioner states, Akzo Nobel's argument regarding the relative volume of targeted sales is of no consequence and should be dismissed by the Department in favor of its current practice. Lastly, with regard to Akzo Nobel's argument that anomalous freight costs account for the pricing patterns identified by petitioner in its targeted dumping allegation, petitioner argues that the range of international freight costs cited by Akzo Nobel in its case brief are actually within the normal range of freight costs reported. Therefore, according to petitioner, freight costs cannot explain Akzo Nobel's targeted dumping. Regarding Akzo Nobel's argument about the Department's use of one standard deviation to find a pattern of price differences in a targeted dumping inquiry, petitioner states that this argument has already been considered and rejected by the Department, most recently in *UAE Nails*.⁴⁸ Regarding Akzo Nobel's argument about the United States' international obligations with regard

⁴⁷ Citing *Flooring From the PRC*, and accompanying Issues and Decision Memorandum at Comment 4.

⁴⁸ *See UAE Nails* and accompanying Issues and Decision Memorandum at Comment 2 (noting that the Court of International Trade has affirmed that the Department's use of one standard deviation is not in violation of section 777A(d)(1)(B)(i) of the Act) (citing *Mid Continental Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (CIT 2010)).

to zeroing, petitioner argues that Akzo Nobel ignored the *Final Modification for Reviews*, in which the Department recognizes its WTO obligations and explains its decision *not* to adopt a total prohibition of zeroing in administrative reviews. *Id.* at 7.⁴⁹ As a result, petitioner states, “if the Department conducts a targeted dumping analysis and applies an average-to-transaction methodology in this review, it is not subject to any obligations, WTO or otherwise, that would require it to offset the results in the way suggested by Akzo.” *Id.* Instead, according to petitioner, just as it would in an original investigation, “the Department has the discretion to apply both the average-to-transaction methodology and zeroing in this administrative review.” *Id.* Accordingly, petitioner submits that the record in this case justifies an exercise of that discretion.

In its January 7, 2013, post-preliminary rebuttal comments, Akzo Nobel argues that in its January 2, 2013, post-preliminary comments, petitioner does not explain why the allegations it has made are sufficient and should serve as a basis for a targeted dumping analysis conducted by the Department. Rather, according to Akzo Nobel, petitioner simply relies on a statistical calculation derived from the *Nails* test as its entire factual basis for asserting that targeted dumping has occurred and should be addressed by utilizing an alternative comparison methodology to calculate the weighted-average margin of Akzo Nobel’s sales.

Akzo Nobel maintains that the *Nails* test is simply an *ad hoc* examination of whether prices of a given product to a customer, region, or time period are disproportionate relative to the prices expected under a normal distribution. *See* Akzo Nobel’s January 7, 2013, comments at 2. Additionally, Akzo Nobel states that as it noted in its case brief, the use of one standard deviation as the threshold criterion across all prices is unreliable. Akzo Nobel argues that petitioner has neither provided any other explanation nor discussed a more robust statistical test that would confirm an allegation of targeted dumping. *Id.* Akzo Nobel states that if the Department conducted an analysis of targeted dumping under a more robust test, such as the t-test, it would find no evidence of pricing patterns that would reflect an attempt by Akzo Nobel to dump its subject merchandise in the U.S. on a targeted basis. *Id.* at 2-3. According to Akzo Nobel, “{t}he sole reliance on one statistical test and the disregard for any other statistical analysis of pricing patterns, particularly in the absence of any supporting facts indicating the targeting of customers, products, or time periods, cannot be a ‘sufficient’ basis for the Department to deviate from its established practice for margin calculation in administrative reviews.” *Id.* at 3.

Additionally, Akzo Nobel maintains that the evidence it provided on the record in this administrative review fully explains the pricing results discussed by petitioner. Akzo Nobel states that the evidence of the high freight costs is seen in its U.S. sales database, and evidence explaining the exchange rate fluctuations was provided to the Department in its June 15, 2012, submission. According to Akzo Nobel, the *Nails* test provides no context for why the pricing in

⁴⁹ Citing *Final Modification for Reviews* at 8106, 8107 (noting that the Department’s review methodology will “parallel the WTO-consistent methodology the Department currently uses in original investigations” and that “{t}he methodologies and interpretations set forth and adopted in the *Final Modification for Reviews* fully address the findings of WTO inconsistency.”).

question occurred, which thereby requires the Department to look to the full evidence on the record regarding pricing behavior for the calculation of a margin. However, Akzo Nobel maintains, the specific factors on the record, such as exchange rate fluctuations and special freight pricing, explain pricing patterns that have nothing to do with targeted dumping. Akzo Nobel further maintains that the Department should ultimately conclude that the sales alleged by petitioner as having been target dumped were in fact priced for legitimate and explainable reasons that do not require the application of an alternative comparison methodology, even if a *Nails* test analysis may indicate a statistical pattern that could possibly (but not definitely) be the result of targeted dumping.

Regarding petitioner's argument that the Department has an established practice of statistical analysis to identify targeted dumping, Akzo Nobel claims that petitioner's only basis for this argument was to cite the recent analysis of targeted dumping in the final results in the *Ball Bearings*. Akzo Nobel contends that there is no specific discussion of the application of targeted dumping in administrative reviews in section 777A(d) of the Act. Moreover, according to Akzo Nobel, there are no regulations issued by the Department that address what facts should be considered or what process is to be used in the analysis of possible targeted dumping. *Id.* Akzo Nobel states that when the Department withdrew proposed regulations on the application of targeted dumping in investigations, "it specifically noted that it would examine matters on the basis of 'case-by-case adjudication, until additional experience allows the Department to gain greater experience in understanding the issue.'" *Id.*, citing 73 FR 74930, 74931 (December 10, 2008). Akzo Nobel argues that since no regulation on targeted dumping has yet been proposed, it is disingenuous to say that the Department has an "established" practice on this matter. Instead, according to Akzo Nobel, the Department has a series of *ad hoc* applications of the *Nails* test, with modifications based on the facts of a particular administrative review. Akzo Nobel argues that these prior applications of the *Nails* test are not binding precedent that must be applied in this current administrative review.

Additionally, Akzo Nobel argues that in citing the Department's discussion of the final results in the recent *Ball Bearings* administrative review, petitioner does not provide an explanation as to why that process, to the exclusion of other factors, should be considered in the Department's analysis of an alternative comparison methodology in this case. Akzo Nobel asserts that in this administrative review, the Department must adhere to the principle that "in implementing the antidumping statute, Commerce is to calculate antidumping margins as accurately as possible." *Id.* at 5, citing *Thai I-Mei*. Akzo Nobel adds that the U.S. Court of International Trade has required the Department to "make case-by-case determinations and consider data unique to the particular case before it." *Id.* Akzo Nobel avers that there is no fully established practice for the application of an alternative calculation methodology to which the Department must adhere in the final results. Rather, according to Akzo Nobel, the Department must adhere to its general principles in the calculation of a margin, and, in doing so, should conclude that the full factual information on the record, as presented by Akzo Nobel, does not ultimately warrant the use of an alternative comparison methodology for the calculation of its margin.

In its January 7, 2013, post-preliminary rebuttal comments, petitioner states that Akzo Nobel's assertion, in its January 2, 2013, post-preliminary comments at 4-7, that the Department must

determine that the patterns of pricing it identified in the CMC Post-Prelim Analysis Memo resulted from some “intentional strategy” to engage in targeted dumping on the part of Akzo Nobel are incorrect. Petitioner asserts that, in fact, “the Act does not require the Department to explain *why* targeted dumping exists, once the Department has determined that it does, and the Department has never found that such a determination is necessary in order for it to perform a targeted dumping analysis.” See Petitioner’s January 7, 2013, rebuttal comments at 2 (emphasis in original). Petitioner contends that the Department, in discussing the legislative intent underlying section 77A(d)(1)(B) of the Act, rejected the same “intent” argument previously. *Id.* at 2-3.⁵⁰ Petitioner states that the Department explained that a standard requiring it to determine “why” an exporter’s pricing behavior may differ significantly as between customers, regions or time periods “is nowhere to be found in the Act and it would likely create an unmanageable standard for the Department. Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to ‘why.’” *Id.* at 3.⁵¹ Therefore, petitioner states, the Department has made it clear that it need not determine that Akzo Nobel engaged in any intentional strategy—or even why Akzo Nobel engaged in targeted dumping at all—in order to perform its targeted dumping analysis. Additionally, according to petitioner, the Department has also rejected Akzo Nobel’s contention that its targeted dumping can be explained by exchange rate fluctuations or international freight costs.

Petitioner also states that Akzo Nobel’s argument regarding the Department’s use of one standard deviation to find a pattern of price differences in a targeted dumping inquiry has already been considered and rejected by the Department in *UAE Nails 2012*⁵² and in the CMC Post-Prelim Analysis Memo. Furthermore, according to petitioner, in *UAE Nails 2012*, the Department justified its long-held practice of applying its average-to-transaction comparison method, once it determines that sales have been targeted to a level warranting the application of this method. Petitioner states that in *UAE Nails*, the Department applied the average-to-transaction methodology to all of the relevant producers’ U.S. sales and stated that “{it} does not have a practice of using {average}-to-transaction comparisons for certain transactions and average-to-average comparisons for other transactions in calculating the weighted-average dumping margin. Rather, the Department chooses the appropriate comparison method and applies it uniformly for all comparisons of {normal value} and export price or constructed export price.” *Id.* at 5, citing *UAE Nails 2012*, and accompanying Issues and Decision Memorandum at Comment 4. Petitioner stresses that the Department refused to do in *UAE Nails 2012* what Akzo Nobel has requested it to do in this review, and the Department should not undermine its analysis of Akzo Nobel’s targeted dumping by applying the average-to-transaction methodology to only a subset of Akzo Nobel’s transactions. Petitioner adds that the Department has already applied the *Nails* test and correctly applied the average-to-transaction methodology to all of Akzo Nobel’s

⁵⁰ Citing *Ball Bearings*, and accompanying Issues and Decision Memorandum, dated December 4, 2012, at Comment 1.

⁵¹ Citing *Ball Bearings* (citing *UAE Nails*), and accompanying Issues and Decision Memorandum, dated March 19, 2012, at Comment 1.

⁵² See *Certain Steel Nails From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value*, 77 FR 17029 (March 23, 2012) (*UAE Nails 2012*), and accompanying Issues and Decision Memorandum, dated March 19, 2012, at Comment 2.

U.S. sales and should continue to calculate less-than-fair-value sales applying this methodology and zeroing in the final results.

Department's Position

In these final results, and consistent with the Post-Preliminary Analysis, we continue to find for Akzo Nobel that a pattern of CEPs for comparable merchandise that differ significantly among time periods does exist. Further, we find that the average-to-average (A-A) method cannot account for the observed price differences, and thus, we have used the average-to-transaction (A-T) comparison method to calculate Akzo Nobel's weighted-average dumping margin. This position is consistent with 19 CFR 351.414(c)(1) and our determinations in several recently completed administrative reviews.⁵³

We address interested parties' comments in three parts, with the first section dedicated to the framework under which the Department determines whether to use an alternative comparison method in administrative reviews as contemplated in 19 CFR 351.414(c)(1), the second dedicated to our analysis of whether to use the A-T comparison method to calculate Akzo Nobel's weighted-average dumping margin, and the third dedicated to the reasonableness of the standard deviation test. Our reasoning is set forth below.

A. Legal Framework For The Application of An Alternative Comparison Method in Administrative Reviews

In this review, petitioner submitted a timely allegation of targeted dumping by Akzo Nobel prior to the *Preliminary Results*.⁵⁴ Petitioner asserted that there are patterns of U.S. sales prices for comparable merchandise that differ significantly among certain time periods. Accordingly, petitioner requested that the Department employ an alternative comparison method to calculate Akzo Nobel's weighted-average dumping margin, comparing individual U.S. transaction prices to normal values based on weighted-averages of comparison market sales prices, in this review.

We disagree with Akzo Nobel's claim that the Department does not have the statutory authority in administrative reviews to conduct a targeted dumping analysis or to employ an alternative comparison method based on a targeted dumping allegation. Section 771(35)(A) of Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The definition of "dumping margin" calls for a comparison of normal value and export price or constructed export price. Before making the comparison called for, it is necessary to determine how to make the comparison. Thus, Akzo Nobel's reliance on *FAG Italia S.p.A.* is misplaced, because here it is necessary to calculate a

⁵³ See e.g., *See Circular Welded Carbon Steel Pipes and Tubes From Turkey; Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 77 FR 72818 (December 6, 2012) (*Pipe from Turkey*), and accompanying Issues and Decision Memorandum at Comment 1; *Ball Bearings*, and accompanying Issues and Decision Memorandum at Comment 1; *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 3396 (January 16, 2013) (*Tapered Roller Bearings*), and accompanying Issues and Decision Memorandum at Comment 1.

⁵⁴ See Targeted Dumping Allegation of Petitioner Aqualon Company, dated May 25, 2012.

dumping margin based on a comparison, the statute is silent in how the Department may make that comparison in administrative reviews and, accordingly, the Department is selecting a comparison methodology to apply.

Section 777A(d)(1) of the Act describes three methods by which the Department may compare normal value and export price (or constructed export price) and places certain restrictions on the Department's selection of a comparison method in antidumping investigations. Contrary to Akzo Nobel's argument, the statute places no such restrictions on the Department's selection of a comparison method in administrative reviews. The Department's regulations at 19 CFR 351.414 describe the methods by which normal value may be compared to export price or constructed export price in administrative reviews: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the export prices or constructed export prices have been averaged together (*i.e.*, for an averaging group). The Department's regulations at 19 CFR 351.414(c)(1) fill the silence in the statute on the choice of comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping investigations and administrative reviews, the average-to-average method will be used "unless the Secretary determines another method is appropriate in a particular case."⁵⁵

The antidumping duty statute, the Statement of Administrative Action (SAA), and the Department's regulations do not address directly whether the Department should use an alternative comparison method in an administrative review, based upon a targeted dumping analysis conducted pursuant to section 777A(d)(1)(B) of the Act.⁵⁶ In light of the statute's silence on this issue, the Department recently indicated that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, but declined to "speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed."⁵⁷ At that time, the Department also indicated that it would look to practices employed by the agency in investigations for guidance on this issue.⁵⁸

In antidumping duty (AD) investigations, the Department examines whether to use an A-T method by using a targeted dumping analysis consistent with section 777A(d)(1)(B) of the Act:

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

⁵⁵ 19 CFR 351.414(c)(1).

⁵⁶ See section 777A(d)(1)(B) of the Act, SAA, H.R. Doc 103-316, vol. I, at 842-43 (1994) (SAA), and 19 CFR 351.414.

⁵⁷ See *Final Modification for Reviews*, 77 FR at 8106-07.

⁵⁸ *Id.* at 8102.

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 a method described in paragraph (1)(A)(i) or (ii).

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is, in fact, analogous to the issue in AD investigations. Accordingly, the Department finds the analysis that has been used in AD investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not direct the Department to conduct targeted dumping analyses in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) of the Act does not require, or prohibit, the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods."⁵⁹ Like the statute, the SAA does not limit the proceedings in which the Department may undertake such an examination.

We disagree with Akzo Nobel that the silence of the statute with regards to application of an alternative comparison methodology in administrative reviews precludes the Department from applying such a practice. Indeed, the Court of Appeals for the Federal Circuit (CAFC) has stated that the Court "must, . . . , defer to Commerce's reasonable construction of its governing statute where Congress 'leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency's generally conferred authority and other statutory circumstances.'"⁶⁰ Further, the Court of International Trade has stated that this "silence has been interpreted as 'an invitation' for an agency administering unfair trade law to 'perform its duties in the way it believes most suitable' and courts will uphold these decisions 'so long as the {agency}'s analysis does not violate any statute and is not otherwise arbitrary and capricious."⁶¹ We find that the above discussion of the

⁵⁹ See SAA, H.R. Doc. 103-316 at 843.

⁶⁰ See *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010) (quoting *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352,1361 (CAFC 2005)).

⁶¹ See *Mid Continent Nail Corp. v. United States*, 712 F.Supp. 2d 1370,1376 (CIT 2010) (*Mid Continent Nail*) citing *U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

extension of the statute with respect to investigations is a logical, reasonable and deliberative method to fill the silence with regard to administrative reviews.

B. Targeted Dumping Analysis of Akzo Nobel

Contrary to Akzo Nobel's insistence that the Department has no established practice that addresses the facts to be considered or what process is to be used in the analysis of possible targeted dumping, in recent AD investigations and administrative reviews where the Department has addressed targeted dumping allegations, the Department has employed the *Nails* test⁶² for each respondent subject to an allegation to determine whether a pattern of export prices or constructed export prices for comparable merchandise that differ significantly among purchasers, regions or time periods existed within the U.S. market.⁶³ The *Nails* test involves a two-step process, as described below, that determines whether the Department should consider whether the A-A method is appropriate in a particular situation.

In the first stage of the test, the "standard-deviation test," we determined the share of the alleged targeted time-period sales of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted-average price of all sales under review, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (*i.e.*, by CONNUM) using the weighted-average prices for the alleged targeted time periods and the time periods not alleged to have been targeted. If that share did not exceed 33 percent, then we did not conduct the second stage of the *Nails* test. If that share exceeded 33 percent, on the other hand, then we proceeded to the second stage of the *Nails* test.

In the second stage, we examined all sales of identical merchandise (*i.e.*, by CONNUM) sold during the alleged targeted time periods which passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for the alleged time periods and the next higher weighted-average price of sales for a non-targeted groups exceeds the average price gap (weighted by sales volume) between the non-targeted time periods. We weighted each of the price gaps between the non-targeted time periods by the combined sales volume associated with the pair of prices for the non-targeted time periods that defined the price gap. In doing this analysis, the allegedly targeted group's sales were not included in the non-targeted groups; the alleged targeted time-period's sales were not included in the non-targeted time periods; the alleged targeted time-period's average price was compared only to the weighted-average prices for the non-targeted

⁶² See *Nails*, as modified in more recent investigations, *e.g.*, *Wood Flooring*; see also *Mid Continent Nail Corp. v. United States*, No. 08-224, Slip. Op. 2010-47 (CIT May 4, 2010) and *Mid Continent Nail*.

⁶³ See, *e.g.*, *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010); OCTG I&D Memo at Comment 2; *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 59217 (September 27, 2010), and accompanying Issues and Decision Memorandum at Comment 3 ; *Ball Bearings and Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 77 FR 72818 (December 6, 2012).

time periods. If the share of the sales that met this test exceeded five percent of the total sales volume of subject merchandise during the alleged targeted time period, then we determined that time-period targeting occurred.

As explained in the Post-Preliminary Analysis, if the Department determined that a sufficient volume of U.S. sales were found to have passed the *Nails* test, then the Department considered whether the A-A method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the A-A method and the weighted-average dumping margin calculated using the A-T method.⁶⁴ Where there was a meaningful difference between the results of the A-A method and the A-T method, the A-A method would not be able to take into account the observed price differences, and the A-T method would be used to calculate the weighted-average margin of dumping for the respondent in question.⁶⁵ Where there was not a meaningful difference in the results, the A-A method would be able to take into account the observed price differences, and the A-A method would be used to calculate the weighted-average dumping margin for the respondent in question.

In determining whether to apply the *Nails* test; as detailed in the CMC Post-Preliminary Analysis Memo, the Department considered the facts on the record of the instant review in making its determination.⁶⁶ We applied the *Nails* test as a reasonable method of determining whether targeted dumping exists in this review, consistent with our approach in several other recent administrative reviews. Although Akzo Nobel does not disagree that the *Nails* test results in certain sales showing up with prices that differ significantly among time periods, it raises some arguments which we have addressed below.

Regarding Akzo Nobel's arguments about whether the *Nails* test is an appropriate method, we note that the Department has repeatedly explained the use of this test,⁶⁷ and that the U.S. Court of International Trade has affirmed the *Nails* test as reasonable.⁶⁸ The Department has examined in prior cases whether the results of the two steps are sufficient to find that further consideration of whether the average-to-transaction method is warranted.⁶⁹ Specifically, the Department

⁶⁴ See CMC Post-Prelim Analysis Memo at 3-4; see also CMC Post-Prelim Calculation Memo and the memorandum entitled "Antidumping Duty Administrative Review of Purified Carboxymethylcellulose (CMC) from the Netherlands: Final Calculation Memorandum from Dena Crossland, International Trade Compliance Analyst, AD/CVD Operations, Office 7, Import Administration, to The File, through Angelica Mendoza, Program Manager, AD/CVD Operations, Import Administration," dated January 31, 2013 (CMC Final Calculation Memo).

⁶⁵ *Id.*

⁶⁶ See CMC Post-Prelim Analysis Memo; *Final Modification for Reviews*; see also Final Calculation Memo.

⁶⁷ See *Ball Bearings*, and accompanying Issues and Decision Memorandum at Comment I.

⁶⁸ See *Mid-Continent Nail*, 712 F. Supp. 2d at 1380.

⁶⁹ See, e.g., *Certain Stilbenic Optical Brightening Agents from Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 76 FR 68154, 68156 (November 3, 2011) ("We preliminarily determine that the overall proportion of {respondent}'s U.S. sales during the POI that satisfy the criteria of section 777A(d)(1)(B)(i) of the Act and our practice as discussed in *Nails* is insufficient to establish a pattern of EPs for comparable merchandise that differ significantly among certain customers or regions. Accordingly, the Department has determined that criteria established in 777A(d)(1)(B)(i) of the Act have not been met."), unchanged in *Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at*

previously has found that such an assessment of sufficiency of the results of the two steps is appropriate to determine in investigations whether section 777A(d)(1)(B)(i) of the Act is satisfied – *i.e.*, whether there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods – and finds that such an assessment is equally appropriate in the context of applying the *Nails* test in this administrative review.⁷⁰ Moreover, section 777A(d)(1)(B) of the Act does not require a specific test for determining whether targeted dumping occurred. As a result, and contrary to Akzo Nobel’s claims, the Department properly examined the results of the two steps of the *Nails* test for sufficiency of those result to support a finding that section 777A(d)(1)(B)(i) of the Act is satisfied. Thus, Akzo Nobel’s arguments are without merit.

We also disagree with Akzo Nobel that the Department should apply a *de minimis* threshold, and have not specified a *de minimis* threshold in these final results. In the *Final Modification for Reviews*, the Department states that it “will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology by examining the same criteria the Department examines in original investigations pursuant to sections 777A(d)(1)(A) and (B) of the Act, where no *de minimis* standard is applied”⁷¹ As stated in *Wood Flooring*, “the only limitations the statute places on the application of the average-to-transaction method are the satisfaction of the two criteria set forth in the provision.”⁷² Further, 19 CFR 351.414(c)(1) states that the Department will use the A-A method in administrative reviews “unless the Secretary determines another method is appropriate in a particular case.”⁷³ Accordingly, the Department has not specified a *de minimis* threshold. Instead, the Department examines the results of the *Nails* test as described above and determines, on a case-by-case basis, whether the volume of sales found to be targeted are sufficient to justify a finding that the pattern requirement has been satisfied. In this case, Akzo Nobel’s volume of sales establishes a pattern under the *Nails* test that was clearly above a *de minimis* level.⁷⁴ In this regard, the Department disagrees that this case presents facts similar to past cases such as *Stilbenic Agents from Taiwan* where the Department has only found a very small percentage of sales to be targeted.

With respect to respondent’s argument about abnormally high freight costs or exchange rate fluctuations affecting our targeted dumping analysis results, the Department’s analysis does not examine the alleged reasons that significant differences in prices exist. As stated in *Ball Bearings*, a standard requiring the Department to determine “‘why’ an exporter’s pricing behavior may differ significantly as between customers, regions or time periods . . . is nowhere found in the Act and it would likely create an unmanageable standard for the Department. Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to ‘why.’” Further, we use the same prices in our targeted dumping analysis that we use in our price comparisons, prices that are affected by freight costs

Less Than Fair Value, 77 FR 17027, 17027-28 (March 23, 2012).

⁷⁰ *Id.*

⁷¹ See *Final Modification for Reviews*.

⁷² See *Wood Flooring*, and accompanying Issues and Decision Memorandum at Comment 4.

⁷³ *Id.* at 8114.

⁷⁴ See CMC Post-Preliminary Analysis Calculation Memorandum and CMC Final Calculation Memorandum.

and exchange rates. If these prices are an acceptable basis for our price comparisons, they likewise should be an acceptable basis for our targeted dumping analysis. Additionally, Akzo Nobel argues that petitioner provided no evidence that Akzo Nobel intentionally engaged in targeted dumping. Congress did not speak to the “intent” of the producers or exporters in setting prices that are significantly different as between the periods of time being examined. Moreover, the Department looks at whether there is a pattern of price differences, not whether the producer/exporter was attempting to target. However, even if the Department were to consider the cause of our targeted dumping finding, Akzo Nobel has not demonstrated that freight costs or exchange rate fluctuations caused such finding, because Akzo Nobel has limited the scope of its explanation pertaining to exchange rate fluctuations, for example, only to certain segments of the period rather than the pattern of prices during the totality of the period.

We disagree with Akzo Nobel that the legislative history of the Uruguay Round Agreements Act requires us to conduct a qualitative analysis as suggested by Akzo Nobel. The statements in the legislative history indicate that the Department should proceed with its analysis on a case-by-case basis because of differences in industries that may be present. Here, we disagree with Akzo Nobel that any such differences exist that would require us to reconsider the analysis we are using in this case for the reason discussed immediately above. Furthermore, we fundamentally disagree with the ultimate conclusion of Akzo Nobel’s argument that an exporter’s “intentional goal” should be a part of the Department’s analysis. As discussed supra, the Department is not required to determine “why” an exporter’s pricing behavior may differ significantly between customers, regions or time periods.⁷⁵

Moreover, Akzo Nobel argues that petitioner did not put their targeted dumping allegation in context or explain the significance of the allegedly targeted time periods. We determine that in its targeted dumping allegation, petitioner provided its analysis which demonstrated, in applying the Department’s *Final Modification for Reviews* methodology, that the criteria for finding a pattern of export prices (or CEPs) for comparable merchandise that differ significantly among periods of time pursuant to section 777A(d)(1)(B) of the Act were met with regard to Akzo Nobel.⁷⁶ Specifically, petitioner alleged that targeted sales existed for certain time periods during the period of review and explained why the A-A methodology could not take into account the observed price differences.⁷⁷ Per our practice, where the Department has received targeted dumping allegations in AD investigations or administrative reviews, the Department has employed the *Nails* test for each respondent subject to an allegation to determine whether a pattern of export prices or CEPs for comparable merchandise that differ significantly among purchasers, regions, or time periods existed within the U.S. market. In this case, we employed the *Nails* test to determine whether a pattern of CEPs for comparable merchandise that differ significantly among the alleged time periods existed.

We disagree with Akzo Nobel that we should limit our A-T methodology to only the targeted sales (e.g., one CONNUM). After applying the *Nails* test in this review and in order to unmask

⁷⁵ See *Ball Bearings*.

⁷⁶ See Page 6 and Exhibit 3 of Petitioner’s May 25, 2012, targeted dumping allegation.

⁷⁷ See Page 8 of Petitioner’s May 25, 2012, targeted dumping allegation.

Akzo Nobel's targeted dumping during the period of review, the Department appropriately applied the A-T methodology to *all* of Akzo Nobel's period of review. As explained above, the Department may compare normal values to export prices or CEPs in administrative reviews by three distinct comparison methods.⁷⁸ The Department also has established criteria for determining whether the A-A or A-T is the more appropriate methodology. The Department does not have a practice of using one comparison method for certain transactions and another comparison method for other transactions in calculating the weighted-average dumping margin.⁷⁹ Rather, the Department chooses the appropriate comparison method and applies it uniformly for all comparisons of normal value and export price or CEP.⁸⁰ We find that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a similarly uniform application of A-T comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the A-T method is the appropriate method.⁸¹ The only limitations the statute places on the application of the A-T method are the satisfaction of the two criteria set forth in the provision.⁸² When the criteria for application of the A-T method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the A-T comparison methodology to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average normal value to the export price (or CEPs) of individual transactions. We find that this interpretation is a reasonable one and is more consistent with our approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally. Accordingly, we are not applying A-T comparisons to only a subset of sales. Instead, because the criteria of section 777A(d)(1)(B) of the Act have been satisfied in this review, we will apply A-T comparisons for all sales in calculating Akzo Nobel's weighted-average dumping margin. Therefore, we find that it is reasonable to apply A-T comparison methodology to all sales because doing otherwise conceals margins associated with targeted sales.

Additionally, we reject Akzo Nobel's assertion that the Department is prohibited from denying offsets in its dumping margin analysis by its international obligations. The *Final Modification for Reviews* was implemented by the Executive Branch, pursuant to section 123 of the URAA, to change the Department's practice related to zeroing in administrative reviews in order to make it consistent with certain WTO panel and appellate body determinations. Neither the *Final Modification for Reviews*, nor the WTO panel and appellate body determinations involved the use of an alternative comparison methodology. Furthermore, no WTO panel or appellate body determination has addressed the use of an alternative comparison methodology pursuant to section 777A(d)(1)(B) or article 2.4.2 of the Antidumping Agreement.

⁷⁸ See 19 CFR 351.414.

⁷⁹ See *Wood Flooring*, and accompanying Issues and Decision Memorandum at Comment 4; see also *UAE Nails 2012*, and accompanying Issues and Decision Memorandum at Comment 1.

⁸⁰ *Id.*

⁸¹ See *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010), and accompanying Issues and Decision Memorandum at Comment 1; see also *Wood Flooring*, and accompanying Issues and Decision Memorandum at Comment 4.

⁸² *Id.*

Moreover, with respect to WTO reports finding the denial of offsets by the United States to be inconsistent with the WTO AD Agreement, the CAFC has held that WTO reports are without effect under U.S. law, “unless and until such {a report} has been adopted pursuant to the specified statutory scheme” established in the URAA.⁸³ As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department’s discretion in applying the statute.⁸⁴ Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports.⁸⁵ Accordingly, the Department continues to find that a pattern of CEPs for comparable merchandise that differ significantly among time periods does exist, and has considered whether the A-A method can account for the observed price differences. Further, the Department continues to find that there is a meaningful difference between the weighted-average dumping margins calculated using the A-A and A-T methods and, thus, the A-A method cannot account for the observed significant price differences. As a result, the Department has used the A-T method to calculate the weighted-average margin of dumping for Akzo Nobel in these final results.

C. The Reasonableness of the Standard Deviation Test

Concerning Akzo Nobel’s reference to the Department’s use of one standard deviation, the Department has determined the one-standard-deviation threshold to be a distinct and reasonable bright line to quantitatively measure significant price differences.⁸⁶ Further, the U.S. Court of International Trade has affirmed the Department’s use of the standard deviation test as part of the *Nails* test.⁸⁷

As an initial matter, the use of one standard deviation limits the number of sales that could be considered targeted because approximately 16 percent of all prices would typically be found to be more than one standard deviation below the mean, assuming a normal distribution of prices. At this stage, a certain portion of all allegedly targeted sales have prices that are one standard deviation below the mean price of the non-targeted sales in the database.

We find the price threshold of one standard deviation below the average market price to reasonably show a price difference that indicates targeted dumping. This is because: 1) it is a distinguishing measure relative to the spread or dispersion of prices in the market in question, and 2) it strikes a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others, and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others.⁸⁸ In contrast, the number of sales with prices that are two standard

⁸³ *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1347-1349 (CAFC 2005); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (CAFC 2007); *NSK Ltd. v. United States*, 510 F.3d 1375, 1380 (CAFC 2007).

⁸⁴ See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).

⁸⁵ See 19 U.S.C. 3533(g).

⁸⁶ See *Tapered Roller Bearings*, and accompanying Issues and Decision Memorandum at Comment 1.

⁸⁷ See *Mid Continent Nail*, 712 F.Supp. 2d at 1377.

⁸⁸ See *Certain Oil Country Tubular Goods from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of*

deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted prices within the observed price data.⁸⁹ Additionally, to the extent Akzo Nobel argues that one standard deviation is too small given its alleged pricing behavior, the standard deviation test uses the average of Akzo Nobel's actual pricing behavior based on allegedly non-targeted time periods to calculate the standard deviation.

In addition, our test introduces a 33-percent threshold in determining whether a significant portion of targeted sales were made at prices one standard deviation below the mean of all prices. We do not use the standard deviation measure to make statistical inferences but, rather, use the standard deviation as a relative standard against which to measure the differences between the price to the alleged target and to the non-targeted group. For this purpose, one standard deviation below the average price is sufficient to distinguish the alleged target from the non-targeted group.

In selecting the 33 percent and 1 standard deviation thresholds, we have considered the probability of a sub-set of sales of a normally-distributed set of sales being selected for which more than 33 percent of the observations are more than 1 standard deviation below the mean of the allegedly non-targeted sales, and the probability that such a difference could result from simple variation or statistical error, and have set these thresholds accordingly. Akzo Nobel argues this probability is "common." Yet the Department has found the probability that the 33 percent/1 standard deviation test would indicate patterns of significant price differences where none exist to be sufficiently unlikely.

Regarding Akzo Nobel's suggestion to use a difference-in-means test ("t-test"), the Department explicitly rejected using this test to identify targeted dumping in *Tires*.⁹⁰ A t-test generates a t-statistic used to test the null hypothesis that two independently drawn random samples are either from the same normal distribution, or from two separate normal distributions having the same mean, to a specified level of probability. The null hypothesis is rejected when the t-statistic indicates that the probability that a difference in the means of the two samples' underlying populations exists is above the specified probability. In this case, the differences between the sample means is said to be statistically significant. However, saying that the difference in sample means is (statistically) significant is not the same as saying that the difference in sample means is significant for the purposes of finding significant price differences. Since the latter is what the statute requires, *i.e.*, prices that differ significantly across purchasers, regions or time periods, the use of the difference-in-means test would not be appropriate in the context of a targeted dumping analysis.

Targeted Dumping, 75 FR 20335 (April 19, 2010), and accompanying Issues and Decision Memorandum at Comment 2.

⁸⁹ *Id.*

⁹⁰ See *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008), and accompanying Issues and Decision Memorandum at Comment 23.D.

Comment 2: Monthly Targeted Dumping Allegation

In its January 2, 2013, post-preliminary comments, petitioner requests that, for the final results in this review, the Department apply the analysis it set forth in its CMC Post-Prelim Analysis Memo. However, petitioner states that the Department should make one change in its methodology with respect to the time periods that were analyzed. Specifically, petitioner asserts that in its targeted dumping allegation, it demonstrated Akzo Nobel's targeted dumping on both a quarterly and a monthly basis, whereas the Department limited its post-preliminary analysis to the former. Accordingly, petitioner requests that the Department analyze all of manifestations of targeted dumping.

In its January 7, 2013, rebuttal comments, Akzo Nobel states that the evidence on the record indicates that the alleged sales in random months were not targeted for dumping, but were *de minimis* in nature and explained by phenomena affecting the price that was no way connected to targeting those sales for dumping. According to Akzo Nobel, the alleged targeted monthly sales constituted a small total volume of its U.S. sales. Akzo Nobel contends that although such sales may technically satisfy the *Nails* test, this *de minimis* level is insufficient to establish a pattern of export prices that "differ significantly" and thereby necessitate the application of an alternative calculation methodology to its sales.⁹¹ Additionally, Akzo Nobel maintains that the only reason why certain months were alleged as months with targeted dumping was because these months had abnormally high international freight costs relative to other sales, which drove the weighted-average price for those months down greatly. Akzo Nobel also maintains that there is no evidence on the record that would indicate a pattern of sales with such freight costs creating low U.S. net prices that would be more emblematic of targeted dumping. *Id.* Thus, Akzo Nobel states, the Department does not need to initiate an inquiry into monthly targeted dumping as suggested by petitioner, but rather should continue to utilize the average-to-average methodology applied in the *Preliminary Results*.

Department's Position

We agree with petitioner and have analyzed both of the time period allegations. While Akzo Nobel argues that the alleged targeted monthly sales constituted a small total volume of its U.S. sales, we note that there is evidence of targeted dumping in certain months at a sufficient level for applying the A-T methodology to Akzo Nobel's U.S. sales. *See* CMC Final Calculation Memo.⁹² Additionally, we note that in the post-preliminary SAS computer program, we inadvertently activated the targeted dumping analysis for the alleged quarterly time period, rather than both the alleged quarterly and monthly time periods. We have revised the program and our results are included in the Final Calculation Memo. We note that the calculated dumping margin remains the same.

⁹¹ *See* Akzo Nobel's January 7, 2013, rebuttal comments at 6, citing *Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027, 17028 (March 23, 2012).

⁹² *See* CMC Final Calculation Memo.

Comment 3: Cost Database

Akzo Nobel states that the Department made a clerical error in the preliminary results by using an earlier version of Akzo Nobel's cost database (ANOCPO2) instead of the cost database submitted on May 4, 2012 (ANOCPO3) for its calculations, resulting in an improper increase in the preliminary dumping margin reported. Therefore, according to Akzo Nobel, the Department should, in its final results, utilize ANOCPO3 to calculate Akzo Nobel's weighted-average dumping margin.

Petitioner did not comment on this issue.

Department's Position

We disagree with Akzo Nobel that we used the wrong cost database for Akzo Nobel's preliminary dumping margin calculation. However, we find that we did inadvertently rename Akzo Nobel's May 4, 2012, cost database as ANOCPO2, rather than ANOCPO3, when we saved the file after downloading it from the Department's electronic filing system called "Import Administration AD and CVD Centralized Electronic Service System," or "IA ACCESS." We have confirmed via SAS database checks that the cost database that was used in the preliminary results was Akzo Nobel's most recent database (*i.e.*, ANOCPO3). Therefore, no programming changes, with regard to Akzo Nobel's cost database, are required for the final results.

Recommendation:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review and the final dumping margin for Akzo Nobel in the *Federal Register*.

Agree ✓ Disagree _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

31 JANUARY 2013
Date