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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of
Antidumping Duty Administrative Review: Polyethylene
Terephthalate Film From India; 2011 – 2012 Administrative
Review

Summary

The Department of Commerce (the Department) analyzed the case and rebuttal briefs submitted by interested parties in the administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (PET Film) from India. As a result of this analysis, we have not made changes to the Preliminary Results.¹ We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

Background

On August 7, 2013, the Department published the Preliminary Results. The review covers three respondents, Jindal Poly Films Limited (Jindal), SRF Limited (SRF), and Polyplex Corporation Ltd. (Polyplex). The period of review (POR) is July 1, 2011, through June 30, 2012. SRF submitted a case brief on September 30, 2013 while Jindal submitted a letter in lieu of a case brief on September 6, 2013. Petitioners submitted a letter in lieu of a rebuttal brief on October 18, 2013 stating that the Department should continue to use the differential pricing methodology based on the precedent and reasoning set forth in Xanthan Gum.²

¹ See Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Antidumping Duty Administrative Review; 2011–2012, 78 FR 48143 (August 7, 2013) (Preliminary Results).

² See Xanthan Gum From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013) (Xanthan Gum), and accompanying Issues and Decision Memorandum at Comment 3.



Scope of the Order

The products covered by the antidumping duty order are all gauges of raw, pretreated, or primed PET Film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET Film are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the antidumping duty order is dispositive.

Discussion of the Issues

Comment 1: Differential Pricing Analysis: Magnitude of the Observed Price Differences Ignored

SRF's Arguments

- SRF asserts that “the Cohen’s d test says nothing about {the} relative magnitude” of the observed price differences, and that “tiny price differences can result in ‘passing’ Cohen’s d values.” SRF provides a hypothetical example in which it claims that small differences, based only on fluctuations in exchange rates, result in sales passing the Cohen’s d test.

Department’s Position:

The Department disagrees with SRF that the Cohen’s d test does not take into account the relative magnitude of the observed price differences. The Cohen’s d coefficient measures the difference in the weighted-average prices between the test group and the comparison group relative to the distribution of prices within each group (*i.e.*, the variance or standard deviation). As a result, if prices within the test and comparison groups differ by only small amounts (such as in SRF’s hypothetical example where the only difference is based on the differences in variable exchange rates applied to the freight expense denominated in rupees), then the variance within each group is small and there only needs to be a proportionally small difference in the weighted-average prices between the test group and the comparison group to identify a significant difference. Likewise, if there would be a wide dispersion of prices within either the test group or the comparison group, then a difference between the weighted-average prices between the test group and the comparison group would have to be correspondingly larger for the Cohen’s d test to identify this difference to be significant.

Comment 2: Differential Pricing Analysis: Inclusion of Both Higher- and Lower-Priced Sales

SRF's Arguments

- The Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316 (1994) (SAA) defines “targeting” as an action directed at a

specific, limited goal, such as a particular group of customers. “Targeted dumping,” therefore, is the action of selling at lower prices to a limited and identifiable category of entities within the whole population. As such, sales to particular customers or regions with prices that are at or above the “norm” are not “targeted.”

- SRF states that, if the Department continues to use the Cohen’s *d* test, then it should only consider the lower-priced sales as passing the test. SRF states that the Cohen’s *d* test does not distinguish between weighted-average prices that are lower or higher than the mean, and that targeting “is not pricing that is bi-directional.”³ SRF continues that a “‘targeter’ does not capture additional sales by raising prices.”⁴
- SRF further asserts that inclusion of higher-priced sales (*i.e.*, test group sales whose weighted-average price is greater than the weighted-average price of the comparison group) constitutes double counting. SRF connects this claim with the observation that the inclusion of the higher priced sales results in the mean increasing and thus causing more lower-priced sales to pass the Cohen’s *d* test. Conversely, when higher-priced sales are excluded from the comparison group, the mean of the comparison group will be lower and the higher-priced sales are more likely to pass the Cohen’s *d* test. This, SRF claims, leads to double counting of the higher priced sales because (1) these sales are counted to the mean and (2) these sales are then counted a second time as passing the test negatively because they are above the standard deviation.
- SRF states that “{u}nder the law, the differing prices must be distributed among the U.S. sales in a discernible ‘pattern.’”⁵ SRF claims that “{m}ore than a simple finding of different prices is required” and that simply finding some lower-priced sales and other higher-priced sales “does not a pattern make.” Therefore, “to find a credible percentage of ‘differential pricing’ that presents a pattern, only the percentage relating to lower priced sales should be considered.”⁶
- “If the Department uses the Cohen’s *d* test to find “differential pricing” and “zeroes” to prevent the average-to-average (A-to-A) method from masking targeted dumping, it should only deny offsets on sales with prices that are below the standard deviation (*i.e.*, sales that create only positive Cohen’s *d* values in the Department’s program).”⁷ Only lower-priced sales can be construed as having been targeted, whose definition “presupposes sales with prices that are lower than some benchmark” whereas “sales that are priced higher than the benchmark are not targeted.”⁸

³ See SRF’s Case Brief at 5.

⁴ *Id.*

⁵ *Id.* at 7.

⁶ *Id.*

⁷ *Id.* at 8.

⁸ *Id.*

Department's Position:

The Department disagrees with SRF's interpretation of the SAA. The SAA expressly recognizes that the statute "provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an A-to-A or transaction-to-transaction (T-to-T) methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring."⁹ As the SAA implies, the Department is not tasked with determining whether targeted dumping is, in fact, occurring. Rather, the SAA recognizes that targeted dumping *may* be occurring where there is a pattern of prices that differ significantly among purchasers, regions, or time periods. In our view, the purpose of the differential pricing test is to determine whether the A-to-A method is a meaningful tool to measure whether, and if so to what extent, dumping is occurring. While targeting may be occurring with respect to such sales, it is not a requirement or a condition precedent for the Department to otherwise determine that the average-to-transaction (A-to-T) method is warranted, based upon a finding of a pattern of prices that differ significantly as provided in the statute.

The Department disagrees with SRF that the Department should not consider that higher-priced sales can contribute to a pattern of prices that differ significantly. As an initial matter, we note that SRF's arguments have no grounding in the language of the statute. There is nothing in the statute that mandates how we measure whether there is a pattern of export prices that differs significantly. As explained in the Preliminary Results and below, the differential pricing analysis used in this administrative review is reasonable, and the use of Cohen's *d* test as a component in this analysis is consistent with the purpose of the statutory provision concerning the application of an alternative comparison method.

Contrary to SRF's claim, the statute does not require that the Department consider only lower-priced sales when considering whether an alternative comparison method is appropriate. In our view, it is reasonable for the Department to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. Contrary to SRF's claim, it is reasonable for the Department to consider both lower-priced and higher-priced sales in the Cohen's *d* analysis because higher-priced sales are equally capable as lower-priced sales to create a pattern of prices that differ significantly. Further, when greater than their normal value, higher-priced sales will offset lower-priced sales when using the A-to-A method, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, which can mask dumping. The statute states that the Department may apply the A-to-T method if "there is a *pattern of export prices . . .* for comparable merchandise that *differ* significantly among purchasers, regions, or periods of time," and the Department "explains why *such differences* cannot be taken into account" using the A-to-A comparison method.¹⁰ The statute directs the Department to consider whether there exists a pattern of prices differ significantly. The statutory language references prices that "differ" and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that the Department consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of

⁹ See SAA at 843.

¹⁰ See section 777A(d)(1)(B) of the Act (emphasis added).

certain sales being priced higher or lower than other sales. The Department explained that higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.¹¹ Higher- or lower-priced sales could be dumped or could be masking other dumped sales. However, the relationship between higher or lower U.S. prices and their comparable normal values is not relevant in the Cohen's *d* test and in answering the question of whether there is a pattern of prices that differ significantly because this analysis includes no comparisons with normal values and section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons. By considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter's pricing to identify whether there is a pattern of prices that differ significantly.

In addition, the Department disagrees with SRF's hypothesis that a pattern of prices that differ significantly must involve "targeting," thus implying that there must exist a reason behind the exporters pricing behavior, i.e., a "'targeter' does not capture additional sales by raising prices",¹² and that targeted pricing behavior is not "bi-directional."¹³ The statute does not include a requirement that the Department must account for some kind of causality for any observed pattern of prices that differ significantly, such as increasing market share, changes in raw material costs, prices of natural gas, or fluctuations in exchange rates. Congress did not speak to the intent of the producers or exporters in setting export prices that exhibit a pattern of significant price differences. Nor is an intent-based analysis consistent with the purpose of the provision, as noted above, which is to determine whether averaging is a meaningful tool to measure whether, and if so, to what extent, dumping is occurring. Consistent with the statute and the SAA, the Department determined whether a pattern of significant price differences exists. Neither the statute nor the SAA requires the Department to conduct an additional analysis to account for potential reasons for the observed pattern of prices that differ significantly.

The Department also disagrees with SRF's assertion that it has "double-counted" its higher-priced sales by including these sales in both a test group and as part of the comparison group when not being tested in the Cohen's *d* test. As stated in the Preliminary Results, the purpose of the Cohen's *d* test is "to evaluate the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise."¹⁴ Simply because certain sale prices are part of a test group in one instance and part of a comparison group in other instances does not constitute double counting. In the Cohen's *d* test, lower-priced sales are also included in both a test group and as part of the comparison group when not being tested. The Department's dumping analysis includes all information and data on the record of this administrative review, and the Department finds that selectively including or excluding certain sales is not supported by the statute.

Further, the Department disagrees with SRF that it must identify an unspecified "discernable pattern" in order to find that there exists a pattern of prices that differ significantly. As discussed

¹¹ See Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 58273 (September 23, 2013) and accompanying Issues and Decision Memorandum at Comment 5.

¹² See SRF's Case Brief at 5.

¹³ Id.

¹⁴ See Preliminary Results, and accompanying Decision Memorandum at 6.

above, section 777A(d)(1)(B)(i) of the Act provides that there be “a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions or periods of time.” The statute does not direct the Department how this should be accomplished and left this to the Department’s discretion. The statute states that a pattern of prices that *differs significantly*, which the Department has reasonably done in its application of the Cohen’s *d* and ratio tests in this administrative review.

The Department disagrees with SRF’s argument that offsets for non-dumped sales should only be denied for lower-priced sales. As discussed above, the Department reasonably considers both higher-priced sales as well as lower-priced sales as potentially creating a pattern of prices that differ significantly. Accordingly, if the Department were to find such a pattern, then it would be appropriate to apply the A-to-T method to a portion of U.S. sales, or to all U.S. sales, based upon the results of the Cohen’s *d* and ratio tests.

Comment 3: Differential Pricing Analysis: Results of the Cohen’s *d* Test By Purchaser, Region or Time Period Should Be Considered Separately in the Ratio Test

SRF’s Arguments

- In the Preliminary Results, the Department found that zero percent of SRF’s sales passed the Cohen’s *d* test by region, less than 33 percent of its sales passed (including both lower- and higher-priced sales) by purchaser, and less than 66 percent of its sales (including both lower- and higher-priced sales) passed by time period. By combining the results of the Cohen’s *d* test by purchaser, region or time period, the Department is mixing different pricing behaviors by these different categories, which is like comparing apples and oranges. Accordingly, for the final results, if the Department continues to use the Cohen’s *d* test, then it should modify the ratio test to limit the results used to determine the level of differential pricing to the highest category-specific percentage found.
- If sales separately pass the Cohen’s *d* test above 33 percent or above 66 percent by category (*i.e.*, purchaser, region, or time period), then and only then should an alternative comparison method be considered. In SRF’s case, if the Department correctly viewed each of the two categories’ passing percentages independently, then, in neither case, would the Department find a result for the ratio test of more than 66 percent. Since the results of the ratio test would not have been above the 66 percent threshold, the A-to-T method would not have been applied to all of SRF’s U.S. sales and SRF’s results would have been de minimis.

Department Position:

The Department disagrees with SRF that it must consider the results of the Cohen’s *d* and ratio tests by purchaser, region and time period independently of one another. The Department considered all information of the record of this review in its analysis and drew reasonable inferences as to what the data show. Second, SRF’s arguments appear to be focused on the concept of targeting alone, rather than on whether there is a pattern of prices that differ

significantly among purchasers, regions or periods of time such that use of the A-to-A method does not provide a meaningful measure of dumping. Moreover, under the Cohen's *d* test and ratio tests, the Department considers the pricing of the producer or exporter in the U.S. market as a whole. The Department does not find the results of the Cohen's *d* test by purchaser, region or time period to be analogous to a comparison of "apples and oranges" but rather to be different aspects of a single pricing behavior of the producer or exporter. This analysis, based on the Cohen's *d* and ratio tests, informs the Department as to whether there exists a pattern of prices that differ significantly for the producer or exporter as a whole. Likewise, the results of the differential pricing analysis, including both criteria provided in the statute, will determine whether the A-to-A method is the appropriate comparison method with which the Department calculates a single weighted-average dumping margin for the producer or exporter.

Finally, SRF urges the Department to take account of explanations or causes for the different results of the Cohen's *d* test by purchaser, region, or time period, such as customer expectations, differences in regional markets, or fluctuations of exchange rates over time. While the Department does use adjusted prices from its dumping calculations in its differential pricing analysis to ensure that its analyses are not affected by such elements as differences in the level of trade, the accounting SRF urges the Department to undertake is not required by the statute; nor is it reasonable as the differential pricing provision is not intent-based. Further, explanations as to the cause of the differences in pricing, validity notwithstanding, does not inform the Department as to whether the use of the A-to-A method provides a meaningful measure of dumping. Last, there is no provision in the statute requiring the Department to determine the existence of a pattern of prices that differ significantly by selecting only one of either purchaser, region or time period. Congress did not speak to the intent of a producer or an exporter in setting prices in the U.S. market that exhibit a pattern of prices that differ significantly or which one should be preferred. Consistent with the statute and the SAA, the Department determined whether a pattern of prices that differ significantly exists for SRF.

Comment 4: Differential Pricing Analysis: Results of the Cohen's *d* Test By Time Period Is Flawed

SRF's Arguments

- "{T}he Cohen's *d* test is ill-suited for determining differential pricing that might constitute targeting using time periods ... because, regardless of a seller's intentions, prices, expenses, and exchange rates inevitably fluctuate over time."¹⁵ Therefore, the Department's Cohen's *d* test will almost invariably identify sales which pass the Cohen's *d* test because of random fluctuations over time. Such fluctuations are outside of the control of the exporter. Therefore, SRF asserts that the Cohen's *d* test "is ill-suited to ferret out a real, meaningful pattern based on time periods."
- The Department's use of quarters to define time periods in the Cohen's *d* test is an artificial construct. One can also define time periods by weeks or months. If months or weeks were used, the results of the Cohen's *d* test would likely be different from what is found using quarters because of exchange rates fluctuations.

¹⁵ See SRF's Case Brief at 10.

Department's Position:

The Department disagrees with SRF's assessment that a time-period-based analysis of a pattern of prices that differ significantly is somehow biased or systematically generates affirmative results in comparison with purchasers or regions, whether analyzed using the Cohen's *d* test or some other approach. Likewise, no such concern is provided for in the statute. Further, the Department disagrees with SRF's continued assertion that the reason behind a pattern of prices that differ significantly must be considered in the Department's analysis. As discussed above, no such requirement is provided for in the statute.

Comment 5: Differential Pricing Analysis: The Cohen's *d* Test Does Not Measure Causal Links or Statistical Significance But Systematically Results in Affirmative Determinations

SRF's Arguments

- The Cohen's *d* test is not a measure that identifies causal links or statistical significance. Rather, Cohen's *d* is used to measure the size of a difference between the means of two groups relative to the population's standard deviation.
- The convention of "small" or "large" is simply relative to the pooled standard deviation of the test and comparison groups. Thus, the Cohen's *d* test "is not designed to capture meaningful pricing differentials in antidumping cases."¹⁶
- Since the Department introduced its differential pricing analysis, it has been applied to 40 cases covering a number of different types of products, including chemicals, steel products, and wood products, and to fourteen different countries. Of those 40 proceedings, the Department found (1) that sales were targeted or "differentially priced" in 24 cases; (2) "de minimis" amounts of targeting in seven cases; and (3) no targeting at all in three cases. Given how rarely targeting was found before the introduction of differential pricing, the fact that new analysis "now finds targeting so often should be viewed as suspect on its face."¹⁷

Department's Position:

To the extent that SRF insists that the Department's analysis demonstrate causal links and statistical significance, the Department disagrees. There is no language in the statute that requires the Department to engage in the kind of analysis SRF insists upon. If Congress had intended to require that a particular result demonstrate a certain causal link, or be obtained with a certain statistical significance for the price differences that mask dumping as a condition for applying an alternative comparison method, then Congress presumably would use language more precise than "differ significantly." We do not interpret the term "significantly" in the statute to mean "statistically significant," or that a causal link must be identified between prices that differ significantly and the intentions or motivations of the producer or exporter. The statute includes

¹⁶ See SRF's Case Brief at 17.

¹⁷ Id.

no such directive. The analysis employed by the Department, including the use of the Cohen's *d* and ratio tests, reasonably informs the Department whether there exists a pattern of prices that "differ significantly."

The Cohen's *d* test "is a generally recognized *statistical measure* of the extent of the difference between the mean of a test group and the mean of a comparison group".¹⁸ Within the Cohen's *d* test, the Cohen's *d* coefficient is calculated based on the means and variances of the test group and the comparison group. The test and comparison groups include all of the U.S. sales of comparable merchandise reported by the respondent. As such, the means and variances calculated for these two groups include no sampling error. Statistical significance is used to evaluate whether the results of an analysis rises above sampling error (*i.e.*, noise) present in the analysis. The Department's application of the Cohen's *d* test is based on the mean and variance calculated using the entire population of the respondent's sales in the U.S. market, and, therefore, these values contain no sampling error. Accordingly, statistical significance is not a relevant consideration in this context.

As a general matter, the Department disagrees with SRF's claim that the Cohen's *d* test systematically results in affirmative findings. SRF confuses the individual results for each comparison of a test group with a comparison group in the Cohen's *d* test with the application of an alternative comparison method. The Cohen's *d* coefficient for each pair of test and comparison groups determines whether the weighted-average sales price to a particular test group is significantly different from the weighted-average sale price to the comparison group. The fact that any one comparison for a respondent meets the threshold for determining that those sales in the test group have significantly different prices is not unexpected. However, this is only the first step of the Department's differential pricing analysis. As described in the Preliminary Results, the Department next aggregates the results of the Cohen's *d* test to confirm whether a pattern of prices that differ significantly exists for the respondent. If a pattern is found to exist such that an alternative comparison method should be considered, then the Department will determine whether the A-to-A method can account for the observed pattern. Additionally, the parameters used for each of these steps for a given respondent are open for comments from interested parties which the Department will consider in its analysis. Further, the Department will continue to evaluate its practice with respect to identifying and addressing masked dumping and implement changes as warranted.

SRF next contends that the Department's differential pricing analysis is suspect on its face because the Department now appears to find "differential pricing" more often than it found "targeted dumping" under the previous methodology. SRF's analysis is flawed on its face, and its argument provides no reasoned basis for the Department to change its approach. First, the SAA expressly provides that "the Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."¹⁹ This is precisely what the Department's differential pricing analysis does through the application of the Cohen's *d* and ratio tests, as explained fully in the Preliminary Results. Second, SRF identifies no prior determination where the Department applied its differential

¹⁸ See Preliminary Results, and accompanying Decision Memorandum at 6 (emphasis added).

¹⁹ See SAA at 843.

pricing analysis and where that determination should have been decided differently, nor upon what basis the Department should have done so. Last, SRF's analysis of prior determinations fails to take account of the fact that in the application of the previous methodology, the Department only engaged in such an analysis when it received a valid, substantiated allegation of targeted dumping. Based upon the Department's experience in this area, the Department decided to consider an alternative comparison method in every segment of a proceeding under its current methodology. To compare the results of the two approaches, as SRF has in its case brief, fails to provide an accurate reflection of the Department's differential pricing analysis.

Comment 6: Differential Pricing Analysis: Explanation of Why the Average-to-Average Method Cannot Account for Such Differences

SRF's Arguments

- U.S. law dictates that, prior to applying the A-to-T method, the Department must explain why the use of the standard A-to-A method cannot account for the pricing differences. Simply comparing the weighted-average dumping margins calculated using the A-to-A method and an alternative comparison method “is a results-oriented tautology that cannot be what the framers of the targeting provision intended.”²⁰
- SRF asserts that the A-to-A method was “blessed” because it prevented “noise” which might create dumping margins. SNR cites to *Live Swine from Canada*,²¹ quoting that “the use of annual weighted averages tends to depress the overall margin of dumping {but that} the Department does not treat this depressive effect as a ‘distortion’ to be corrected in the weighted average dumping margin.”²²
- SRF further asserts that before the A-to-A method can be discarded, the Department must show why it cannot use some other form of A-to-A calculation in order to account for the price differences found by the Cohen’s *d* test. Options include adjusting the averaging groups; finding that the price differentials are not large or systematic; or finding alternative explanations for price differentials.
- Because the Department does not provide an adequate explanation of why the A-to-A method cannot account for the observed pattern of price that differ significantly, it fails to meet the statutory prerequisite for considering the A-to-T method. Accordingly, the Department should calculate SRF’s weighted-average dumping margin using the A-to-A method.

Department’s Position:

The Department disagrees with SRF. As explained in the Preliminary Results, if the difference in the weighted-average dumping margins calculated using the A-to-A method and an

²⁰ See SRF’s Case Brief at 18.

²¹ See Notice of Final Determination of Sales at Less than Fair Value: Live Swine from Canada, 70 FR 12181 (March 11, 2005) (Live Swine from Canada).

²² Id., and accompanying IDM at Comment 5.

appropriate alternative comparison method is meaningful, then this demonstrates that the A-to-A method cannot account for such differences and, therefore, an alternative method would be appropriate. The Department determined that a difference in the weighted-average dumping margins is considered meaningful if: 1) there is a 25 percent relative change in the weighted-average dumping margin between the A-to-A method and the appropriate alternative method when both margins are above *de minimis*; or 2) the resulting weighted-average dumping margin moves across the *de minimis* threshold. Here, such a meaningful difference exists for SRF because when comparing SRF's weight-averaged dumping margin calculated pursuant to the A-to-A method and an alternative comparison method based on applying the A-to-T method to all U.S. sales, SRF's weighted-average dumping margin moves across the *de minimis* threshold. This threshold is reasonable because comparing the weighted-average dumping margins calculated using the two comparison methods allows the Department to quantify the extent to which the A-to-A method cannot take into account different pricing behaviors exhibited by the exporter in the U.S. market. Therefore, for these final results, the Department continues to find that the A-to-A method cannot take into account the observed differences, and to apply the A-to-T method for all U.S. sales to calculate SRF's weighted-average dumping margin.

Comment 7: The Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Less-Than-Fair-Value Investigations

SRF's Arguments

- The Department's application in this administrative review of the differential pricing analysis, as introduced in Xanthan Gum, is not lawful because the Department did not follow the Administrative Procedures Act (APA) rule-making procedures in accordance with 5 U.S.C. §553.
- In December 2008, the Department abruptly withdrew the targeted dumping standards that were codified in its regulations between June 1997 and December 2008 and justified the withdrawal by noting that "the Department may have established an impractical deadline" when it promulgated 19 CFR 351.301(d)(5). This was not the "good cause" required in the APA for the withdrawal of a regulation.
- In Gold East Paper,²³ the CIT stated that:

Because Commerce failed to provide notice and comment before withdrawing the Limiting Rule {the targeted dumping regulation}, and the agency failed to provide adequate cause to qualify under the exceptions to the notice and comment requirements, the court finds that the repeal of the regulation was invalid, and the Limiting Rule is still in force. Commerce's decision to apply the targeted dumping remedy to all of APP-China's sales failed to comply with applicable law.

- Given that the Department had no authority to rescind the prior targeted dumping regulation absent compliance with the APA, it should reinstate the regulation and should

²³ See Gold East Paper (Jiangsu) Co. v. United States, 918 F.Supp.2d 1317 (CIT 2013) (Gold East Paper).

follow it when analyzing whether SRF engaged in targeted dumping during the POR and whether zeroing should be applied.

Department Position:

The Department disagrees with SRF that the withdrawal of the targeted dumping regulations in antidumping investigation was unlawful. The 2008 Withdrawal involved a regulation which only applied in less-than-fair-value investigations and not in administrative reviews.²⁴ Likewise, the Gold East Paper judicial proceeding involves a less-than-fair-value investigation and not an administrative review.

Even if the 2008 Withdrawal were relevant to administrative reviews, the Department would still disagree with SRF that the 2008 Withdrawal was improper. Moreover, the targeted dumping regulation was properly withdrawn pursuant to the APA. During the withdrawal process, the Department engaged the public to participate in its rulemaking process. In fact, the Department's withdrawal of its regulations in December 2008 came after two rounds of soliciting public comments on the appropriate targeted dumping analysis. The Department solicited the first round of comments in October 2007, more than one year before it withdrew the regulation by posting a notice in the Federal Register seeking public comments on what guidelines, thresholds, and tests it should use in conducting an analysis under section 777A(d)(1)(B) of the Act.²⁵ As the notice explained, because the Department had received very few targeted dumping allegations under the regulations then in effect, it solicited comments from the public to determine how best to implement the remedy provided under the statute to address masked dumping. The notice posed specific questions, and allowed the public 30 days to submit comments.²⁶ Various parties submitted comments in response to the Department's request.²⁷ SRF provide no comments in response to the Department's request.²⁸

After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.²⁹ Among other things, the Department specifically sought comments "on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping."³⁰ Several of the submissions³¹ received from parties explained that the Department's proposed methodology was inconsistent with the statute and should not be adopted.³² Moreover, several entities explicitly stated that the Department should not establish

²⁴ See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (December 10, 2008) (2008 Withdrawal).

²⁵ See Targeted Dumping in Antidumping Investigations; Request for Comment, 72 FR 60651 (October 25, 2007).

²⁶ Id.

²⁷ See Public Comments Received December 10, 2007, Department of Commerce, <http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html> (December 10, 2007) (listing the entities that commented).

²⁸ Id.

²⁹ See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations, 73 FR 26371, 26372 (May 9, 2008).

³⁰ Id.

³¹ The public comments received June 23, 2008 and submitted on behalf of several domestic parties can be accessed at: <http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html>.

³² See, e.g., Letter from Kelley, Drye and Warren to the Department: "Comments on Targeted Dumping Methodology, Comments," (Letter from Kelley Drye) (June 23, 2008) at 2.

minimum thresholds for accepting allegations of targeted dumping because the statute contains no such requirements.³³ Once again, SRF did not comment on the Department's proposed methodology.³⁴

These comments suggested that the regulation was impeding the development of an effective remedy for masked dumping. Indeed, after considering the parties' comments the Department explained that because "the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."³⁵ For this reason, the Department determined that the regulation had to be withdrawn.³⁶ Although this withdrawal was effective immediately, the Department again invited parties to submit comments, and gave them a full 30 days to do so.³⁷ The comment period ended on January 9, 2009, with several parties submitting comments.³⁸ As before, SRF failed to participate and did not submit comments in response to the Department's request.³⁹

The course of the Department's decision-making demonstrates that it actively sought to engage the public. This type of public participation is fully consistent with the APA's notice-and-comment requirement.⁴⁰ Moreover, various courts rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.⁴¹ Rather, where the public is given the opportunity to comment meaningfully consistent with the statute, the APA's requirements are satisfied. The touchstone of any APA analysis is whether the agency, as a whole, acted in a way that is consistent with the statute's purpose.⁴² Here, similar to the agency in Mineta, the Department provided the parties more than one opportunity to submit comments before issuing the final rule. As in Mineta, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in Mineta found all of those facts to indicate that the agency's actions were consistent with the APA, so too the Department's actions here demonstrate that it fulfilled the notice and comment requirements of the APA.

³³ See, e.g., letter from Committee to Support U.S. Trade Laws, to the Department: "Comments on Targeted Dumping Methodology" at 25; see also Letter from Kelley Drye at 29.

³⁴ See Public Comments received June 23, 2008, available at <http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html> (June 23, 2008) (listing the entities that commented).

³⁵ See 2008 Withdrawal.

³⁶ Id.

³⁷ Id.

³⁸ See Public Comments received January 23, 2009, available at <http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html> (Jan. 23, 2009) (listing the entities that commented).

³⁹ Id.

⁴⁰ See, e.g., Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000) (holding that the EPA's decision to not implement a rule upon which it had sought comments did not violate the APA's notice and comment requirements because the parties should have understood that the agency was in the process of deciding what rule would be proper).

⁴¹ See Fed. Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (Mineta) (holding that the Department of Transportation's promulgation of four rules, each with immediate effect, only after the issuance of which the public was given the opportunity to comment, afforded proper notice and comment).

⁴² Id.

The APA does not require that a final rule that the agency promulgates must be identical to the rule that it proposed and upon which it solicited comments.⁴³ Here, the Department actively engaged the public in its rulemaking process; it solicited comments, and considered the submissions it received. In fact, that the numerous comments prompted the Department to withdraw the regulation demonstrates that the Department provided the public with an adequate opportunity to participate. In doing so, the Department fully complied with the APA.

Further, even if the two rounds of comments that the Department solicited before the withdrawal of the regulation were insufficient to satisfy the APA's requirements, the Department properly declined to solicit further comments pursuant to the APA's "good cause" exception. This exception provides that an agency is not required to engage in notice and comment if it determines that doing so would be "impracticable, unnecessary, or contrary to the public interest."⁴⁴ The Federal Circuit recognized that this exception can relieve an agency from issuing notice and soliciting comment where doing so would delay the relief that Congress intended to provide.⁴⁵ In National Customs Brokers, the Federal Circuit rejected a plaintiff's argument that the U.S. Customs Service failed to follow properly the APA in promulgating certain interim regulations when it had published these regulations without giving the parties a prior opportunity to comment. Moreover, although the U.S. Customs Service solicited comments on the published regulations, it stated that it "would not consider substantive comments until after it implemented the regulations and reviewed the comments in light of experience" administering those regulations.⁴⁶ The U.S. Customs Service explained that "good cause" existed to comply with the APA's usual notice and comment requirements because the new requirements did not impose new obligations on parties, and emphasized its belief that the regulations should "become effective as soon as possible" so that the public could benefit from "the relief that Congress intended."⁴⁷ The Court recognized that this explanation was a proper invocation of the "good cause" exception and explained that soliciting and considering comments was *both* unnecessary (because Congress had passed a statute that superseded the regulation) "*and* contrary to the public interest because the public would benefit from the amended regulations."⁴⁸ For this reason, the Court affirmed the regulation against the plaintiff's challenge.⁴⁹

The regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to unmask dumping. Such effect would have been contrary to congressional intent. The Department's revocation of such a regulation without additional notice and comment was based upon a recognized invocation of the "public interest" exception. Accordingly, the Department determined not to base its analysis in the instant proceeding upon the withdrawn regulation.

⁴³ See, e.g., First Am. Discount Corp. v. CFTC, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

⁴⁴ See 5 U.S.C. 553(b)(B).

⁴⁵ See, e.g., National Customs Brokers and Forwarders Ass'n of Am., Inc. v. United States, 59 F.3d 1219, 1223 (Fed. Cir. 1995) (National Customs Brokers).

⁴⁶ Id., 59 F.3d at 1220–21.

⁴⁷ Id., 59 F.3d at 1223.

⁴⁸ Id., 59 F.3d at 1224 (emphasis).

⁴⁹ Id.

Comment 8: Use of an Alternative Comparison Method in Administrative Reviews

SRF's Arguments

- The statutory provision regarding the consideration of an alternative comparison method, section 777A(d)(1)(B) of the Act, is specific to antidumping duty investigations and not to antidumping duty administrative reviews. Therefore, the Department does not have the authority to consider an alternative comparison method in administrative reviews in general or to SRF specifically.
- Congress did not intend for the Department to consider the application of an alternative comparison method in administrative reviews, otherwise it would create this exception in the parts of the statute that relate to administrative reviews. Instead, in sections 777A(d)(1)(B) of the Act, Congress specifically included an alternative comparison method to the normal procedure for determining less than fair value in investigations, and omitted this alternative in section 777A(d)(2) of the Act relating to reviews.
- In Gray Portland Cement,⁵⁰ the CAFC held that “it is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission.”⁵¹
- In accordance with the Court’s ruling in Fag Italia S.p.A. v. US,⁵² the fact that the statute explicitly provides for the consideration of an alternative comparison method in less-than-fair-value investigations - but is silent on this matter with regard to administrative reviews - is not an adequate source of authority for the Department to consider an alternative comparison method in administrative reviews.
- In response to the Court’s decision in GPX International Tire Corp. v. US,⁵³ Congress amended the countervailing duty statute to allow its application to non-market economies. Accordingly, if the Department wishes to apply targeted dumping in administrative reviews, it must await a statutory amendment and Congressional authority to do so.

Department Position:

The Department disagrees with SRF’s claim that it does not have the statutory authority to employ an alternative comparison method in administrative reviews. Section 771(35)(A) of the 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

⁵⁰ See Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. US, 13 F.3d 398 n. 9 (Fed. Cir. 1994) (Grey Portland Cement).

⁵¹ *Id.* at 401.

⁵² See Fag Italia S.p.A. v. US, 291 F.3d 806, 816-817 (Fed. Cir. 2002) (Fag Italia S.p.A. v. US).

⁵³ See GPX International Tire Corp. v. US, 666 F.3d 732, 745 (Fed. Cir. 2011) (GPX International Tire Corp. v. US).

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.

SRF argues that the Department has no statutory authority to consider the application of an alternative comparison method in administrative reviews. SRF also states that Congress made no provision for the Department to apply an alternative comparison method in an administrative review under section 777A(d) of the Act. Indeed, section 777A(d)(1) of the Act applies to “Investigations” and section 777A(d)(2) of the Act applies to “Reviews.” Section 777A(d)(1) of the Act discusses, for investigations, the standard comparison methods (*i.e.*, the A-to-A method and the transaction-to-transaction or T-to-T method), and then provides for an alternative comparison method (*i.e.*, the A-to-T method) that may be applied as an exception to the standard methods when certain criteria have been met. Section 777A(d)(2) of the Act discusses, for administrative reviews, the maximum length of time over which the Department may calculate weighted-average normal values when using the A-to-T method. Section 777A(d)(2) has no provision specifying the comparison method to be employed in administrative reviews.

SRF asserts that in order to consider an alternative comparison method, that “it must seek amendment to the statute in order to do so.” To follow SRF’s logic, that statute makes no provision for comparison methods in reviews at all. Such a conclusion would infer that Congress did not intend that the Department ever make a comparison in administrative reviews of NVs and EPs or CEPs in order to calculate a dumping margin as described in section 771(35)(A) of the Act.

To fill the gap in the statute, the Department has promulgated regulations to specify how comparisons between normal value and export price or constructed export price would be made in administrative reviews. With the implementation of the Uruguay Round Agreements Act (URAA), the Department promulgated the 1997, in which 19 CFR 351.414(c)(2) stated that the Department would normally use the A-to-T comparison method in administrative reviews. In 2010, the Department published its Proposed Modification for Reviews⁵⁴ pursuant to section 123(g)(1) of the URAA. This proposal was in reaction to several World Trade Organization (WTO) Dispute Settlement Body panel reports which had found that the denial of offsets for non-dumped sales in administrative reviews to be inconsistent with the WTO obligations of the United States. When considering the proposed revisions to 19 CFR 351.414, the Department gave proper notice and opportunity to comment to all interested parties. Pursuant to section 123(g)(1)(D) of the URAA, in September 2011, the U.S. Trade Representative (USTR) submitted a report to the House Ways and Means and Senate Finance Committees which described the proposed modifications, the reasons for the modifications, and a summary of the advice which the USTR had sought and obtained from relevant private sector advisory committees pursuant to section 123(g)(1)(B) of the URAA. Also in September 2011, pursuant to section 123(g)(1)(E) of the URAA, the USTR, working with the Department, began consultations with both congressional committees concerning the proposed contents of the final rule and the final modification. As a result of this process, the Department published the Final

⁵⁴ See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Proposed Rule; Proposed Modification; Request for Comment, 75 FR 81533 (December 28, 2010) (Proposed Modification for Reviews).

Modification for Reviews.⁵⁵ These revisions were effective for all preliminary results of review issued after April 16, 2012, as is the situation for this administrative review.

19 CFR 351.414(b) describes the methods by which NV may be compared to EP or CEP in antidumping investigations and administrative reviews (*i.e.*, A-to-A, T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A 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 group⁵⁶). The Department does not interpret the Act or the SAA to prohibit the use of the A-to-A comparison method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T comparison method in administrative reviews. 19 CFR 351.414(c)(1) (2012) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both antidumping investigations and administrative reviews, the A-to-A method will be used “unless the Secretary determines another method is appropriate in a particular case.”⁵⁷

The Act, the SAA, and the Department’s regulations do not address the circumstances that could lead the Department to select a particular comparison method in an administrative review. Indeed, whereas the statute addresses this issue specifically in regards to investigations, the statute conspicuously leaves a gap to fill on this same question in regards to administrative reviews.⁵⁸ In light of the statute’s silence on this issue, the Department indicated that it would use the A-to-A method as the default method in administrative reviews, but would consider whether to use an alternative comparison method on a case-by-case basis.⁵⁹ At that time, the Department also indicated that it would look to practices employed by the Department in antidumping investigations for guidance on this issue.⁶⁰

In antidumping investigations, the Department examines whether to use the A-to-T method 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 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

⁵⁵ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews).

⁵⁶ See 19 CFR 351.414(d)(2).

⁵⁷ See 19 CFR 351.414(c)(1).

⁵⁸ See section 777A(d)(1)(B) of the Act; SAA at 842-43; and 19 CFR 351.414.

⁵⁹ See Final Modification for Reviews, 77 FR at 8107.

⁶⁰ Id., 77 FR at 8102.

- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).⁶¹

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 to be analogous to the issue in antidumping investigations. Accordingly, the Department finds the analysis that has been used in antidumping investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. In less-than-fair-value investigations, the Department considered an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act.⁶² Similarly, the Department considered an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1).⁶³ For this administrative review, the Department continues to find the consideration of an alternative comparison method to be a reasonable extension of the statute where the statute made no provision for the Department to follow.

The SAA does not demonstrate that the Department may consider the application of an alternative comparison method 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 comparison methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods."⁶⁴ Like the statute, the SAA does not limit the Department to undertake such an examination in investigations only.⁶⁵

The silence of the statute with regard to the application of an alternative comparison method in administrative reviews does not preclude the Department from applying such a practice in this situation. Indeed, the Federal Circuit stated that the "court must, as we do, 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

⁶¹ See section 777A(d)(1)(B) of the Act.

⁶² See, e.g., Polyethylene Retail Carrier Bags From Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 16431 (April 1, 2010); Certain Stilbenic Optical Brightening Agents From Taiwan: Final Determination of Sales at Less Than Fair Value, 77 FR 17027 (March 23, 2012); and Xanthan Gum.

⁶³ See, e.g., 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); Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review, 2010–2011, 77 FR 73013 (December 7, 2012); Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review; 2011–2012, 78 FR 65272 (October 31, 2013).

⁶⁴ See SAA at 843.

⁶⁵ Id.

statutory circumstances.”⁶⁶ Further, the court 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 ‘{s}o long as the {agency}’s analysis does not violate any statute and is not otherwise arbitrary and capricious.”⁶⁷ The Department filled a gap in the statute with a logical, reasonable and deliberative comparison method for administrative reviews.

Recommendation

We recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of this administrative review in the Federal Register.



Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

21 FEBRUARY 2017

(Date)

⁶⁶ See United States Steel Corp. v. United States, 621 F.3d 1351, 1357 (Fed. Cir. 2010).

⁶⁷ See Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010), citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996).