



A-533-840  
Administrative Review  
POR: 2/1/2012 – 1/31/2013  
Public Document  
Office II: SAB

August 20, 2014

MEMORANDUM TO: Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance

FROM: Gary Taverman   
Senior Advisor  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the  
Antidumping Duty Administrative Review of Certain Frozen  
Warmwater Shrimp from India

---

### Summary

We analyzed the case and rebuttal briefs of interested parties in the 2012-2013 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from India. As a result of our analysis, we have not made changes to the Preliminary Results.<sup>1</sup> We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of issues in this administrative review for which we received comments from the interested parties:

### Background

On March 25, 2014, the Department of Commerce (the Department) published the preliminary results of the 2012-2013 administrative review of the antidumping duty order on shrimp from India.<sup>2</sup> This review covers 205 producers/exporters. The respondents which the Department selected for individual examination are Devi Fisheries Limited (Devi Fisheries) and Falcon Marine Exports Limited (Falcon). The period of review (POR) is February 1, 2012, through January 31, 2013.

We invited parties to comment on the Preliminary Results. We received case and rebuttal briefs from the American Shrimp Processors Association (ASPA) and 18 producers/exporters of

---

<sup>1</sup> See Certain Frozen Warmwater Shrimp From India; Preliminary Results of Antidumping Duty Administrative Review; 2012-2013, 79 FR 16285 (March 25, 2014) (Preliminary Results).

<sup>2</sup> Id.



shrimp (hereinafter, the respondents).<sup>3</sup> We received a rebuttal brief from the Ad Hoc Shrimp Trade Action Committee (the petitioner). After analyzing the comments received, we have not changed the weighted-average margins from those presented in the preliminary results.

### Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,<sup>4</sup> deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not “prepared meals,” that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order. Excluded from the scope are: (1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); (7) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) that is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a “dusting” layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh

---

<sup>3</sup> These companies are: Devi Fisheries, Falcon, Apex Frozen Foods Private Limited; Asvini Fisheries (P) Ltd., Avanti Feeds Limited, Bluepark Seafoods Pvt. Ltd., Five Star Marine Exports Private Limited, Jagadeesh Marine Exports, Jayalakshimi Sea Foods Pvt. Ltd.; Liberty Group, Nekkanti Sea Foods Limited, Sagar Grandhi Exports (P) Ltd., SAI Marine Exports Pvt. Ltd., Sandhya Marines Limited, Sprint Exports Pvt. Ltd., Star Agro Marine Exports Pvt. Ltd., Suryamitra Exim (P) Limited, and Wellcome Fisheries Limited.

<sup>4</sup> “Tails” in this context means the tail fan, which includes the telson and the uropods.

thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and ten percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.<sup>5</sup>

### Discussion of the Issues

#### Comment 1: Legal Authority to Consider an Alternative Comparison Method in an Administrative Review

In the Preliminary Results, the Department applied a “differential pricing” analysis to determine whether to make average-to-average (A-to-A) or average-to-transaction (A-to-T) comparisons in its calculation of dumping margins. As a result of this analysis, we found that 73.3 percent of Devi Fisheries’ U.S. sales, and 65.31 percent of Falcon’s U.S. sales, passed the Cohen’s *d* test, which confirmed the existence of a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or time periods for both respondents. We further determined that the A-to-A method could not appropriately account for such differences because the difference in the weighted-average dumping margins computed using the A-to-A method and the appropriate alternative method<sup>6</sup> was meaningful. Accordingly, to calculate the weighted-average dumping margins, we used the A-to-T method for all U.S. sales for Devi Fisheries, and we used the A-to-T method as an alternative to the A-to-A method for a portion of Falcon’s U.S. sales.

---

<sup>5</sup> On April 26, 2011, the Department amended the antidumping duty order to include dusted shrimp, pursuant to the U.S. Court of International Trade (CIT) decision in Ad Hoc Shrimp Trade Action Committee v. United States, 703 F. Supp. 2d 1330 (CIT 2010) and the U.S. International Trade Commission determination, which found the domestic like product to include dusted shrimp. See Certain Frozen Warmwater Shrimp from Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision, 76 FR 23277 (April 26, 2011); see also Ad Hoc Shrimp Trade Action Committee v. United States, 703 F. Supp. 2d 1330 (CIT 2010) and Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam (Investigation Nos. 731-TA-1063, 1064, 1066-1068 (Review), USITC Publication 4221, March 2011).

<sup>6</sup> When the percentage of U.S. sales passing the Cohen’s *d* test is between 33 and 66 percent, the Department considers whether it is appropriate to apply a “mixed” methodology, consisting of using the A-to-T method for those U.S. sales which passed the Cohen’s *d* test and the A-to-A method for the U.S. sales which have not passed the Cohen’s *d* test. When the percentage of U.S. sales is 66 percent or greater, the Department considers whether it is appropriate to use the A-to-T method for all U.S. sales.

The respondents characterize the above analysis as a “targeted dumping” analysis, which they argue the Department has no statutory authority to conduct. Specifically, the respondents contend that section 777A(d)(1) of the Tariff Act of 1930, as amended (the Act), the statutory provision governing the selection of the appropriate comparison method, pertains only to investigations. According to the respondents, the Act’s failure to provide a parallel provision for administrative reviews was intentional, given that, when the “targeted dumping” provision (*i.e.*, section 777A(d)(1)(B) of the Act) was written, the Department used the A-to-A method<sup>7</sup> only in investigations. The respondents argue that, as a result, the development of a “targeted dumping” provision for administrative reviews was unnecessary.

The respondents argue that, because the plain language of the Act is unambiguous, the Department cannot justify applying the “targeted dumping” provision in administrative reviews on the grounds that the Act does not preclude its actions. According to the respondents, the U.S. Court of Appeals for the Federal Circuit (CAFC) has held that Congress intended different meanings when it included specific language in one section of the statute but omitted it from another.<sup>8</sup> Further, the respondents contend that courts have held that an agency is not permitted to fill a “gap” in a statute where there is no ambiguity,<sup>9</sup> notwithstanding the fact that the courts have accorded the Department substantial deference in administering the unfair trade laws.<sup>10</sup> Further, the respondents maintain that the CAFC has held that the Department may not exercise its discretion contrary to congressional intent.<sup>11</sup>

The respondents note that the Department itself acknowledged in the preliminary results that 777(A)(d)(1)(B) of the Act does not provide authority to conduct a “targeted dumping” analysis in administrative reviews, but that it also concluded that investigations and reviews are sufficiently analogous to warrant the consideration of an alternative comparison method in both. The respondents claim that this stance is a direct result of numerous adverse decisions by the World Trade Organization (WTO) on the issue of zeroing both in investigations and administrative reviews.<sup>12</sup> However, the respondents argue that, in order to comply fully with the WTO’s rulings, the Department simply should have ceased zeroing in administrative reviews

---

<sup>7</sup> The respondents cite the Statement of Administrative Action (SAA) as support for their argument that the Department’s A-to-A method was the source of Congressional concern over masked dumping. See the SAA accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, vol. 1 (1994) at 656 and 843. The respondents note that, at that time, the Department compared monthly average normal values (NVs) to individual U.S. sales transactions (*i.e.*, which they term the “MA-to-T” method) in administrative reviews.

<sup>8</sup> See Ad Hoc Committee of AZ-NM-TX-FL Prod. of Gray Portland Cement v. United States, 13 F.3d 398, 401-402 (Fed. Cir. 1994). See also Sioux Honey Ass’n v. Hartford Fire Ins. Co., 672 F.3d 1041 (Fed. Cir. 2012).

<sup>9</sup> See Marine Harvest v. United States, 244 F. Supp. 2d 1364, 1379 (CIT 2002). See also FAG Italia S.p.A. v. United States, 291 F.3d 806 (Fed. Cir. 2002) (FAG Italia) (where, according to the respondents, the CAFC distinguished between ambiguous statutory language which creates a “gap” in the statute that an agency may reasonably fill and silence in the statute from which an agency cannot create authority).

<sup>10</sup> See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (Chevron).

<sup>11</sup> See GPX Int’l Tire Corp. v. United States, 666 F.3d 732, 745 (Fed. Cir. 2002).

<sup>12</sup> See, *e.g.*, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (April 18, 2006).

when using the MA-to-T method,<sup>13</sup> instead of: 1) abandoning the MA-to-T method and adopting an A-to-A method, similar to that already used in investigations;<sup>14</sup> and 2) reintroducing zeroing under the “targeted dumping” provision. According to the respondents, as a result of its flawed implementation of section 129(b)(2)<sup>15</sup> of the URAA, the Department itself created any “gap” in the Act which now exists.

Finally, the respondents contend that, even assuming, *arguendo*, the Department has the authority to apply section 777A(d)(1)(B) of the Act in administrative reviews, there is no need for it to do so. According to the respondents, the factors that drive “targeted dumping” in investigations (e.g., offsetting low-priced sales with high-priced ones) are not present in administrative reviews given that the price-averaging periods in reviews are significantly shorter. According to the respondents, 19 CFR 351.414(d)(3) demonstrates that Congress intended for the Department to account for significant price differences in administrative reviews by using monthly comparison periods, not the “targeted dumping” provision. The respondents claim that, because this regulation safeguards against targeted, or masked, dumping, it obviates the need for a separate “targeted dumping” provision for administrative reviews.

ASPA and the petitioner (collectively, the domestic industry) maintain that the Department has the authority to consider an alternative comparison method in administrative reviews,<sup>16</sup> as the CIT has affirmed.<sup>17</sup> Furthermore, ASPA asserts that the Department’s interpretation of the Act is consistent with legislative intent. The petitioner notes that, contrary to the respondents’ assertion, the SAA in fact shows that Congress considered the possibility of targeted dumping in administrative reviews; according to the petitioner, Congress made the A-to-T method the preferred comparison method in reviews because of its stated concern that the A-to-A method could conceal targeted, or masked, dumping.<sup>18</sup> Further, while the petitioner agrees that, at the

---

<sup>13</sup> The respondents disagree with the Department’s position that it changed its comparison method in administrative reviews to comply with adverse WTO rulings. According to the respondents, the WTO’s rulings only addressed the illegality of zeroing in administrative reviews using the A-to-T method, and thus only required the elimination of that zeroing, not a change in the comparison method.

<sup>14</sup> The respondents point out that, since this change in practice, the Department in administrative reviews uses a monthly average-to-monthly average (MA-to-MA) method, while in investigations the Department calculates weighted average NVs and U.S. prices for the period of investigation (POI).

<sup>15</sup> Although respondents cite section 129(b)(2) of the URAA as the basis for the Department’s change in practice to come into compliance with the adverse WTO rulings related to the denial of offsets for non-dumped sales in reviews, this change in practice was in fact implemented pursuant to section 123(g)(1) of the URAA. 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).

<sup>16</sup> ASPA points out that the Department has previously addressed and rejected this argument in the previous review of this order. See Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination; 2011-2012, 78 FR 42492 (July 16, 2013), and accompanying Issues and Decision Memorandum at Comment 1 (Shrimp from India 2011-2012).

<sup>17</sup> See CP Kelco Oy v. United States, 978 F. Supp. 2d 1315,1321-1324 (CIT 2014) (Kelco); and Timken Co. v. United States, Slip Op. 14-24 at 11-12 n.7 (CIT 2014).

<sup>18</sup> See SAA at 842.

time the URAA was enacted, the Department's use of the A-to-T method obviated the need for the Act to address masked dumping in administrative reviews, it contends that such a need now exists. Indeed, the petitioner notes that the CAFC has rejected methodologies which "completely eviscerate" the statutory requirement to determine dumping on an entry-by-entry basis (e.g., the A-to-T method).<sup>19</sup> Thus, the petitioner maintains that the Department is precluded from adopting a comparison method in administrative reviews that fails to account for masked dumping.

Moreover, the petitioner disagrees that court precedent supports the respondents' position that the Department cannot fill a "gap" in the Act here, noting that the CIT in Kelco held that the comparison to FAG Italia (a case relied upon by the respondents) was inapt.<sup>20</sup> Rather, the petitioner notes that Kelco found that the statutory language authorizing "targeted dumping" in investigations did not bar the Department from conducting similar inquiries in administrative reviews.<sup>21</sup>

Finally, ASPA disagrees that the use of shorter averaging periods in administrative reviews obviates the need to apply an alternative comparison method to unmask dumping. ASPA notes that the differential pricing analysis identifies masked dumping not only by time period, but also by region and purchaser. Thus, ASPA maintains that, even if the use of monthly averaging periods addresses masked dumping by time to some degree, it does nothing to unmask dumping by purchaser or region. ASPA points to the CAFC's ruling in Union Steel,<sup>22</sup> where the CAFC held that unmasking the full extent of dumping is better achieved by the A-to-T method rather than the MA-to-MA method. ASPA asserts that the difference in the weighted-average dumping margins calculated for Devi Fisheries and Falcon using the MA-to-MA method and the A-to-T method (i.e., de minimis versus 1.97 and 3.01 percent, respectively) demonstrates that the MA-to-MA method is insufficient to unmask the full amount of the respondents' dumping. Therefore, ASPA maintains that the Department should continue to apply the A-to-T method when calculating Devi Fisheries' and Falcon's weighted-average dumping margins for purposes of the final results.

#### Department's Position:

We disagree with the respondents' claim that the Department 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 margin" calls for a comparison of NV and export price (EP) or constructed export price (CEP). Before making the comparison called for, it is necessary to determine how to make the comparison.

---

<sup>19</sup> See Floral Trade Council v. United States, 74 F. 3d 1200, 1204 (Fed. Cir. 1996).

<sup>20</sup> See Kelco, 978 F. Supp. 2d at 1323.

<sup>21</sup> Id.

<sup>22</sup> See Union Steel v. United States, 713 F.3d 1101, 1108 (Fed. Cir 2013) (Union Steel).

In addition to arguing that the Department has no statutory authority to consider the application of an alternative comparison method in administrative reviews, the respondents also state 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 NVs when using the A-to-T method. Section 777A(d)(2) has no provision specifying the comparison method to be employed in administrative reviews.

To fill the gap in the Act, the Department has promulgated regulations to specify how comparisons between NV and EP or CEP would be made in administrative reviews. With the implementation of the URAA, the Department promulgated regulations in 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 Reviews<sup>23</sup> pursuant to section 123(g)(1) of the URAA. This proposal was in reaction to several WTO Dispute Settlement Body panel reports which had found 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 Modification for Reviews.<sup>24</sup> These revisions were effective for all preliminary results of review issued after April 16, 2012, as is the situation for this administrative review.

Section 351.414(b) of the Department’s regulations describes the methods by which NV may be compared to EP or CEP in LTFV 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

---

<sup>23</sup> 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).

<sup>24</sup> See Final Modification for Reviews, 77 FR 8101.

transactions for which the EPs, or CEPs, have been averaged together (*i.e.*, for an averaging group<sup>25</sup>). The Department does not interpret the Act or the SAA to prohibit the use of the A-to-A method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T method in administrative reviews.

Section 351.414(c)(1) of the Department's regulations fills the gap in the Act concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both LTFV investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another method is appropriate in a particular case."<sup>26</sup>

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 Act addresses this issue specifically in regards to investigations, the Act conspicuously leaves a gap to fill on this same question in regards to administrative reviews.<sup>27</sup> In light of the Act's silence on this issue, in 2012, the Department indicated in the Final Modification for Reviews 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.<sup>28</sup> At that time, the Department also indicated that it would look to practices employed by the Department in LTFV investigations for guidance on this issue.<sup>29</sup>

In LTFV 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
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).<sup>30</sup>

---

<sup>25</sup> See 19 CFR 351.414(d)(2).

<sup>26</sup> See 19 CFR 351.414(c)(1).

<sup>27</sup> See section 777A(d)(1)(B) of the Act; SAA at 842-43; and 19 CFR 351.414.

<sup>28</sup> See Final Modification for Reviews, 77 FR at 8107.

<sup>29</sup> Id., 77 FR at 8102.

<sup>30</sup> See section 777A(d)(1)(B) of the Act.

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 analogous to the issue in LTFV investigations. Accordingly, the Department finds the analysis that has been used in LTFV investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. In LTFV investigations, the Department considered an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act.<sup>31</sup> Similarly, the Department considered an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1).<sup>32</sup> For this administrative review, the Department continues to find the consideration of an alternative comparison method to be a reasonable extension of the Act where the Act contains 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 Act 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."<sup>33</sup> Like the Act, the SAA does not limit the Department to undertake such an examination in investigations only.<sup>34</sup>

The silence of the Act 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 CAFC 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

---

<sup>31</sup> 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 From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013), and accompanying Issues and Decision Memorandum at Comment 3 (Xanthan Gum from the PRC).

<sup>32</sup> 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), and accompanying Issues and Decision Memorandum at Comment 1; Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review, 2010–2011, 77 FR 73013 (December 7, 2012), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>33</sup> See SAA at 843.

<sup>34</sup> Id.

statutory circumstances.”<sup>35</sup> Further, the courts have held 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.”<sup>36</sup>

In fact, the CIT in both Kelco<sup>37</sup> and JBF RAK<sup>38</sup> recently upheld the Department’s consideration of an alternative comparison method in administrative reviews. The Court in Kelco held that, “Because neither the statute nor the regulations dictate when using A-T would be ‘appropriate’ in reviews, it was reasonable for Commerce to use the targeted dumping inquiry as a principled way of choosing between A-A and A-T to calculate Kelco’s margins.”<sup>39</sup> In JBF RAK, the Court stated:

Commerce has provided a legitimate explanation for applying its targeted dumping methodology in this context. It is logical for Commerce to borrow the comparison methodologies it uses to uncover dumping in investigations and apply those same methodologies in administrative reviews. The fact that the statute is silent with regard to administrative reviews does not preclude Commerce from filling gaps in the statute to properly calculate and assign antidumping duties. In fact, this is precisely the type of the situation where Commerce would be expected to establish comparison methodologies to apply in administrative reviews. This deliberate policy choice by Commerce does not violate the statute or SAA.<sup>40</sup>

Further, the Court in Kelco found the respondent’s reliance on FAG Italia (where the issue before the Court was the Department’s conduct of duty absorption inquiries) inapt, stating:

In FAG Italia, the same provision that authorized duty absorption inquiries also limited those inquiries to the second and fourth years following an order. See 19 U.S.C. § 1675(a)(4).... Here, by contrast, the provisions authorizing Commerce to calculate dumping margins in investigations and reviews are separate from provisions describing how to perform those calculations.... 19 U.S.C. §1673 empowers Commerce to calculate margins in investigations, and §1677f-1(d)(1) channels Commerce’s exercise of that power. 19 U.S.C. §1675(a) charges Commerce to compute margins in reviews, and § 1677f-1(d)(2) provides limited mathematical guidance regarding those computations. Paragraphs 1677f-1(d)(1) and (2), in short, were designed to be read in light of their parent provisions and

---

<sup>35</sup> See U.S. Steel Corp. v. United States, 621 F.3d. 1351, 1357 (Fed. Cir. 2010) (U.S. Steel).

<sup>36</sup> See Mid Continent Nail Com. v. United States, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010) (Mid-Continent Nail) (citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996)).

<sup>37</sup> See Kelco, 978 F. Supp. 2d at 1325.

<sup>38</sup> See JBF RAK v. United States, Slip Op. 14-78 (CIT 2014) (JBF RAK).

<sup>39</sup> See Kelco, 978 F. Supp. 2d at 1324.

<sup>40</sup> See JBF RAK, Slip Op. 14-78 at 6.

not as a unit. Given this statutory scheme, one cannot easily infer that language authorizing targeted dumping inquiries in investigations bars the agency from conducting similar inquiries in reviews....<sup>41</sup>

Therefore, we find that the respondents' reliance on FAG Italia in this case to be similarly misplaced.

We disagree with the respondents' assertion that the Department improperly came into compliance with the adverse WTO panel reports regarding zeroing in reviews. To come into compliance, as described above, the Department followed each of the requirements specified under section 123 of the URAA, and promulgated revised regulations to implement these changes pursuant to the Administrative Procedures Act (APA), including time to comment by all interested parties. The respondents' argument that the Department must continue to use the A-to-T method without zeroing as the method to fully comply with the adverse WTO panel reports is irrelevant in this proceeding.

Regarding the respondents' argument that the use of the monthly A-to-A method in administrative reviews obviates the need to apply the A-to-T method, we disagree. Section 351.414(d)(3) of the Department's regulations states that "when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate." Since this is not an investigation, this provision is inapposite in this review.

Further, 19 CFR 351.414(d)(3) states that "{w}hen applying the average-to-average method in a review, the Secretary normally will calculate weighted averages on a monthly basis and compare the weighted-average monthly export price or constructed export price to the weighted-average normal value for the contemporaneous month." This is in accordance with 19 CFR 351.414(c)(1) and section 777A(d)(2) of the Act which the Department has applied in this review with the consideration of an alternative comparison method similar to that done in investigations.

Finally, in general, the CAFC in Union Steel addressed masked dumping, stating, "...when it comes to setting the final rates to be used for actual assessment, *i.e.*, the review rates, it is reasonable for the agency to look for more accuracy, which it achieves in some measure through monthly averaging, and also for the agency to look for the full measure of duties resulting therefrom, which it better achieves through zeroing."<sup>42</sup> In other words, the CAFC has held that the Department is better able to unmask dumping through the use of the A-to-T method with zeroing. Furthermore, the Department's differential pricing analysis identifies a pattern of prices that differ significantly not only by time period, but also by region and purchaser. Thus, even if the use of monthly averaging periods addresses potential implicit masking of dumping by time within period-wide averaging groups (albeit insufficiently as there may still be implicit masking of dumping within the monthly averaging groups), it does nothing

---

<sup>41</sup> See Kelco, 978 F. Supp. 2d at 1323.

<sup>42</sup> See Union Steel, 713 F.3d at 1108 (citing Union Steel v. United States, 823 F. Supp. 2d 1346, 1359 (CIT 2012)).

to unmask dumping by purchaser or region, as provided for under section 777A(d)(1)(B) of the Act. As a result, we find that the use of the monthly weighted-average NVs and U.S. prices is insufficient to unmask the full amount of the respondents' dumping in either an investigation or an administrative review as provided for by the statute.

Comment 2: *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in LTFV Investigations*

The Department withdrew its regulatory provision on targeted dumping in 2008;<sup>43</sup> however, in 2013, the CIT in Gold East<sup>44</sup> held that this withdrawal was invalid because the Department failed to provide a notice and comment period as required by the APA. In light of these facts, the respondents contend that the targeted dumping regulations remain in effect, and, if the Department continues to find that it has the authority to conduct a “targeted dumping” analysis in this administrative review, it must do so pursuant to its targeted dumping regulations at 19 CFR 351.414(f). The respondents contend that, consistent with 19 CFR 351.414(f)(2) (1997), the Department must limit its application of the A-to-T method only to those sales which passed the Cohen’s *d* test.<sup>45</sup>

Finally, the respondents note that the Department’s targeted dumping regulations provide that the Department may conduct a “targeted dumping” analysis only in response to a timely allegation from the petitioner.<sup>46,47</sup> Thus, at a minimum, the respondents argue that the Department should be required to explain why it has investigated “targeted dumping” here absent an allegation from the petitioner required under the regulations.

The domestic industry disagrees, pointing out that 19 CFR 351.414(f) applied only to investigations. ASPA notes that, in response to Gold East and after a notice and comment period, the Department issued a Non-Application Notice affirming that it would not apply the withdrawn targeted dumping regulation in investigations initiated on or after May 22, 2014.<sup>48</sup> However, ASPA points out that, in the Non-Application Notice, the Department explained that there was no need to determine whether the withdrawn targeted dumping regulations applied in

---

<sup>43</sup> See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (December 10, 2008) (2008 Withdrawal).

<sup>44</sup> See Gold East Paper (Jiangsu) v. United States, 918 F. Supp. 2d 1317, 1327 (CIT 2013) (Gold East).

<sup>45</sup> The respondents claim that if the Department applies the A-to-T method only to Devi Fisheries’ sales which passed the Cohen’s *d* test, Devi Fisheries’ margin drops to 1.65 percent.

<sup>46</sup> See, e.g., Shrimp from India 2011-2012, 78 FR 42492, where the petitioner submitted targeted dumping allegations for the respondents at issue.

<sup>47</sup> According to the respondents, the Department in a number of cases has refused to initiate a targeted dumping investigation because the allegation submitted was either insufficient or unsubstantiated. See, e.g., Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission: 2011-2012, 78 FR 14964 (March 8, 2013), and accompanying Preliminary Decision Memorandum at 16.

<sup>48</sup> See Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 79 FR 22371 (April 22, 2014) (Non-Application Notice).

administrative reviews because: 1) the Department changed its calculation methodology for administrative reviews in 2012 to use the A-to-A method as the standard comparison method;<sup>49</sup> 2) the Department properly promulgated the regulations regarding this new methodology; and 3) the use of this methodology was limited to the preliminary results of administrative reviews issued after April 16, 2012. As a result, ASPA maintains that any administrative review issued after this date would be subject to the Final Modification for Reviews, not the withdrawn targeted dumping regulation.<sup>50</sup> Finally, the petitioner notes that the Department has already addressed and rejected many of the respondents' concerns regarding the 2008 Withdrawal in other proceedings.<sup>51</sup> The petitioner maintains that the Department should do the same here.

#### Department's Position:

We disagree that the now-withdrawn targeted dumping regulations are applicable to this administrative review. As a general matter, we disagree with the respondents that the withdrawal of the targeted dumping regulations was invalid. Further, the targeted dumping regulations only applied in LTFV investigations, not administrative reviews.<sup>52</sup> Likewise, the ongoing Gold East judicial proceeding involves a LTFV investigation, not an administrative review. Therefore, the Department's use of a differential pricing analysis in this administrative review contradicts no applicable statute or regulation.

Even assuming, arguendo, that the 2008 Withdrawal were relevant to administrative reviews, we would nonetheless disagree with the respondents that the 2008 Withdrawal was improper. The targeted dumping regulations were properly withdrawn pursuant to the APA. During the withdrawal process, the Department engaged the public to participate in its rulemaking process. Further, the Department stated in the 2008 Withdrawal that notice and an opportunity for public comment are not required under the APA's "good cause" exception. 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.<sup>53</sup> 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

---

<sup>49</sup> See Final Modification for Reviews, 77 FR at 8102. See also 19 CFR 351.414.

<sup>50</sup> See, e.g., Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review: 2011-2012, 78 FR 70533 (November 26, 2013), and accompanying Issues and Decision Memorandum at Comment 3 (Activated Carbon from the PRC).

<sup>51</sup> See, e.g., Activated Carbon from the PRC at Comment 3.

<sup>52</sup> See 2008 Withdrawal, 73 FR at 74931.

<sup>53</sup> See Targeted Dumping in Antidumping Investigations: Request for Comment, 72 FR 60651 (October 25, 2007).

dumping. The notice posed specific questions, and allowed the public 30 days to submit comments, which various parties did.<sup>54</sup>

After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.<sup>55</sup> Among other things, the Department specifically sought comments “on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping.”<sup>56</sup> Several of the submissions<sup>57</sup> received from parties explained that the Department’s proposed methodology was inconsistent with the statute and should not be adopted.<sup>58</sup> Moreover, several entities explicitly stated that the Department should not establish minimum thresholds for accepting allegations of targeted dumping because the statute contains no such requirements.<sup>59</sup>

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.”<sup>60</sup> For this reason, the Department determined that the regulation had to be withdrawn.<sup>61</sup> Although this withdrawal was effective immediately, the Department again invited parties to submit comments and gave them a full 30 days to do so.<sup>62</sup> The comment period ended on January 9, 2009, with several parties submitting comments.<sup>63</sup>

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.<sup>64</sup> Moreover, various courts have rejected the idea that an agency must

---

<sup>54</sup> Id.; see also 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).

<sup>55</sup> See Proposed Methodology, 73 FR at 26372.

<sup>56</sup> Id.

<sup>57</sup> The public comments received on 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>.

<sup>58</sup> See, e.g., Letter from AK Steel Corp., et al. to the Department: “Comments on Targeted Dumping Methodology, Comments,” (AK Steel Comments) (June 23, 2008) at 2.

<sup>59</sup> See, e.g., letter from Committee to Support U.S. Trade Laws, to the Department: “Comments on Targeted Dumping Methodology” at 25; see also AK Steel Comments at 29.

<sup>60</sup> See 2008 Withdrawal, 73 FR at 74831.

<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> See Public Comments received January 23, 2009, available at <http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html> (January 23, 2009) (listing the entities that commented).

<sup>64</sup> See, e.g., Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000), cert denied 532

give the parties an opportunity to comment before every step of regulatory development.<sup>65</sup> 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.<sup>66</sup> 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 do the Department's actions here demonstrate that it fulfilled the notice and comment requirements of the APA.

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.<sup>67</sup> 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."<sup>68</sup> The CAFC 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.<sup>69</sup> In National Customs Brokers, the CAFC 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.<sup>70</sup> The U.S. Customs Service explained that "good cause" existed to bypass the

---

U.S. 970 (U.S. 2001) (holding that the Environmental Protection Agency'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).

<sup>65</sup> 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).

<sup>66</sup> Id.

<sup>67</sup> See, e.g., First Am. Discount Corp. v. CFTC, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

<sup>68</sup> See 5 U.S.C. §553(b)(B).

<sup>69</sup> 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).

<sup>70</sup> Id., 59 F.3d at 1220–21.

APA's usual notice and comment requirements because the new regulations 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."<sup>71</sup> 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 "*and* contrary to the public interest because the public would benefit from the amended regulations."<sup>72</sup> For this reason, the Court affirmed the regulation against the plaintiff's challenge.<sup>73</sup>

The regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to unmask dumping. Such an 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. However, as noted above, the regulation applied to LTFV investigations and not to administrative reviews. Therefore, its withdrawal is not relevant to this review.<sup>74</sup>

The Department also disagrees with the respondents that it is improper to consider an alternative comparison method without the submission of a targeted dumping allegation pursuant to 19 CFR 351.414(f)(3) (1997) and 19 CFR 351.301(d)(5) (1997). As described above, the 2008 Withdrawal is valid, these regulations are no longer in force, and in any case, they did not apply to administrative reviews.

### Comment 3: Differential Pricing Analysis and the APA

The respondents argue that, if the Department plans to consider an alternative comparison method based on an application of a differential pricing analysis in administrative reviews, it must develop this analysis pursuant to formal rulemaking procedures under the APA.<sup>75</sup> According to the respondents, the courts broadly construe legislative rules to be those that: 1) create new rights or duties;<sup>76</sup> and 2) do not merely interpret prior regulations, but impose new obligations.<sup>77</sup> The respondents point out that the Department itself recently recognized the APA's rulemaking requirements when it published the Non-Application Notice.<sup>78</sup> The

---

<sup>71</sup> Id., 59 F.3d at 1223.

<sup>72</sup> Id., 59 F.3d at 1224 (emphasis added).

<sup>73</sup> Id.

<sup>74</sup> As a result of the withdrawal of the targeted dumping regulation, we note that the Department no longer requires petitioners to submit an allegation of targeted dumping before conducting its analysis.

<sup>75</sup> See Attorney General's Manual on the Administrative Procedures Act (1947) and 5 U.S.C. § 553.

<sup>76</sup> See Sweet v. Sheahan, 235 F.3d 80, 91 (2<sup>nd</sup> Cir. 2000).

<sup>77</sup> See American Mining Congress v. Mine & Safety Health Admin., 995 F. 2d 1106, 1109 (D.C. Cir. 1993).

<sup>78</sup> See Non-Application Notice, 79 FR 22371. The respondents note that, in the Non-Application Notice, the Department stated that it would be requesting comments on its differential pricing analysis from interested parties. Id., at 22378. Given its stated intention, the respondents contend that the Department should wait until it receives parties' comments before employing the Cohen's *d* test. In any event, the respondents argue that, because the Department should have provided interested parties with the opportunity to comment on differential pricing

respondents claim that rulemaking on its differential pricing analysis in administrative reviews is essential because the “gap” in the statute that the Department seeks to fill relates to a situation Congress had contemplated and determined would not arise.<sup>79</sup> Thus, the respondents contend that, until the differential pricing analysis is promulgated as a rule under the APA, the Department should not automatically apply it in administrative reviews.

The petitioner disagrees that the Department’s differential pricing analysis is a substantive rule requiring formal rulemaking under the APA. Rather, the petitioner maintains that differential pricing is simply a methodological approach. According to the petitioner, the APA specifically excludes rules of agency procedure or practice.<sup>80</sup> Moreover, the petitioner contends that the Department’s differential pricing analysis is simply a refinement of the Nails<sup>81</sup> test. The petitioner points out that, in the Final Modification for Reviews, the Department stated that it would address the application of alternative comparison methods on a case-by-case basis.<sup>82</sup> Finally, the petitioner states that the U.S. Supreme Court has recognized the need for an agency to address new concerns in an incremental and informal fashion without being subject to the rulemaking requirements of the APA.<sup>83</sup>

#### Department’s Position:

We disagree with the respondents’ argument. We note the notice and comment requirements of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>84</sup> Further, as the Department has noted, we normally make these types of changes in practice (e.g., the change from the targeted dumping analysis, including the Nails test, to the current differential pricing analysis) in the context of our proceedings, on a case-by-case basis.<sup>85</sup> As the CAFC has recognized, the Department is entitled to make changes and adopt a new approach in the context of its proceedings, provided it explains the basis for the change, and the change is a reasonable interpretation of the statute.<sup>86</sup>

---

years ago, it has tainted its use of the differential pricing analysis here.

<sup>79</sup> The respondents contend that, had Congress envisioned the need for targeted dumping in administrative reviews, it would have enacted a provision in the Act parallel to section 777A(d)(1) of the Act for investigations.

<sup>80</sup> See 5 U.S.C. § 533(b).

<sup>81</sup> 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) (Nails from the PRC); and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, Nails).

<sup>82</sup> See Final Modification for Reviews, 77 FR at 8104-8108.

<sup>83</sup> See SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

<sup>84</sup> See 5 U.S.C. § 553(b)(A).

<sup>85</sup> See Differential Pricing Analysis; Request for Comments, 79 FR 26720, 26722 (May 9, 2014) (Differential Pricing Comment Request).

<sup>86</sup> See Saha Thai Steel Pipe Company v. United States, 635 F.3d 1335, 1341 (Fed. Cir. 2011); and Washington Red Raspberry Commn. v. United States, 859 F. 2d 898, 902-03 (Fed. Cir. 1988). See also Carlisle Tire v. United States, 634 F. Supp. 419, 423 (CIT 1986) (discussing exceptions to the notice and comment requirements of the APA).

As with the Department’s prior interpretation of the provision at issue, the Department adopted the targeted dumping analysis, including the Nails test, in the context of its proceedings.<sup>87</sup> There, the Department explained the basis for its interpretation and provided parties with an opportunity to comment. Similarly, with respect to the Department’s differential pricing analysis, the Department has explained the basis for the change in practice and provided the respondents with an opportunity to comment on the Department’s interpretation and methodology. Moreover, as the Department noted, as it “gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the average-to-average comparison method, the Department expects to continue to develop its approach with respect to the use of an alternative comparison method.”<sup>88</sup> Further developments and changes, along with further refinements, are expected in the context of its proceedings based upon an examination of the facts and the parties’ comments in each case. Accordingly, the Department’s development of the differential pricing analysis and its application in this case are consistent with established law.

Comment 4: *Differential Pricing Analysis: Identification of a Pattern of Prices that Differ Significantly and Whether the A-to-A Method Can Account for Such Differences*

The respondents contend that the Department has failed to establish the existence of a pattern of prices that differ significantly, as required by section 777A(d)(2) of the Act.<sup>89</sup> The respondents argue that the Act requires the Department to determine in sequence whether: 1) the prices for comparable merchandise differ significantly among purchasers, regions, or time periods; 2) there is a pattern of export prices demonstrating such significant differences; and 3) this pattern constitutes “targeting,” or simply are attributable to normal price fluctuations. The respondents argue that the Department has not made each of these determinations, but has instead merely calculated weighted-average export prices for the POR for purchasers and regions, and by quarter for time period, without making any determination that individual export prices of comparable merchandise differ significantly.

The respondents also claim that the Department has failed to define the term “differ significantly” as used in section 777A(d)(1)(B)(i) of the Act, and it must do so now. According to the respondents, the court in Mid-Continent Nail noted that the Department has often used a threshold of five percent to measure significance for antidumping purposes,<sup>90</sup> and, as a result, it found the use of a five percent threshold in the Nails test to be neither arbitrary nor capricious.<sup>91</sup>

---

<sup>87</sup> See Nails from the PRC, 73 FR 33977.

<sup>88</sup> See Differential Pricing Comment Request, 79 FR at 26722.

<sup>89</sup> According to the respondents, because the word “differ” in the Act is plural, it refers to export prices, not the pattern.

<sup>90</sup> See Mid-Continent Nail, 712 F. Supp.2d at 1374.

<sup>91</sup> Id. at 1378. See also section 773(a)(1)(C) of the Act, section 773(a)(1)(B)(ii)(II) of the Act, and 19 CFR 351.403(d).

The respondents find it significant that many of the sales that passed the Cohen's *d* test in this case had price differences of less than five percent.<sup>92</sup>

The respondents point out that, when determining whether there exists a pattern of prices that differ significantly, the SAA directs the Department to proceed on a case-by-case basis because differences which may be significant for one industry or product may not be so for another.<sup>93</sup>

The respondents argue that, despite this, the Department has not investigated or addressed the issue of what constitutes a significant difference in the frozen shrimp industry, nor has it done so in any specific industry.

Furthermore, the respondents claim that the Department's differential pricing analysis does not distinguish between "targeted dumping" and the range of other potential causes of price variations such as normal market fluctuations, seasonality, and supply availability. According to the respondents, the Department itself has recognized that such price differences may be unrelated to targeting.<sup>94</sup> In any event, the respondents note that the Preamble to the Department's regulations provides that the Department will provide parties the opportunity to explain whether a particular pricing pattern constitutes "targeted dumping."<sup>95</sup> The respondents claim that the Department has violated its regulations by not providing parties with such an opportunity.

The respondents contend that any observed difference between the weighted-average dumping margins calculated using the A-to-A and A-to-T methods in the preliminary results is almost entirely attributable to zeroing. According to the respondents, when comparing the dumping margins resulting from the two different calculation methods, it is unreasonable for the Department to also employ zeroing (which the respondents argue is designed to inflate dumping margins) on only one side of the equation. The respondents contend that, by doing so, the Department has virtually assured its use of the A-to-T method.

Further, the respondents argue that section 777A(d)(1)(B)(ii) of the Act requires that, before applying the alternative method, the Department must explain why its standard method cannot account for significant price differences. Accordingly, the respondents infer that the Department should only apply the alternative A-to-T method to those sales which pass the Cohen's *d* test. Additionally, the respondents note that, instead of examining whether the standard A-to-A method can account for such differences, the Department has first applied the alternative method

---

<sup>92</sup> The respondents claim that a comparison of the net U.S. prices of each sale in a test group which passed the Cohen's *d* test to the mean of the corresponding base group shows that under any measure these price differences are not significant. Specifically, the respondents point to the fact that less than half of Devi Fisheries' U.S. sales which passed the Cohen's *d* test have price differences of between +/- 10 percent of the mean price of the base group, while less than a quarter of Falcon's U.S. sales which passed the Cohen's *d* test have price differences between +/- 5 percent.

<sup>93</sup> See SAA at 883.

<sup>94</sup> See Nails from the PRC, 73 FR at 33985; and Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011), and accompanying Issues and Decision Memorandum at Comment 4.

<sup>95</sup> See Antidumping Duties; Countervailing Duties: Final rule, 62 FR 27296, 27374 (May 19, 1997) (Preamble).

and then examined whether the A-to-A method accounts for significant price differences. The respondents provide an exhibit in their case brief which they claim shows that the differences in Devi Fisheries' and Falcon's weighted-average dumping margins calculated using the A-to-A and A-to-T methods are less than de minimis.<sup>96</sup> According to the respondents, their analysis demonstrates that the standard A-to-A method accounts for the significant price differences and, thus, the Department should apply the A-to-A method without zeroing in the final results.

Finally, the respondents claim that the Department's Cohen's *d* test penalizes an exporter for making higher-priced sales, an outcome allegedly unintended by Congress.<sup>97</sup> Specifically, the respondents note that the Department considers U.S. sales which have higher prices than U.S. sales in the control group as passing the Cohen's *d* test,<sup>98</sup> despite the fact that the Department cannot find sales which are priced higher than the comparison group to be "targeted." The respondents contend that, as a result, a respondent looking to avoid paying antidumping duties no longer needs to eliminate making low-priced U.S. sales, but instead (contrary to the intent of the law) it can eliminate making high-priced U.S. sales to ensure that its sales do not fail the Cohen's *d* test. Thus, the respondents contend that, if the Department continues to use the Cohen's *d* test for the final results, it should apply the A-to-T methodology only to those sales which it both finds to be "targeted" and priced lower than the mean of the comparison group.

The domestic industry disagrees that the Department is required to determine why patterns of significant price differences exist. ASPA points out that the Department has previously explained that it does not consider intent as part of its analysis of whether there exists a pattern of prices that differ significantly.<sup>99</sup> Moreover, ASPA finds it significant that the Act only refers to a pattern of prices that differ significantly, not "targeted dumping" per se. As a result, according to ASPA, if the Department finds that such a pattern exists, it may logically infer that the alternative method is necessary to unmask any targeted dumping, regardless of the reasons for the pricing pattern.

Furthermore, ASPA disagrees that the Department's comparison of the weighted-average dumping margins calculated using the A-to-A and A-to-T methods only measures differences attributable to zeroing. According to ASPA, the respondents ignore the fact that, without zeroing, the results of the A-to-A and A-to-T methods are identical and it is the A-to-T method with zeroing that allows dumped sales to be unmasked. Thus, ASPA maintains that, where the Department has found masked dumping, the application of the A-to-T method with zeroing is a

---

<sup>96</sup> See the respondents' case brief, dated May 8, 2014, at Exhibit H.

<sup>97</sup> The respondents maintain that, according to the SAA, the purpose of the targeted dumping analysis is to unmask targeted dumping. They further note that Congress intended for the Department to apply the targeted dumping methodology only to targeted, low-priced sales.

<sup>98</sup> Moreover, the respondents point out that: 1) Devi Fisheries' lowest priced U.S. sale did not pass the Cohen's *d* test; and 2) for both Devi Fisheries and Falcon, while a certain sale does not pass the Cohen's *d* test, there are similar sales with both higher and lower prices that do pass. The respondents claim that such results show there is no discernable pattern for a particularly priced sale to pass the Cohen's *d* test.

<sup>99</sup> See, e.g., Shrimp from India 2011-2012 at Comment 1; and Purified Carboxymethylcellulose From the Netherlands: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, 78 FR 9884 (February 12, 2013), and accompanying Issues and Decision Memorandum at Comment 1.

reasonable and appropriate means to expose and remedy that dumping. In any event, ASPA notes that the Department has stated in previous cases that it would be illogical to determine whether the A-to-A method is inadequate by comparing it to methodologies different from the court-upheld methodologies the Department actually uses.<sup>100</sup> ASPA maintains that, when the Department chooses between two permissible methodologies, it is reasonable for the Department to compare the outcomes of those methodologies as they exist. Thus, ASPA asserts that the Department should continue its use of zeroing when applying the A-to-T method in the final results.

ASPA also disagrees that the Department failed to explain why the A-to-A method cannot account for the existing patterns of prices that differ significantly. ASPA points out that the CAFC found that the A-to-A method may mask dumped sales and, by using the A-to-T method and zeroing, the Department may identify merchants who intermittently engage in dumping.<sup>101</sup> ASPA notes that, as a result, the CAFC has upheld the Department's use of zeroing when applying the A-to-T method, and of not zeroing when applying the A-to-A method, finding that these comparison methods calculate weighted-average dumping margins in different ways and for different reasons.<sup>102</sup>

The petitioner disagrees that the differential pricing analysis is flawed because the Cohen's *d* test does not distinguish between prices which are higher or lower than the average prices of the comparison group. The petitioner notes that the Department has already addressed this argument in detail in other cases. For example, the petitioner points out that in Activated Carbon from the PRC, the Department stated that: 1) the statutory language only references prices that "differ" without specifying whether these prices are higher or lower; 2) higher or lower priced sales could be dumped or could be masking other dumped sales; and 3) by considering all sales in its analysis, the Department is able to identify whether there is a pattern of prices that differ significantly.<sup>103</sup> As a result, the petitioner maintains that there is no "flaw" in the Cohen's *d* test and the Department should continue to employ it for purposes of the final results.

Finally, the petitioner disagrees that the Department did not provide parties with an opportunity to explain that any price differences it found were attributable to other factors, noting that, pursuant to 19 CFR 351.301(b)(2), the respondents were permitted to provide such information. According to the petitioner, the respondents' failure to provide an adequate explanation is not a reason for the Department to abandon its differential pricing analysis, especially since the CAFC has recognized that the burden is on a respondent, not the Department, to create an adequate record.<sup>104</sup>

---

<sup>100</sup> See Shrimp from India 2011-2012 at Comment 1.

<sup>101</sup> See Koyo Seiko Co., Ltd. v. United States, 20F.3d 1156, 1159 (Fed. Cir. 1994). See also Union Steel v. United States, 713 F. 3d 1101, 1109 (Fed. Cir. 2013) (Union Steel).

<sup>102</sup> See Union Steel, 713 F.3d at 1109.

<sup>103</sup> See Activated Carbon from the PRC at Comment 4.

<sup>104</sup> See QVD Food Co. v. United States, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (QVD Food).

### Department's Position:

As an initial matter, we note that the respondents do not argue that the Department's reliance on the Cohen's *d* test violates the language of the Act. Rather, the respondents put forth several reasons why they believe the Department should modify its approach from the preliminary results. In fact, there is no language in the Act that mandates the approach by which the Department should: 1) determine whether there exists a pattern of prices for comparable merchandise that differ significantly among purchasers, regions or periods of time; and 2) whether the standard A-to-A method can account for such differences.<sup>105</sup> In addition, although the respondents continually refer to the term "targeted" or "targeted dumping" for justifying their arguments, that term also does not appear in the Act.

The means of carrying out the purpose of the Act and the authority to create a reasonable approach to implement that purpose is specifically delegated to the Department. Thus the threshold questions that the Department must determine is whether the differential pricing analysis, including the Cohen's *d* test and meaningful difference analysis, is reasonable and satisfies the express requirements of the Act based on the record of this review.

In these final results, as in the Preliminary Results, the Department, using the Cohen's *d* test, analyzed the respondents' U.S. sale prices to determine whether there was a pattern of prices that differ significantly, and whether the Cohen's *d* coefficient met or exceeded the "large" threshold which "provides the strongest indication that there is a significant difference between the means of the test and comparison groups."<sup>106</sup> We find this to be a reasonable threshold in evaluating whether there is a pattern of prices that differ significantly.

The Department disagrees with the respondents that it must examine individual U.S. sale prices to determine whether there exists a pattern of prices for comparable merchandise that differ significantly among purchasers, regions or time periods. The purpose of considering the application of an alternative comparison method is to determine whether the application of the A-to-A method is appropriate pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act. The A-to-A method compares "the weighted average of the normal values with the weighted average of the export prices (or constructed export prices) for comparable merchandise."<sup>107</sup> Consideration of an alternative comparison method in administrative reviews consistent with section 777A(d)(1)(B) of the Act involves examination whether there exists a pattern of prices that differ significantly among purchasers, regions or time periods within these weighted-average prices. Thus, the Department has divided the weighted-average price used in the calculation of individual dumping margins into a weighted-average price to a given purchaser (or region or time period) – i.e., the test group – and a weighted-average price to all other purchasers (or regions or time periods) – i.e., the comparison group – in order to examine whether there is a pattern of prices that differ significantly among purchasers, regions or time periods. This is the same approach used by the Department in the Nails test with

---

<sup>105</sup> See Sections 777A(d)(B)(i) and (ii) of the Act.

<sup>106</sup> See Preliminary Results, 79 FR 16285, and accompanying Preliminary Decision Memorandum at 16.

<sup>107</sup> See section 777A(d)(1)(A)(i) and 19 CFR 351.414(b)(1).

the targeted dumping analysis, where the Department used weighted-average prices for purchasers, regions and time period in both the “standard deviation test” and the “gap test” of the Nails test.<sup>108</sup> Furthermore, neither the statute nor the regulations specify how the Department should examine whether there exists a pattern of prices that differ significantly. As noted above, the respondents have provided no support that the differential pricing analysis, the Cohen’s *d* test, or the use of weighted-average prices rather than transaction-specific prices in any way violates the statute or regulations; they just disagree with the Department’s approach in this administrative review. The Department finds that its use of weighted-average prices in determining whether there exists a pattern of prices that differ significantly is reasonable and appropriate, and has continued to use this approach for these final results.

According to the respondents, it is insufficient for the Department to determine merely that a “significant difference” in export prices exists. They claim that the Department must determine what is “significant” specifically for the frozen shrimp industry, because differences which may be significant for one industry or product may not be so for another. However, by its terms, the Act only requires a finding of a pattern of prices that differ “significantly,” not that this difference be deemed “significant” for a particular industry. The analysis employed by the Department, including the use of the Cohen’s *d* test, reasonably fills the statutory gap as to how to determine whether a pattern of prices “differ significantly.”

The Department disagrees with the respondents’ logic that because the Court found in Mid-Continent Nail that a five percent threshold in defining “differ significantly” in the Nails test was reasonable, that the Department’s finding in this review, where many prices differences are substantially below five percent, is unreasonable in finding that these prices differ significantly. In order for sales to pass the Nails test, the Department had to find that at least five percent, by volume, of a respondent’s U.S. sales to an allegedly targeted group passed the “gap” test portion of the Nails test.<sup>109</sup> The respondents have incorrectly projected this to mean that the Department must then find that the price differences found between the test and comparison groups must amount to five percent of the comparison group. As stated elsewhere, the measure of whether a difference in the mean prices between the test and comparison groups exists is based on the variance or dispersion of prices within both groups. Therefore, if the prices in the test and comparison groups exhibit little variance, then the difference in the mean prices between the two groups, to be significant, need also be relatively small. However, if the variance of prices with the two groups is larger, then the difference in the mean prices between the two groups must be larger to be significant. Accordingly, whether the difference in the mean prices between the test and comparison groups is significant depends upon the pricing behavior exhibited by the respondent. For the respondents to claim that this measure of price differences in the Cohen’s *d* test should be the same as that used to measure the volume of sales passing the “gap” test is not relevant.

---

<sup>108</sup> See Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 15691 (March 12, 2013) and the accompanying Decision Memorandum dated March 4, 2013 (India Shrimp AR-7 Preliminary Results) at page 8; unchanged in Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination; 2011-2012; 78 FR 42492 (July 16, 2013).

<sup>109</sup> Id. at 8

We agree that in the SAA, Congress explained that “small differences may be significant for one industry or one type of product but not for another,”<sup>110</sup> but we have concluded the Cohen’s *d* test specifically accounts for this. Specifically, the Cohen’s *d* coefficient measures the significance of the difference in the weighted-average sales prices between the test and comparison groups relative to the variances of the individual sales prices within each group. Thus, if there is little variance in prices among purchasers in a particular industry, regions or time periods, then small differences, in absolute terms, may be significant. On the other hand, if individual sale prices within each comparison group (including purchasers in a given industry) have a greater variability (*i.e.*, they are less homogeneous), there then there must be greater differences in the weighted-average sale prices between the two groups for the difference to be significant.

The idea behind the Cohen’s *d* coefficient is that it indicates the degree by which the distribution of prices within the test and comparison groups overlaps or, conversely, how significant the difference is between the prices in the test and comparison groups. This measurement is based on the difference between the means of the test and comparison groups relative to the variances within the two groups, *i.e.*, the pooled standard deviation. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, then this value is expressed in standardized units (*i.e.*, the Cohen’s *d* coefficient) based on the dispersion of the prices within each group, and quantity of the overlap or, conversely, the significance of the differences, in the prices within the two groups. In other words, the “significance” of differences specifically to purchasers within a given industry is addressed through the Cohen’s *d* test.

With respect to the respondents’ arguments that the Department must account for some kind of causality for any observed price differences, we disagree. Congress did not speak to the intent of the producers or exporters in setting prices that exhibit a pattern of significant price differences. Consistent with the Act and the SAA, the Department determined whether a pattern of significant price differences exists, and neither the Act, nor the SAA, requires the Department to conduct an additional analysis as argued by the respondents to account for potential reasons that the observed price differences exist. This position has been affirmed by the CIT.<sup>111</sup>

We also disagree with the respondents’ contention that the Department’s application of the Cohen’s *d* test penalizes exporters for making higher-priced sales. Section 777A(d)(1)(B)(i) of the Act requires that the Department find a “pattern of export prices (or constructed export prices) for comparable merchandise which differ significantly among purchasers, regions, or periods of time . . . .” This provision, which the Cohen’s *d* and ratio tests address, involves an analysis of U.S. prices, and makes no reference to comparisons with NVs. As explained in the Preliminary Results, the Cohen’s *d* test is the first stage of the differential pricing analysis - the part where the Cohen’s *d* coefficient is calculated to evaluate the extent to which the net prices in the U.S. market to a particular purchaser, region or time period differ significantly from the net

---

<sup>110</sup> See SAA at 843.

<sup>111</sup> See JBF RAK, Slip Op. 14-78 at 16; and Borusan Mannesmann Boru Sanayi ve Ticaret A.S., v. United States, Slip Op. 14-71 (CIT 2014) (Borusan) at 8.

prices of all other sales of comparable merchandise. The analysis of the impact of a pattern of prices that differ significantly, if one is identified, on dumping and the potential for masked dumping is addressed subsequently by section 777A(d)(1)(B)(ii) of the Act.

The respondents also argue that higher-priced sales cannot be part of a pattern of prices that differ significantly because the sole purpose of the targeted dumping analysis is to unmask targeted dumping. We disagree. The respondents' claims conflate two different, discernable statutory tests. The first question to be addressed under the Act is whether or not there is a pattern of U.S. prices that differ significantly. It is an entirely different question, which is addressed by the Department later in its calculations, as to whether or not there is dumping of those U.S. transactions in the United States. That analysis includes a review of comparable NVs, which is not part of the Department's process of determining whether a pattern exists.

The Act states that the Department may apply the A-to-T comparison method if: 1) "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 2) the Department "explains why such differences cannot be taken into account" using the A-to-A comparison method.<sup>112</sup> The first requirement examines a pattern of export prices or constructed export prices, *i.e.*, the prices of transactions in the U.S. market, and makes no provision for comparisons with NVs, as is provided for when examining dumping.<sup>113</sup> Therefore, whether U.S. prices are above or below their comparable NVs, *i.e.*, whether they are dumped or not, is not a consideration when examining whether there exists a pattern of prices that differ significantly consistent with section 777A(d)(1)(B)(i) of the Act. Higher-priced sales may be dumped; lower-priced sales may not be dumped; we do not know at the time that the pattern is analyzed and discerned, and the Act does not require that the Department make a finding of dumping when examining whether there exists a pattern of prices that differ significantly.

Accordingly, we disagree with the respondents' arguments with respect to the analysis employed by the Department, including the use of the Cohen's *d* and ratio tests, for discerning whether a pattern of prices that "differ significantly" exists. We determine that this test is reasonable and is in accordance with the requirements of the Act and the SAA.

With respect to the arguments pertaining to masked dumping, for these final results, the Department considered all of the U.S. sales information on the record for the respondents in its analysis and to draw reasonable inferences as to what the data show. The purpose of considering an alternative comparison method is to examine whether the A-to-A method is appropriate to measure each respondent's amount of dumping, some of which may be hidden because of masked dumping. Masked dumping is the result of two concurrent situations: dumped sales and non-dumped sales. One, without the other, does not result in masked dumping. The existence of both dumped and non-dumped sales is necessary to have the potential for masked dumping, and one must consider both low-priced and high-priced sales when determining whether a pattern of prices that differ significantly exists and whether masking is occurring. When the Department

---

<sup>112</sup> See section 777A(d)(1)(B) of the Act.

<sup>113</sup> See section 771(35)(A) of the Act.

looks for a pattern of prices that differ significantly, a pattern can involve prices that are lower than the comparison price or higher than a comparison price. Lower, higher, or both are all possibilities for establishing a pattern consistent with section 777A(d)(1)(B)(i) of the Act.

Notably, the language of the Act directs the Department to consider whether a pattern of prices that differ significantly exists. 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 Act does not direct the Department to consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor does the Act specify whether the difference must be the result of certain sales being priced higher or lower than other sales.

Consequently, 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 of creating a pattern of prices that differ significantly. Further, higher-priced sales will offset lower-priced sales, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets that can mask dumping.

Higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis. Higher- or lower-priced sales could be dumped or could be masking other dumped sales - this is immaterial in the Cohen’s *d* test and the question of whether there is a pattern of prices that differ significantly, because this analysis includes no comparisons with NVs. By considering all sales, both higher-priced and lower-priced, the Department is able to analyze an exporter’s pricing behavior and to identify whether there is a pattern of prices that differ significantly. Moreover, finding such a pattern of prices that differ significantly among purchasers, regions, or periods of time signals that the exporter is discriminating between purchasers, regions, or periods of time within the U.S. market, rather than following a more uniform pricing behavior. Where the evidence indicates that the exporter is engaged in a pricing behavior which creates a pattern, there is cause to continue with the analysis to determine whether masked dumping is occurring. Accordingly, we have determined that both higher- and lower-priced sales are relevant to the Department’s analysis of the exporter’s pricing behavior and should be included in our analysis.

Comment 5: *Differential Pricing Analysis: Use of the Cohen’s d Test*

The respondents argue that it is inappropriate for the Department to use the Cohen’s *d* statistic to determine the existence of a pattern of prices that differ significantly. According to the respondents, the Department cannot base its differential pricing analysis on the Cohen’s *d* test because the test: 1) is not meant to assess differences in dollar-denominated transactions; 2) is likely to find “false positives;” 3) fails to consider the statistical or commercial significance of any price difference that it finds; and 4) uses a 0.8 benchmark, which is inappropriate in the test’s context. For these reasons, the respondents contend that the Cohen’s *d* coefficient is the wrong measure for the Department to use to identify targeted dumping and, as a result, any results of the Department’s analysis are not based on substantial evidence, as required by law.<sup>114</sup>

---

<sup>114</sup> See 19 USC § 1516a(b)(1)(B)(i). See also *Altx Inc. v. United States*, 370 F. 3d 1108, 1116 (Fed. Cir. 2004) (holding that substantial evidence requires “more than a mere scintilla” but less than the weight of the

Further, the respondents argue that the Department's use of the Cohen's *d* test is arbitrary and capricious because the test entirely fails to identify patterns of export prices for the purpose of unmasking targeted dumping.<sup>115</sup> Consequently, the respondents contend that the courts will not accord the Department deference in its use of the Cohen's *d* test.<sup>116</sup>

The respondents state that the Cohen's *d* coefficient is the ratio of the difference between the means of two groups to their pooled standard deviation, developed to measure effect size in terms of the standard deviations for the test and comparison groups. According to the respondents, the Cohen's *d* coefficient was intended for use when analyzing results measured in units that are difficult to understand or when comparing the results of studies measured in different units. The respondents contend that in circumstances such as the Department's differential pricing analysis, where the prices being compared are measured consistently in dollars, it is inappropriate to use the Cohen's *d* coefficient because it yields inaccurate results.

Furthermore, the respondents claim that the Department arbitrarily calculated the Cohen's *d* coefficient, because it used inconsistent periods to create the subgroups in its comparisons.<sup>117</sup> Specifically, the respondents point to the fact that the Department has created subgroups covering the POR for region and purchaser, but by quarter for time period. As a result, according to the respondents, the subgroups which pass the Cohen's *d* test display inconsistent patterns, eliminating the purpose of the pattern test. Moreover, the respondents note that the Department then uses the results of the Cohen's *d* test calculated from these inconsistent periods to determine whether the MA-to-MA methodology can account for significant price differences. The respondents contend that the Department cannot determine dumping margins on a monthly basis using the Cohen's *d* coefficient calculated on a POR basis. Therefore, the respondents claim that, because the Department calculates the Cohen's *d* coefficient arbitrarily, without a legal or statistical basis for how the Cohen's *d* test will be used, the results are irrational and have no economic significance.

The respondents also take issue with the 0.8 benchmark used in the Cohen's *d* test.<sup>118</sup> While the respondents point out that the Department has in prior cases<sup>119</sup> cited to a statistics textbook as

---

evidence); Huaiyin Foreign Trade Corp. (30) v. United States, 322 F. 3d 1369, 1374 (Fed. Cir. 2003) (Huaiyin Corp.) (holding that substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion); and Elkem Metals Co. v. United States, 441 F. Supp. 2d 1292, 1298 (2006) (holding that the existence of substantial evidence is determined by the record as a whole).

<sup>115</sup> See Motor Vehicle Mfrs Ass'n of the U.S., Inc. v. State Farm Mutual Auto Ins. Co., 462 U.S. 29 (1983) (holding that an agency rule would be arbitrary and capricious if it failed to consider "an important aspect of the problem").

<sup>116</sup> See Gold East, 918 F. Supp. 2d at 1321.

<sup>117</sup> The respondents also claim that these inconsistent periods arise because the Cohen's *d* test is not being used to test any particular hypothesis, but simply to determine whether the prices to some groups are different than the prices to others.

<sup>118</sup> The respondents note that the Department determines that a test group with a Cohen's *d* statistic above 0.8 passes the Cohen's *d* test, indicating targeted dumping.

<sup>119</sup> See, e.g., Xanthan Gum from the PRC at Comment 3.

support that this benchmark has been widely adopted, the respondents claim that this same source calls the benchmark somewhat arbitrary and not universally adopted. The respondents claim that, because the 0.8 benchmark has no relationship to the reasons a pattern of prices that differ significantly exists, its use in the Cohen's *d* test is arbitrary and unjustifiable. Moreover, the respondents claim that the Cohen's *d* test (*i.e.*, a measure of "effect size") must be interpreted along with tests of statistical significance.<sup>120</sup> According to the respondents, without also examining statistical significance, the Department's use of the 0.8 benchmark may make small price differences, which are simply the result of random variation, appear to indicate the presence of prices that differ significantly.<sup>121</sup> The respondents point out that the Department in prior cases<sup>122</sup> has claimed that statistical significance is not a relevant consideration in a differential pricing analysis because the elements of the Cohen's *d* test are calculated using all of a respondent's U.S. sales; as a result, these values contain no sampling error. However, the respondents contend that no Cohen's *d* test is based on the entire population of a respondent's sales because the Department: 1) correctly excludes observations with missing or obviously incorrect data; 2) excludes sales with entry dates outside the POR; and, 3) breaks down the remaining U.S. transactions into product-specific subgroups.<sup>123</sup>

Moreover, the respondents argue that the Cohen's *d* test is likely to find false positives. The respondents note that the Department tests each of the respondents' sales three times: by region, time period, and purchaser. Nonetheless, the respondents point out that most of Devi Fisheries' and Falcon's sales which passed the Cohen's *d* test only passed one test (*i.e.*, at 52 and 71 percent, respectively). Further, the respondents contend that the Department's differential pricing analysis is circular because a test group which the Department finds to have anomalous prices is still included in comparison groups to determine if other test groups have unusually high or low prices.<sup>124</sup> According to the respondents, this circularity was not always an issue in

---

<sup>120</sup> The respondents note that the Department has previously held that a measure of effect size "has many advantages over the use of statistical significance tests alone." See Xanthan Gum from the PRC at Comment 3. However, the respondents claim that the use of the word "alone" in that quotation is important. According to the respondents, the article on which the Department relied states that effect size measures, such as the Cohen's *d* test, should be presented with tests of statistical significance because it is important to know the statistical significance of a result.

<sup>121</sup> The respondents argue that, because the Department has created homogenous product groups, the standard deviations between subgroups are very low. Therefore, the respondents contend that a difference which appears large based on a low standard deviation may represent a small price difference. For example, the respondents point to Cohen's *d* coefficient of -2.42 and .94 calculated for specific CONNUMs for Devi Fisheries and Falcon, respectively, in the Preliminary Results. The respondents note that the difference between the means for these two groups was only 0.49 percent for Devi Fisheries and 0.03 percent for Falcon. The respondents claim that, because groups of sales can pass the Cohen's *d* test with a very small difference between means, the Cohen's *d* test does not indicate the commercial significance of the price differences it finds.

<sup>122</sup> See Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Antidumping Duty Administrative Review; 2011-2012, 79 FR 11406 (February 21, 2014), and accompanying Issues and Decision Memorandum at Comment 5.

<sup>123</sup> As a result, the respondents note that while there are over 1,000 transactions involving Devi Fisheries and Falcon during the POR, the Department often conducted the Cohen's *d* test on fewer than 20 observations.

<sup>124</sup> According to the respondents, this circular calculation yields unjustifiable results. The respondents provide examples of such situations for Devi Fisheries and Falcon in Exhibit I of their case brief.

the differential pricing methodology. Specifically, the respondents note that: 1) the standard dumping margin calculation from the Department’s website “in October 2012” included a note indicating that sales passing the differential pricing test would be removed from the “DPSALES” database; and, 2) the Nails test simply compared the allegedly targeted sales to non-targeted sales without the circularity present here.

Finally, the respondents argue that the Department incorrectly calculated the Cohen’s *d* coefficient in the Preliminary Results in two ways. First, the respondents claim that the Department incorrectly calculated the pooled standard deviation by assuming that the size of the two groups being compared is the same. However, the respondents note that the groups being compared are often of different sizes. According to the respondents, the appropriate formula for calculating pooled standard deviation weights the standard deviation of each group based on the total number of observations in the group. The respondents contend that the method used by the Department skews the statistic upwards when the larger group has a higher standard deviation. The respondents argue that, while standard deviation is not necessarily related to group size, comparison groups are likely to have larger standard deviations than test groups because they are composed of sales from different regions, time periods, or purchasers. Second, the respondents claim that the Cohen’s *d* coefficient suffers from small sample bias which overestimates the statistic. According to the respondents, because the groups used in the Cohen’s *d* test are often based on only a few sales observations, it is important for the Department to remove this small sample bias. The respondents allege that, when these two errors in the Cohen’s *d* test are corrected, the number of transactions passing the Cohen’s *d* test, and the resulting weighted-average dumping margins for Devi Fisheries and Falcon, fall. Consequently, the respondents contend that, if the Department continues to use the Cohen’s *d* coefficient in its calculations for the final results, it should, at a minimum, correct its calculation of this statistical measure.

The petitioner dismisses the respondents’ objections to the Cohen’s *d* coefficient, noting that the Department has repeatedly employed this test in its differential pricing analyses. Moreover, the petitioner points out that the Department has rejected challenges similar to those raised by the respondents in Activated Carbon from the PRC,<sup>125</sup> Xanthan Gum from the PRC,<sup>126</sup> and Nails from the PRC Fourth Review.<sup>127</sup> According to the petitioner, the respondents have failed to present any facts or argument to demonstrate that the Department’s reliance on the Cohen’s *d* coefficient is unreasonable and the Department must instead satisfy some higher threshold not specified in the Act in its analysis.<sup>128</sup> As a result, the petitioner asserts that the Department’s differential pricing analysis, including the use of the Cohen’s *d* test, is reasonable and consistent with congressional intent.<sup>129</sup>

---

<sup>125</sup> See Activated Carbon from the PRC at Comment 3.

<sup>126</sup> See Xanthan Gum from the PRC at Comment 3.

<sup>127</sup> See Certain Steel Nails From the People's Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review, 79 FR 19316 (April 8, 2014), and accompanying Issues and Decision Memorandum at Comment 7 (Nails from the PRC Fourth Review).

<sup>128</sup> Id.

<sup>129</sup> Id.

Department's Position:

With respect to the Cohen's *d* test, the Cohen's *d* coefficient is a statistical measure which gauges the extent (or "effect size") of the difference between the means of two groups. In the final determination for Xanthan Gum from the PRC, the Department stated "{e}ffect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone."<sup>130</sup> In addressing Deosen's comment in Xanthan Gum from the PRC, the Department continued:

Effect size is the measurement that is derived from the Cohen's *d* test. Although Deosen argues that effect size is a statistic that is "widely used in meta-analysis," we note that the article also states that "{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference*." The article points out the precise purpose for which the Department relies on Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant.<sup>131</sup>

Accordingly, we disagree with the respondents' claim that the Cohen's *d* test is not an appropriate and reasonable approach to examine whether there exists a pattern of prices that differ significantly.

Regarding the respondents' argument that it is inappropriate to use the Cohen's *d* coefficient in situations like the differential pricing analysis, where the prices being compared are measured consistently in dollars, we also disagree. One of the advantages of the use of measures of effect size, such as the Cohen's *d* coefficient, is its ability to aggregate results of independent studies (*i.e.*, metadata analysis) which often involve different measures of their results. This application, however, does not invalidate the use of effect size, including the Cohen's *d* coefficient, as an analysis tool simply because the measures used are the same. To make comparisons between a test and comparison group, the basis for the difference in the means must be the same (*e.g.*, U.S. dollars per kilogram). Aggregating the results of the comparisons does not require the use of different units of measure. For the test to be valid, it is unnecessary for the analysis examining whether there exists a pattern of prices that differ significantly to be based on different units of measure for different kinds of comparison groups.

For the Cohen's *d* coefficient, this examination of the price differences between test and comparison groups is relative to "pooled standard deviation." The pooled standard deviation reflects the dispersion, or variance, of prices within each of the two groups. When the variance of prices is small within these two groups, then a small difference between the weighted-average sale prices of the two groups may represent a significant difference, but when the variance within the two groups is larger (*i.e.*, the dispersion of prices within one or both of the groups is greater), then the difference between the weighted-average sale prices of the two groups must be larger in order for the difference to be significant. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, then this

---

<sup>130</sup> See Xanthan Gum from the PRC at Comment 3.

<sup>131</sup> Id.

value is expressed in standardized units based on the dispersion of the prices within each group. This is the concept of an effect size, as represented in the Cohen's *d* coefficient.

We note that the Department addressed the respondents' arguments regarding the use of the 0.8 benchmark (i.e., the "large" effect size) in the Cohen's *d* test in Xanthan Gum from the PRC, stating:

Deosen's claim that the Cohen's *d* test's thresholds of "small," "medium," and "large" are arbitrary is misplaced. In "Difference Between Two Means," the author states that "there is no objective answer" to the question of what constitutes a large effect. Although Deosen focuses on this excerpt for the proposition that the "guidelines are somewhat arbitrary," the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size "have been widely adopted." The author further explains that Cohen's *d* is a "commonly used measure{ }" to "consider the difference between means in standardized units." At best, the article may indicate that although the Cohen's *d* test is not perfect, it has been widely adopted. And certainly, the article does not support a finding, as Deosen contends, that the Cohen's *d* test is not a reasonable tool for use as part of an analysis to determine whether a pattern of prices differ significantly.<sup>132</sup>

Therefore, we continue to find that it is appropriate to rely on the 0.8 benchmark to measure a large effect size in the Cohen's *d* test.

We disagree with the respondents' claim that the Cohen's *d* test must be interpreted along with tests of statistical significance. If Congress had intended to require a particular result be obtained with level of "statistical significance" of price differences as a condition for finding that there exists a pattern of prices that differ significantly, then Congress presumably would have used language beyond the stated requirement and more precise than "differ significantly" as it did, for example, with respect to enacting the sampling provision for respondent selection in section 777A(c)(2)(A) of the Act.

Moreover, for the Department's application of the Cohen's *d* test, it is unnecessary to include a measure of the "statistical significance" of its results as this analysis includes all data in the "statistical population" of the respondent's sales in the U.S. market.<sup>133</sup> The Cohen's *d* test "is a generally recognized *statistical measure* of the extent of the difference between the mean of a

---

<sup>132</sup> *Id.* (citations omitted).

<sup>133</sup> We disagree with the respondents' contention that no Cohen's *d* test is based on the entire population of a respondent's sales because the Department excludes certain observations from its analysis (such as observations with missing or incorrect data or sales with entry dates outside of the POR). Regarding sales with missing or incorrect data, neither Devi Fisheries nor Falcon reported these types of U.S. sales during the POR and, thus, this statement is irrelevant. Further, regarding sales with entry dates outside of the POR, we find that such sales are akin to sales with dates of sale outside of the POR. The inclusion or exclusion of such sales results from the period of sales under examination, rather than the sampling of a respondent's sales. As a result, we find that we included all U.S. sales of subject merchandise reported by the respondents in our differential pricing analysis.

test group and the mean of a comparison group.”<sup>134</sup> As noted in Comment 4, 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 respondents. 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.

The Department disagrees with the respondents’ argument that the Department may exclude information or sales for missing or incorrect data, which therefore would invalidate the Department position that it is examining all U.S. sales in the Cohen’s *d* test. Section 761(a)(2)(A) of the Act requires the Department to calculate a normal value, export price (or constructed export price) and dumping margin for each entry of subject merchandise during the period of review. Such dumping margins are aggregated to determine the weighted-average dumping margin for each examined respondent. In certain situations where entries cannot be linked with export sales (such as with an affiliated importer), the Department relies on U.S. sales as a proxy for entries to calculate dumping margins. Accordingly, the Department examines all U.S. sales or entries when calculating a weighted-average dumping margin for a respondent, as it did for Falcon and Devi in this administrative review. If a respondent has missing or incorrect data, the Department requests additional information from the party involved, or relies on facts available, pursuant to section 776 of the Act. Accordingly, the respondents’ claim is meritless.

Likewise, the Department disagrees that excluding sales during the POR because the entries for such sales occurred outside of the POR also invalidates the Department position that it is examining all U.S. sales in the Cohen’s *d* test. As noted above, the statute directs the Department to examine entries during the period of investigation or review. However, when the entry represents a transaction between a party affiliated with the exporter, and there is no link between the entry and the first sale to an unaffiliated customer in the United States, then the Department must rely upon sales, rather than entries, as the basis for its calculation of dumping margins. Nevertheless, whether the Department is determining the universe of sales based on the date of sale or on the date of entry for a particular sale under examination does not cast doubt that the Department is examining all U.S. sales relevant for a given period of investigation or review. Therefore, the respondents’ claim that somehow using the date of entry, rather than the date of sale, to define the entire universe of sales under examination is without merit.

Further, the Department disagrees that aggregating U.S. sales by “product-specific subgroups” invalidates the Department position that it is examining all U.S. sales in the Cohen’s *d* test. Section 777A(d)(1)(B)(i) of the Act requires that the Department identify a pattern of prices that differ significantly “for comparable merchandise.....among purchasers, regions, or periods of time.” Default definitions for each of these terms were provided in the Preliminary Results, and

---

<sup>134</sup> See Preliminary Results, 79 FR 16285, and accompanying Preliminary Decision Memorandum at 6 (emphasis added).

no party has commented on how the Department has used these definitions in its differential pricing analysis in this administrative review. These definitions are necessary in order to make comparisons of U.S. sale prices among purchasers, regions or periods of time in order to evaluate whether there exists a pattern of prices that differ significantly. When the Department groups a respondent's sales by purchaser, region or time period, it includes all such sales, just as it includes all such sales in its calculation of the weighted-average dumping margin, as prescribed by the statute. Accordingly, and contrary to the respondents' assertion, the Department has included all relevant sales for comparable merchandise among purchasers, regions or time period when it conducts the Cohen's *d* test, calculates the individual Cohen's *d* coefficients, and examines whether there exists a pattern of prices that differ significantly pursuant to the language of section 777A(d)(1)(B)(i) of the Act. Therefore, the Department finds the respondents' argument without merit.

The Department disagrees with the respondents' claims that the differential pricing analysis used in the Preliminary Results is "circular" or that "the result is double counting of sales that passed the Cohen's *D*."<sup>135</sup> The respondents assert that this is the result of the fact that the Department includes all U.S. sales in its analysis, unlike what it allegedly did in its targeted dumping analysis, specifically in the Nails test. To rely on a general example such as those provided by the respondents, there are two purchasers, A and B, which purchase the subject merchandise at average prices of 10 and 20, respectively. Based on the Cohen's *d* test, when testing purchaser A, the weighted-average price to purchaser B will be the comparison group, and the difference in the two prices between purchaser A and purchaser B, *i.e.*, 10, is found to pass the Cohen's *d* test. Then, when purchaser B is the test group, purchaser A will be the comparison group, and the sales to purchaser B will also be found to pass the Cohen's *d* test. The Department finds that this is a reasonable outcome for a simple scenario. If the weighted-average price to purchaser A differs significantly from the weighted-average price to purchaser B, then the weighted-average price to purchaser B also differs significantly from the weighted-average price to purchaser A.

The respondents' suggestion, that once the Department finds that the weighted-average price to purchaser A differs significantly from the weighted-average price to purchaser B, then the sales prices to purchaser A should be excluded henceforth from the analysis, is illogical. This would result in no comparison being made for the weighted-average price to purchaser B. Further, if purchaser B's sales were tested first, then purchaser A's sales would not be tested. Such an approach would lead to arbitrary and unpredictable results that would depend upon the order in which purchasers, regions or time periods were examined.

Further, the Department disagrees with the respondents' assertion that, in the Nails test, the allegedly targeted sales were compared only with non-allegedly targeted sales. In describing the standard deviation test in the previous administrative review of this proceeding, the Department stated:

In the first stage of the test, the "standard deviation test," the Department determined the share of alleged targeted group's sales of subject merchandise (by

---

<sup>135</sup> See the respondents' case brief at 48.

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.<sup>136</sup>

Therefore, the respondents' claim is false.

The Department disagrees that it must take into account "that reasons other than targeted dumping may be responsible for price differences."<sup>137</sup> Section 777A(d)(1)(B)(i) of the Act requires that the Department identify a pattern of prices that differ significantly in order to consider whether to apply the A-to-T method. The statute provides no requirement that the Department must take into consideration the source of these price fluctuations, whether from changing production costs or the intent of the exporter or producer. The Court has affirmed that the statute requires no such divination by the Department to dissect the pricing behavior of the respondent.<sup>138</sup>

Finally, we disagree with the respondents that we incorrectly calculated the pooled standard deviation of the Cohen's *d* coefficient. The respondents claim that the correct approach is to calculate a weighted average, based on the frequency of observations, to adjust for differences in sizes between the test and comparison groups, and that calculating a simple average gives too much weight to the variance from the test groups. However, as explained above with respect to other issues, there is no statutory directive with respect to how the Department should determine whether a pattern of EPs that differ significantly exists, let alone how to calculate the pooled standard deviation of the Cohen's *d* coefficient. The Department's intent is to rely on a reasonable approach that affords predictability. The Department finds here that the best way to accomplish this goal is to use a simple average (*i.e.*, giving equal weight to the test and comparison groups) when determining the pooled standard deviation. By using a simple average, the respondent's pricing practices to each group will be weighted equally, and the magnitude of the sales to one group does not skew the outcome (although we note that within both the test group and comparison group, the Department uses weight averaging when calculating the variance for each group). Additionally, regarding the respondents' claim that the Cohen's *d* statistic suffers from small sample bias, as explained above, the Department in the Cohen's *d* test uses all of a respondent's reported U.S. sales of subject merchandise. As a result, all uncertainty that may result from relying on a sample of data is eliminated.

In sum, the respondents' arguments fall short of demonstrating that the Department's differential pricing analysis, including the Cohen's *d* test, does not comply with the Act, fails to address the requirements of section 777A(d)(1)(B)(i) of the Act, or is unreasonable.

---

<sup>136</sup> See India Shrimp AR-7 Preliminary Results, at page 8; unchanged in Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination; 2011-2012; 78 FR 42492 (July 16, 2013).

<sup>137</sup> See the respondents' case brief at 30.

<sup>138</sup> See JB F RAK, Slip Op. 14-78 at 6; Borusan, Slip Op. 14-71 at 8.

Comment 6: *Combining the Results of the A-to-A Comparisons and the A-to-T Comparisons to Calculate a Weighted-Average Dumping Margin*

The respondents contend that the Department has applied zeroing twice in its calculations for Falcon, where it used the mixed alternative method. Specifically, the respondents note that, in calculating Falcon's weighted-average dumping margin, the Department divided all U.S. sales into two pools, one containing sales which passed the Cohen's *d* test and the other with sales which did not. According to the respondents, the Department zeroed the negative results in the first ("passing") pool and calculated one aggregate margin for these sales, and it also calculated an aggregate margin for the sales in the second ("non-passing") pool, which it then also zeroed (because the aggregate margin was negative) before combining the results of the two pools to calculate the overall margin for Falcon. The respondents argue that the Department should have only aggregated Falcon's margins once and used the actual margins for all of Falcon's transactions which did not pass the Cohen's *d* test. The respondents claim that the Department's second application of zeroing in its calculations for Falcon is unreasonable and arbitrary and must be remedied in the final results.

ASPA disagrees with the respondents' claim that the Department applied zeroing twice when calculating Falcon's margin. According to ASPA, the respondents' contention that the amount of dumping for the group of sales in the second pool (*i.e.*, where the dumping margins are calculated using the A-to-A method) should be negative is illogical. ASPA asserts that, while the A-to-A method allows the dumping margins for certain sales to be offset, it cannot result in a "negative" amount of dumping for the entire second pool of sales. ASPA maintains that these sales are either dumped or not dumped, and if they are not dumped the amount of dumping for those sales must be zero. ASPA notes that, if the Department were to adopt the approach advocated by the respondents, it would defeat the entire purpose of the differential pricing analysis and the application of the alternative method only to those sales which pass the Cohen's *d* test. According to ASPA, if the Department allows a "negative" amount of dumping for sales which do not pass the Cohen's *d* test to offset the amount of dumping found for those sales which passed the Cohen's *d* test, it would simply re-mask the dumping that has occurred. Therefore, ASPA maintains that the Department should reject the respondents' arguments and continue to calculate the weighted-average dumping margin in the final results as was done in the Preliminary Results.

Department's Position:

We disagree with the respondents. The A-to-A method and the A-to-T method are different comparison methods which are provided for in the Act and regulations and which are distinct and independent from each other. We also find that results from the calculations under each of these methods (or other methods by which the Department may calculate the amount of dumping for a group of sales, such as facts available or the transaction-to-transaction method) are distinguishable. To calculate the weighted-average dumping margin for a respondent whose sales have been evaluated using more than one comparison method, the Department reasonably aggregates the results of each of these distinct comparison methods, specifically summing the amount of dumping and the U.S. sales value for each of these methods. To allow for offsets when combining the results of the mixed comparison approach would defeat the purpose of the

A-to-T method where a pattern of EPs or CEPs for comparable merchandise was found that differed significantly among purchasers, regions, or periods of time. Such an approach would allow the results of the A-to-A method to reduce or completely negate the results of the A-to-T method prescribed by section 777A(d)(1)(B) of the Act. Instead, by preserving the results of the A-to-T method, the Department ensures that the purpose of the A-to-T method of uncovering masked dumping is fulfilled, just as it is when the Department applies the A-to-T method as a singular comparison method.

Comment 7: *Differential Pricing Analysis: Application of the A-to-T Method for Falcon's U.S. Sales*

ASPA argues that the Department should apply the A-to-T method to all of Falcon's U.S. sales, not just those that passed the Cohen's *d* test. According to ASPA, the purpose of the Department's differential pricing analysis is to determine whether the application of an alternative method is required to address dumping that may otherwise be masked by the A-to-A method. ASPA contends that, by applying the A-to-A method to Falcon's sales which did not pass the Cohen's *d* test, the Department has failed to unmask the full amount of Falcon's dumping.

ASPA points out that, in the prior administrative review of this antidumping duty order, the Department itself applied the A-to-T method to all U.S. sales when it found: 1) a pattern of prices that differ significantly; and, 2) that the application of the A-to-A method could not account for such differences.<sup>139</sup> According to ASPA, the Department noted in that administrative review that there was no evidence Congress intended for the Department to apply the A-to-T method only to a subset of sales once the Department determined that the application of an alternative comparison method was warranted.<sup>140</sup>

ASPA acknowledges that, since the time of the prior administrative review, the Department has changed the method by which it identifies the existence of a pattern of prices that differ significantly. Nonetheless, ASPA claims that, once the Department finds such a pattern, it is still necessary to apply the A-to-T method to all U.S. sales in order to unmask dumping. ASPA notes that Falcon's U.S. sales exhibit such a pattern and contends that all of Falcon's U.S. sales are part of that pattern, regardless of whether they pass the Cohen's *d* test. As a result, ASPA argues that the Department should apply the A-to-T method to all of Falcon's U.S. sales in its margin calculations for the final results. However, if the Department does not do so, ASPA contends that, at a minimum, it must explain why it has reached a different result here than the result in the prior administrative review.<sup>141</sup>

---

<sup>139</sup> See Shrimp from India 2011-2012 at Comment 1.

<sup>140</sup> Id.

<sup>141</sup> According to ASPA, when the Department found a pattern of prices that differed significantly in the prior administrative review, it applied the A-to-T method to all U.S. sales, but it has not done the same for Falcon's U.S. sales here.

The respondents maintain that the Department's use of the A-to-T method only for those sales which passed the Cohen's *d* test is consistent with 19 CFR 351.414, which the respondents claim was still in effect as of the date of the Preliminary Results. According to the respondents, there is no justification for applying the alternative method to sales that do not meet the targeted dumping thresholds. The respondents point out that, since the first investigation where it applied the Cohen's *d* test, the Department has consistently applied the A-to-T method only to the sales which passed the Cohen's *d* test in instances where between 33 and 66 percent of sales pass the test. The respondents note that ASPA has neither cited any cases where the Department has deviated from this approach since adopting the Cohen's *d* test, nor has it provided a legal or statistical basis for deviating from it here. Rather, the respondents claim that ASPA's contention merely highlights that the Department's differential pricing analysis is imperfect and fails to serve its stated purpose.

Moreover, the respondents point out that the difference in the Department's methodology noted by ASPA between the 2011-2012 administrative review and the instant review results from the fact that, in the prior proceeding, the Department was still using the Nails test (which the respondents argue has since been discredited), not the Cohen's *d* test. The respondents note that in a remand redetermination issued subsequent to the 2011-2012 administrative review, the Department articulated a policy of when it would apply the A-to-T method to all sales or a subset of targeted sales under the Nails test,<sup>142</sup> a position which the CIT upheld.<sup>143,144</sup>

Finally, the respondents claim that ASPA referenced the CAFC's decision in U.S. Steel<sup>145</sup> out of context. According to the respondents, the CAFC in U.S. Steel discussed why the Department's use of zeroing may be permissible (albeit not required) under certain circumstances. The respondents contend that the CAFC only noted in passing that "certain profitable sales serve to 'mask' sales at less than fair value" and the term "profitable sales" referred to higher-priced sales for which there were negative margins. The respondents assert that there is nothing in the CAFC's ruling stating: 1) that profitable sales were made to create an opportunity for targeted dumping; 2) whether the A-to-T or MA-to-MA comparison method should be used; or, 3) how higher-priced sales were made to mask lower-priced sales. Rather, the respondents argue that the CAFC only implied that making higher-priced sales in the ordinary course of business appears to create an opportunity to make lower-priced sales, nothing more.

---

<sup>142</sup> See Results of Redetermination Pursuant to Court Remand, Chang Chun Petrochemical Co. Ltd. v. United States, Consol. Court No. 11-00095, Slip Op. 13-49 (CIT 2013), found at <http://enforcement.trade.gov/remands/index.html>. According to the respondents, the Department stated that it would apply the A-to-T method to all sales when: 1) targeted dumping by a firm is so pervasive that the A-to-T method becomes the best benchmark for gauging the fairness of that firm's pricing patterns; and 2) the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of the company.

<sup>143</sup> See Chang Chun Petrochemical Co. Ltd. v. United States, 953 F. Supp. 2d 1300 (CIT 2013).

<sup>144</sup> While the methodology at issue in Chang Chun was the Nails test, not the Cohen's *d* test, the respondents contend that the rationale is the same.

<sup>145</sup> See U.S. Steel, 621 F.3d at 1361, cited in Shrimp from India 2011-2012 at Comment 1.

Consequently, the respondents assert that, if the Department continues to use the Cohen's *d* test in the final results, it should continue to apply the A-to-T method only to Falcon's U.S. sales which passed the Cohen's *d* test, as it did in the Preliminary Results.

Department's Position:

In our calculations for the final results, we have continued to apply the A-to-T method only to Falcon's U.S. sales which passed the Cohen's *d* test. As we explained in the Preliminary Results, the differential pricing analysis relies on a tiered approach to apply an alternative comparison method. Depending on the extent of the pattern of prices that differ significantly, the Department applied the A-to-T comparison method to either all U.S. sales, a subset of U.S. sales, or no U.S. sales:

If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for more than 33 percent but less than 66 percent of the value of total sales, then the results support the application of an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method, and application of the average-to-average method to those sales identified as not passing the Cohen's *d* test. If 33 percent or less of the value of total sales passes the Cohen's *d* test, then the results of the Cohen's *d* test do not support the application of an alternative to the average-to-average method.<sup>146</sup>

We find that this approach is reasonable because whether, as an alternative methodology, the A-to-T comparison method is applied to all U.S. sales, a subset of U.S. sales, or no U.S. sales, depends on what percentage of U.S. sales passes the Cohen's *d* test. Thus, there is a direct correlation between the U.S. sales that establish a pattern of EPs that differ significantly and to what portion of the U.S. sales the A-to-T comparison method is applied.

We disagree with ASPA's claim that, once the Department finds a pattern of prices which differ significantly, it must apply the A-to-T method to all U.S. sales in order to unmask dumping, as it did in the 2011-2012 administrative review. At the time of the 2011-2012 administrative review, the Department addressed targeted dumping using the Nails test by applying the A-to-T method to all U.S. sales where it found: 1) a pattern of prices that differ significantly; and 2) that the application of the A-to-A method could not account for such differences.<sup>147</sup> However, for all cases which were initiated after March 2013, the Department has changed the methodology by which it determines whether to apply an alternative comparison method based on the Cohen's *d* test using the criteria noted above. The use of the comparison method based on the Cohen's *d*

---

<sup>146</sup> See Preliminary Results, 79 FR 16285, and accompanying Preliminary Decision Memorandum at 6.

<sup>147</sup> See Shrimp from India 2011-2012 at Comment 1.

test is a result of our expanded understanding and experience in addressing masked dumping. As a result, in accordance with our practice, we have continued to apply the A-to-T method only to Falcon's U.S. sales which passed the Cohen's *d* test for purposes of the final results.

Comment 8: Rejection of New Factual Information

On May 2, 2014, the respondents collectively submitted a case brief which contained untimely-filed new factual information. On May 5, 2014, we rejected this submission and provided the respondents an opportunity to resubmit it after redacting it to remove the new information.<sup>148</sup> The respondents filed their redacted case brief on May 8, 2014.

On May 16, 2014, the respondents requested that the Department reconsider its rejection of their May 2 brief,<sup>149</sup> contending that: 1) the information the Department deemed to be untimely-filed new factual information is actually argument, as defined in 19 CFR 351.102(b)(21);<sup>150</sup> and, 2) even if the Department continues to deem the information new, it is still timely because it rebuts factual information placed on the record in the preliminary results.

With respect to the first argument, the respondents contend that the information placed on the record consists primarily of legal and economic analyses of the Cohen's *d* test and citations to the determinations of other agencies,<sup>151</sup> neither of which is typically considered to be "new" factual information. Rather, the respondents claim that, because this information is actually argument, it was timely filed as part of their case brief. Thus, according to the respondents, it should be considered for purposes of the final results.

With respect to the second argument, the respondents disagree that the deadline for new factual information in this proceeding, without exception, was July 18, 2013 (*i.e.*, 140 days after the last day of the anniversary month, pursuant to 19 CFR 351.301(b)(2)). Rather, the respondents assert that they are entitled to rebut new factual information whenever it is placed on the record and, in this case, the Department itself placed new factual information on the record when it applied the Cohen's *d* test for the first time in the March 2014 preliminary results.<sup>152</sup> The respondents argue

---

<sup>148</sup> See the May 5, 2014, letter from the Department to the respondents.

<sup>149</sup> See the May 16, 2014, letter from the respondents (Reconsideration Request). The respondents originally submitted a request for reconsideration on May 8, 2014; however, the Department also rejected that filing because it contained new factual information.

<sup>150</sup> See Definition of Factual Information and Time Limits for Submission of Factual Information, 78 FR 21246 (April 10, 2013) (Factual Information Final Rule).

<sup>151</sup> The respondents argue that they should be allowed to cite to determinations from agencies and authorities other than the Department without these citations being considered new factual information. The respondents point out that the Department does not consider citations to its own Issues and Decision Memoranda to be new factual information, and they request that the determinations of other agencies be treated in a similar fashion because they are procedurally no different.

<sup>152</sup> Specifically, the respondents claim that the Department itself included in the preliminary results statements on the record which constitute new factual information related to the application of the Cohen's *d* test. As a result, pursuant to 19 CFR 351.301(c)(4), the respondents contend that they should have the opportunity to rebut with their own evidence the Department's new factual statements.

that, given this fact, they could not have commented meaningfully on the Department's use of the Cohen's *d* test prior to the July 2013 deadline and, as a consequence, they argue that the Department should accept the rejected information now. The respondents contend that, if the Department does not reconsider its decision, it will deny them their first and only opportunity to present arguments regarding the Cohen's *d* test in this review.

The petitioner disagrees that the rejected case brief contained only argument. The petitioner notes that much of the rejected information consisted of an "expert" opinion, and they argue that, at a minimum, the expert's credentials are new factual information. Further, the petitioner claims that the expert opinion was provided as testimony, not argument, because it was submitted separately from the case brief (*i.e.*, as an attachment). Thus, the petitioner asserts that the Department properly rejected the new factual information contained in the respondents' case brief.

Further, the petitioner points out that the Department's preliminary results were published on March 25, 2014, and the respondents had ample time to request permission to submit rebuttal factual information prior to the due date for the case briefs. The petitioner notes that the respondents failed to make such a request, despite the fact that they requested an extension of the briefing schedule deadlines and made other filings in the period between the issuance of the preliminary results and the submission of case briefs.

Finally, regarding the respondents' argument that they should be allowed to cite the determinations of other agencies, the petitioner notes that the respondents cite no authority or precedent in support of their position. Thus, the petitioner maintains that Department should disregard the respondents' argument because it is unsupported.

#### Department's Position:

We disagree with the respondents that the rejected portions of their case brief were argument and not new factual information. As a threshold matter, the regulations cited by the respondents (*i.e.*, 19 CFR 351.102(b)(21)), are applicable only to segments initiated after May 10, 2013.<sup>153</sup> This administrative review was initiated on April 2, 2013,<sup>154</sup> and, therefore, these regulations are not applicable to this segment. Regarding the rejected information itself, we note that it consisted of: 1) an analysis submitted by the respondents' affiant, including this individual's credentials; 2) citations to, and information from, statistical reference materials; and, 3) data from other U.S. government agencies. Such categories of information are more than mere argument or citation to settled decisions. Moreover, none of the rejected information existed on the record prior to its inclusion in the respondents' case brief. As a result, we continue to find that it represents new, and untimely filed, factual information.

---

<sup>153</sup> See Factual Information Final Rule, 78 FR 21246.

<sup>154</sup> See Certain Frozen Warmwater Shrimp from India and Thailand: Notice of Initiation of Antidumping Duty Administrative Reviews, 78 FR 19639 (April 2, 2013).

We disagree that, by rejecting the new factual information contained in the respondents' case brief, the Department has denied the respondents a meaningful opportunity to comment on the Cohen's *d* test. The Department's use of the Cohen's *d* test to perform the differential pricing analysis is not new. In fact, it was used in the March 4, 2013, Xanthan Gum from the PRC Investigation Post-Preliminary Analysis<sup>155</sup> prior to the initiation of the instant administrative review, and subsequently used in the preliminary and/or final results of numerous antidumping duty proceedings<sup>156</sup> prior to the deadline to submit new factual information (*i.e.*, July 18, 2013). Given the Department's many public statements about the Cohen's *d* test and its consistent application of it since early 2013, the application of this methodology in the preliminary results in this case could reasonably have been expected.

In the instant administrative review, we find that the respondents had ample time to submit timely new factual information related to the Cohen's *d* test and, as a consequence, we disagree that the case briefs were the first and only opportunity for the respondents to comment on the Department's use of it. Further, had the respondents believed that they needed additional time to submit new factual information, the respondents could have made a timely request that the Department grant an extension of the deadline and/or exercise its discretion to accept such new factual information before the deadline for the submission of the case briefs.<sup>157</sup>

With regard to the argument that the Department's regulations permit the submission of rebuttal information to counter factual statements made by the Department in the preliminary results, we disagree. The Department's regulations at 19 CFR 351.301(c)(1) state that:

Any interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the deadline provided in this section for submission of such factual information. If factual information is submitted less than 10 days before, on, or after (normally only with the Department's permission) the applicable deadline for submission of such factual information, an interested party may submit factual information to

---

<sup>155</sup> See “Less Than Fair Value Investigation of Xanthan Gum from the People’s Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.,” dated March 4, 2013; see also “Less Than Fair Value Investigation of Xanthan Gum from the People’s Republic of China: Post Preliminary Analysis and Calculation Memorandum for Deosen Biochemical Ltd.,” dated March 4, 2013, unchanged in Xanthan Gum from the PRC, 78 FR at 33352.

<sup>156</sup> See *e.g.*, Xanthan Gum from the PRC; Circular Welded Carbon Steel Pipes and Tubes From Thailand: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 21105 (April 9, 2013), unchanged in Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 65272 (October 31, 2013) (Thai Steel Pipes); and Hardwood and Decorative Plywood From the People’s Republic of China: Antidumping Duty Investigation, 78 FR 25946 (May 3, 2013), unchanged in 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) (Plywood from the PRC); see also Certain Activated Carbon From the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 26748 (May 8, 2013), unchanged in Activated Carbon from the PRC, 78 FR 70533.

<sup>157</sup> We note that the case briefing schedule was extended at the respondents' request, giving even more time to make these additional requests.

rebut, clarify or correct the factual information no later than 10 days after the date such factual information is served on the interested party or, if appropriate, made available under APO to the authorized applicant.

Pursuant to the regulation above, the respondents were permitted to submit rebuttal factual information only if such information was: 1) in response to new factual information placed on the record by another interested party (*i.e.*, not the Department); and, 2) submitted no more than ten days after the timely new factual information was placed on the record.<sup>158</sup> We further note that the regulations cited in the respondents' reconsideration request are not applicable in this administrative review for the reasons explained above.

Finally, with regard to the argument that the respondents should be permitted to cite to authority from other government agencies without those citations being considered new factual information, we note that citations are not inherently new factual information. Citations which provide support for a practice or decision is not considered new factual information; however, the rejected portions of the respondents' case brief went beyond citations because they contained new data submitted for the purpose of the facts contained therein and, as such, we find that these portions were properly removed from the administrative record.

#### Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish the final results of this administrative review in the Federal Register.

Agree  \_\_\_\_\_

Disagree \_\_\_\_\_

*Ronald K Lorentzen*

\_\_\_\_\_  
Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance

*August 20, 2014*  
\_\_\_\_\_  
(Date)

---

<sup>158</sup> We note that the case briefs were filed 43 days after the issuance of the preliminary results, and eight months after the deadline for new factual information.