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DATE: August 30, 2016

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Antidumping Duty Administrative Review of Large Residential
Washers from Mexico

I. SUMMARY

We analyzed the case and rebuttal briefs of interested parties in the 2014-2015 administrative review of the antidumping duty order on large residential washers (LRWs) from Mexico. The review covers one producer/exporter of the subject merchandise: Electrolux.¹ We did not make any changes to Electrolux's margin calculation since the preliminary results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues for which we received comments and rebuttal comments from the interested parties:

1. Zeroing
2. Methodological Issues in the Differential Pricing Analysis

II. BACKGROUND

On March 11, 2016, the Department published in the Federal Register the preliminary results of the 2014-2015 administrative review of the antidumping duty order on LRWs from Mexico.² The POR is February 1, 2014, through January 31, 2015.

¹ Electrolux includes Electrolux Home Products, Corp. N.V. and Electrolux Home Products de Mexico, S.A. de C.V.
² See Large Residential Washers From Mexico: Preliminary Results of the Antidumping Duty Administrative Review; 2014-2015, 81 FR 12873 (March 11, 2016) (Preliminary Results), and accompanying Decision Memorandum (Preliminary Results Decision Memorandum).



We invited parties to comment on the Preliminary Results. In April 2016, we received a timely case brief from Electrolux and a timely reply brief from Whirlpool Corporation (the petitioner).³ On June 15, 2016, the Department postponed the final results by 60 days.⁴ Based on our analysis of the comments received, we are not changing the weighted-average dumping margin calculated for Electrolux in the Preliminary Results.

III. MARGIN CALCULATIONS

We calculated constructed export price and normal value (NV) using the same methodology stated in the Preliminary Results.

IV. SCOPE OF THE ORDER

The products covered by the order are all large residential washers and certain subassemblies thereof from Mexico. The term “large residential washers” denotes all automatic clothes washing machines, regardless of the orientation of the rotational axis, except as noted below, with a cabinet width (measured from its widest point) of at least 24.5 inches (62.23 cm) and no more than 32.0 inches (81.28 cm).

Also covered are certain subassemblies used in large residential washers, namely: (1) all assembled cabinets designed for use in large residential washers which incorporate, at a minimum: (a) at least three of the six cabinet surfaces; and (b) a bracket; (2) all assembled tubs⁵ designed for use in large residential washers which incorporate, at a minimum: (a) a tub; and (b) a seal; (3) all assembled baskets⁶ designed for use in large residential washers which incorporate, at a minimum: (a) a side wrapper;⁷ (b) a base; and (c) a drive hub;⁸ and (4) any combination of the foregoing subassemblies.

Excluded from the scope are stacked washer-dryers and commercial washers. The term “stacked washer-dryers” denotes distinct washing and drying machines that are built on a unitary frame and share a common console that controls both the washer and the dryer. The term “commercial washer” denotes an automatic clothes washing machine designed for the “pay per use” market meeting either of the following two definitions:

- (1) (a) it contains payment system electronics;⁹ (b) it is configured with an externally mounted steel frame at least six inches high that is designed to house a coin/token

³ See Letter from Electrolux entitled, “Large Residential Washers from Mexico: Case Brief,” April 11, 2016 (Electrolux Case Brief); and Letter from Whirlpool Corporation entitled, “Large Residential Washers from Mexico: Rebuttal Brief,” dated April 18, 2016 (Petitioner Rebuttal Brief).

⁴ See the June 15, 2016, Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through Melissa Skinner, Director, Office II, entitled, “Large Residential Washers from Mexico and the Republic of Korea: Extension of Deadline for Final Results of Antidumping Duty Administrative Reviews.”

⁵ A “tub” is the part of the washer designed to hold water.

⁶ A “basket” (sometimes referred to as a “drum”) is the part of the washer designed to hold clothing or other fabrics.

⁷ A “side wrapper” is the cylindrical part of the basket that actually holds the clothing or other fabrics.

⁸ A “drive hub” is the hub at the center of the base that bears the load from the motor.

⁹ “Payment system electronics” denotes a circuit board designed to receive signals from a payment acceptance device and to display payment amount, selected settings, and cycle status. Such electronics also capture cycles and

operated payment system (whether or not the actual coin/token operated payment system is installed at the time of importation); (c) it contains a push button user interface with a maximum of six manually selectable wash cycle settings, with no ability of the end user to otherwise modify water temperature, water level, or spin speed for a selected wash cycle setting; and (d) the console containing the user interface is made of steel and is assembled with security fasteners;¹⁰ or

(2) (a) it contains payment system electronics; (b) the payment system electronics are enabled (whether or not the payment acceptance device has been installed at the time of importation) such that, in normal operation,¹¹ the unit cannot begin a wash cycle without first receiving a signal from a bona fide payment acceptance device such as an electronic credit card reader; (c) it contains a push button user interface with a maximum of six manually selectable wash cycle settings, with no ability of the end user to otherwise modify water temperature, water level, or spin speed for a selected wash cycle setting; and (d) the console containing the user interface is made of steel and is assembled with security fasteners.

Also excluded from the scope are automatic clothes washing machines with a vertical rotational axis and a rated capacity of less than 3.70 cubic feet, as certified to the U.S. Department of Energy pursuant to 10 CFR § 429.12 and 10 CFR § 429.20, and in accordance with the test procedures established in 10 CFR Part 430.

The products subject to this order are currently classifiable under subheadings 8450.20.0040 and 8450.20.0080 of the Harmonized Tariff System of the United States (HTSUS).¹² Products subject to this order may also enter under HTSUS subheadings 8450.11.0040, 8450.11.0080, 8450.90.2000, and 8450.90.6000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this scope is dispositive.

V. DISCUSSION OF THE ISSUES

Comment 1: Zeroing

Electrolux asserts that a World Trade Organization (WTO) dispute settlement Panel recently held in the companion Large Residential Washers from Korea proceeding that Articles 2.4 and 9.3 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (AD Agreement) and Article VI:2 of the General Agreement on Tariffs and Trade (GATT 1994) prohibit the Department from zeroing when making average-to-transaction (A-T)

payment history and provide for transmission to a reader.

¹⁰ A “security fastener” is a screw with a non-standard head that requires a non-standard driver. Examples include those with a pin in the center of the head as a “center pin reject” feature to prevent standard Allen wrenches or Torx drivers from working.

¹¹ “Normal operation” refers to the operating mode(s) available to end users (i.e., not a mode designed for testing or repair by a technician).

¹² The HTSUS numbers are revised from the numbers previously stated in the scope. See Memorandum to the file entitled “Changes to the HTS Numbers to the ACE Case Reference Files for the Antidumping Duty Orders,” dated January 6, 2015.

comparisons in administrative reviews.¹³ According to Electrolux, the relevant factual and legal framework leading to the Panel’s findings in DS464 Panel Report is indistinguishable from this case. Additionally, Electrolux cites several cases where it argues that the WTO Appellate Body and WTO Panels consistently held in other contexts that the Department’s zeroing practice in administrative reviews is inconsistent with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of GATT 1994.¹⁴ Electrolux submits that, in response to the WTO decisions, the Department modified its administrative review calculation methodology by adopting a preference for average-to-average (A-A) comparisons without zeroing.

Electrolux continues that the Department’s use of the “mixed alternative” method (A-T method with zeroing for U.S. sales that pass the Cohen’s *d* test, and A-A method without zeroing for U.S. sales that do not pass the Cohen’s *d* test) to calculate Electrolux’s antidumping margin for the preliminary results violates the prior WTO Appellate Body and Panel decisions described above and should therefore be rejected by the Department. Electrolux claims that additional support for this conclusion is provided by the Appellate Body’s decisions in those cases in which it has considered the appropriateness of zeroing in administrative reviews which used the identical A-T comparison methodology that the Department employed for part of Electrolux’s sales in the Preliminary Results.¹⁵ In addition, Electrolux stresses that, as the Panel recognized in DS464 Panel Report, the second sentence of Article 2.4.2 of the AD Agreement does not justify zeroing when an administrative authority finds differential pricing; rather, it states that a finding of differential pricing authorizes the administering authority to use the A-T comparison methodology in “limited circumstances.”¹⁶ Furthermore, Electrolux maintains that DS464 Panel Report recognizes that the Appellate Body’s decisions finding zeroing to be WTO-impermissible do not allow an exception for its use in the context of the A-T methodology.

The petitioner cites to several court decisions to support its argument that, when applying the A-T methodology, zeroing is lawful, consistent with the United States’ international obligations, and appropriate to unmask targeted dumping or differential pricing behavior.¹⁷ The petitioner asserts that Electrolux’s arguments citing to the WTO decisions involving the use of zeroing are inapposite because these WTO decisions have not been adopted into the relevant section of U.S. law (*i.e.*, section 777A(d) of the Tariff Act of 1930, as amended (the Act)). Moreover, according to the petitioner, Electrolux’s argument that the Department cannot zero non-dumped transactions when applying the A-T comparison methodology would render meaningless the second sentence of Article 2.4.2 of the AD Agreement.¹⁸ The petitioner continues that following

¹³ See Electrolux Case Brief at 1 (citing Panel Report, United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea, WT/DS464/4 (March 11, 2016) (DS464 Panel Report)).

¹⁴ *Id.*, at 2-3 (citing, *e.g.*, Panel Report, United States – Anti-Dumping Measures on Certain Shrimp from Vietnam, WT/DS429/R (November 17, 2014); and Panel Report, United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China, WT/DS422/R (June 8, 2012)).

¹⁵ *Id.*, at 3-4 (citing, *e.g.*, Panel Report, United States-Use of Zeroing in Anti-Dumping Measures Involving Products from Korea, WT/DS402/R (January 18, 2011); Panel Report, United States-Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand, WT/DS383/R (January 22, 2010)).

¹⁶ *Id.*, at 5 (citing DS464 Panel Report at para. 7.12).

¹⁷ See Petitioner’s Rebuttal Brief at page 5 (citing Union Steel v. United States, 713 F. 3d 1101, 1109 (Fed. Cir. 2013); U.S. Steel Corp. v. United States, 621 F. 3d 1351, 1363 (Fed. Cir. 2010) (U.S. Steel Corp.); and JBF RAK LLC v. United States, 790 F. 3d 1358 (Fed. Cir. 2015) (JBF RAK)).

¹⁸ The second sentence of Article 2.4.2 of the AD Agreement states “a normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export

Electrolux’s logic, if zeroing is prohibited in both the A-A and A-T comparison methodologies, then both methodologies will always yield identical results in terms of the total amount of dumping and the weighted-average dumping margin for an exporter for the product under investigation. The petitioner reasons that the Department could never truly unmask dumping or ever affirmatively address targeted dumping without zeroing when applying the A-T methodology.

The petitioner also notes that, to date, neither Congress nor the Administration have made any recommendations on whether or to what extent DS464 Panel Report will be implemented. The petitioner further adds that, because the recent WTO panel decision cited by Electrolux may still be appealed by one of the parties to the dispute, this decision is irrelevant to this administrative review.¹⁹

The Department’s Position:

We agree with the petitioner. As an initial matter, the Court of Appeals for the Federal Circuit (CAFC) has affirmed the Department’s practice of denying offsets for non-dumped sales when using the A-T method.²⁰ Specifically, the CAFC affirmed the Department’s explanation that it may interpret the statute to permit the denial of offsets for non-dumped sales with respect to the A-T comparison method in administrative reviews, while permitting the Department to grant offsets for non-dumped transactions when applying the A-A comparison method in investigations. The CAFC also affirmed the Department’s explanation that it may interpret the same statutory provision differently because there are inherent differences between the comparison methods used in investigations and reviews. Indeed, the CAFC noted that although the Department recently modified its practice “to allow for offsets when making A-A comparisons in administrative reviews . . . {t}his modification does not foreclose the possibility of using the zeroing methodology when {the Department} employs a different comparison method to address masked dumping concerns.”²¹ Likewise, in U.S. Steel Corp., the CAFC sustained the Department’s decision to no longer apply zeroing when employing the A-A comparison method in investigations while recognizing the Department’s intent to continue to apply zeroing in other circumstances. Specifically, the CAFC recognized that the Department may use zeroing when applying the A-T comparison method where patterns of significant price differences are found.²² In addition, the Court of International Trade (CIT) has repeatedly sustained the Department’s authority to deny offsets under the A-T comparison method where the requirements of section 777A(d)(1)(B) of the Act are satisfied.²³

prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction-to-transaction comparison.”

¹⁹ After the filing of the briefs in this administrative review, both the United States and Korea appealed the DS464 Panel Report in April 2016.

²⁰ See Union Steel, 713 F.3d 1101, 1103 (Fed. Cir. 2013).

²¹ Id., 713 F.3d at 1106.

²² See U.S. Steel Corp., 621 F.3d. at 1351 and 1363 (Fed. Cir. 2010) (recognizing that the use of the A-T method with zeroing would combat “targeted or masked dumping”).

²³ See, e.g., Apex Frozen Foods Private Ltd. v. United States, 144 F. Supp. 3d 1308, 1333-34 (CIT 2016) (Apex 2016), currently on appeal; Apex Frozen Foods Private Ltd. v. United States, 37 F. Supp. 3d 1304-06 (CIT 2014) (Apex 2014); and Timken Co. v. United States, Slip Op. 16-47, at 17-18 (CIT May 10, 2016).

The Department’s application of the “mixed alternative methodology” in calculating Electrolux’s weighted-average dumping margin in these final results constitutes a reasonable interpretation of an otherwise silent statute that is well within the gap-filling deference that the Department receives under Chevron, and that the CAFC has recognized in cases like U.S. Steel Corp.²⁴ As the CAFC held in U.S. Steel Corp., courts “defer to Commerce’s reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by ‘the agency’s generally conferred authority and other statutory circumstances.’”²⁵ Such a “gap” exists with respect to the appropriate manner for the Department to account for masked dumping concerns in antidumping administrative reviews, as the CAFC recently recognized in JBF RAK.²⁶ Moreover, when the Department exercises its technical expertise to select and apply methodologies to implement the dictates of the trade statute—in this case the statute’s authorization to use the A-T method—courts afford the Department “tremendous deference” that is “both greater than and distinct from that accorded the agency in interpreting the statutes it administers.”²⁷

Here, if the Department were to offset positive A-T comparison results with negative A-A comparison results (i.e., non-dumped sales) as Electrolux advocates, it would permit the “re-masking” of dumped sales that the Department had, at that point, “unmasked” through its analysis. Such an approach would defeat the purpose of the statutory provision endorsing the Department’s use of the A-T method in the first place. The A-A method and the A-T method are comparison methods provided for in the Act and regulations which are distinct and independent from each other, and the 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 (T-T) method) are distinguishable. With respect to Electrolux in this review, the Department reasonably aggregated the results of each of these distinct comparison methods in calculating Electrolux’s weighted-average dumping margin, specifically summing the amount of dumping and the U.S. sales value for each of these methods. If the Department were to take the additional step advocated by Electrolux and offset dumped sales from the A-T method with non-dumped sales from the A-A method, it would defeat the purpose of the A-T method by allowing the results of the A-A method to reduce or completely negate the results of the A-T method prescribed by section 777A(d)(1)(B) of the Act. The CIT has likewise sustained the Department’s approach to applying the mixed comparison method.²⁸

²⁴ See U.S. Steel Corp., 621 F.3d at 1357.

²⁵ Id. (citations omitted).

²⁶ See JBF RAK, 790 F.3d at 1364 (holding that the Department’s application of A-T method in an administrative review “properly” filled the gap Congress left in the statute).

²⁷ See Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (Fujitsu); PSC VSMPO-Avisma Corp. v. United States, 688 F.3d 751, 764 (Fed. Cir. 2012) (quoting Fujitsu).

²⁸ See Apex 2016, 144 F. Supp. 3d at 1336 (“Commerce’s method of aggregating two separate weighted averages, one with offsets and one without, is reasonable because it proportionately applies the remedy across the sales. It is not unreasonable for Commerce to decline to use offsets during the aggregation stage because, as explained by Commerce, without such offsets, the masked dumping uncovered by the analysis is preserved and the A-T remedy nonetheless remains confined to the differentially priced sales by ‘summing the amount of dumping and the U.S. sales value for each of these methods’”) (citation omitted).

With respect to Electrolux’s reliance on DS464 Panel Report and various other WTO panel or Appellate Body reports as a basis to challenge the Department’s zeroing practice, we note as a general matter, that the CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the Uruguay Round Agreements Act (URAA).²⁹ In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.³⁰ As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department’s discretion in applying the statute.³¹ Accordingly, we note that DS464 Panel Report has not been adopted by WTO Members, and the manner in which any eventual report might be implemented by the United States is “far from clear.”³² In any event, “WTO decisions are ‘not binding on the United States . . .’”³³ Indeed, the SAA explicitly states that “WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.”³⁴

With respect to the other WTO panel or Appellate Body reports cited by Electrolux, we note that they did not address the use of an alternative comparison methodology or the denial of offsets for non-dumped transactions pursuant to section 777A(d)(1)(B) of the Act or the second sentence of Article 2.4.2 of the AD Agreement. Each of the WTO panel or Appellate Body reports finding that the United States had not fulfilled its obligations under the AD Agreement by denying offsets for non-dumped transactions involved provisions other than the second sentence of Article 2.4.2 of the AD Agreement. The United States has fully implemented these decisions pursuant to the requirements established by the URAA.³⁵

Based on the foregoing analysis, the Department did not alter its approach in combining the comparison results between the A-A method and the A-T method for these final results.

Comment 2: Methodological Issues in the Differential Pricing Analysis

Electrolux argues that the preliminary results failed to satisfy the requirements of either stage of the two-stage targeted dumping provision. First, Electrolux contends that the Department’s “pattern of pricing” test is contrary to the statute and its WTO obligations because aggregating random and unrelated price variations does not establish a pattern of export prices which differ significantly among purchasers, regions or time periods.³⁶ Electrolux also argues that the Department’s analysis fails to satisfy the second stage of the targeted dumping provision

²⁹ See Corus Staal BV v. U.S. Dep’t of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied 126 S. Ct. 1023 (2006) (Corus Staal); accord Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

³⁰ See, e.g., 19 USC 3533, 3538 (sections 123 and 129 of the URAA).

³¹ See, e.g., 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).

³² See NSK Ltd. v. United States, 510 F.3d 1375, 1380 (Fed. Cir. 2007).

³³ See Corus Staal, 395 F.3d at 1348 (quoting Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004)).

³⁴ See Statement of Administrative Action, H.R. Doc. 103-316, vol. 1 (1994) (SAA) at 659.

³⁵ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006); and 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).

³⁶ See Electrolux Case Brief (citing DS464 Panel Report at para. 7.141).

because, even assuming that the application of the Cohen's *d* test was sufficient to establish a significant pattern of price differences under section 777A(d)(1)(B)(i) of the Act, the Department has not explained why such differences cannot be taken into account using the normal A-A methodology. Electrolux contends that the Department never examined the differences other than finding that they existed as a result of the statistical analysis performed. Electrolux adds that the Panel held in DS464 Panel Report that this omission in the Department's analysis constituted a violation of Article 2.4.2 of the AD Agreement because it may result in a higher margin of dumping even in cases where the pattern of significantly differing export sales has nothing to do with the targeting conduct of the exporter.³⁷ Electrolux asserts that the only means for completing the analysis consistent with its WTO obligations is for the Department to consider the basis for the price differences, as opposed to simply considering whether the two methodologies yield a different dumping margin as the basis for employing the A-T methodology. According to Electrolux, the Department's ultimate obligation under the statute is to calculate dumping margins as accurately as possible, as opposed to simply calculating the highest possible dumping margin.³⁸

The petitioner refutes Electrolux's argument that the Department may not cross-aggregate patterns found for customers, regions, or periods of time, stating that there is no such explicit limitation in the statute. The petitioner adds that the Courts have held that the Department is entitled to substantial deference when applying this provision of the statute.³⁹ The petitioner also believes that the legislative history supports the Department's determination.⁴⁰

Additionally, the petitioner disputes Electrolux's argument that the Department did not properly explain why the A-A methodology could not account for the significant price differences observed in Electrolux's export sales transactions, arguing that the CIT has affirmed repeatedly the Department's explanation for applying the A-T comparison methodology in similar circumstances. Moreover, the petitioner emphasizes that the CIT has repeatedly rejected Electrolux's argument that the A-T methodology will always result in a higher dumping margin than the A-A methodology as long as there is one export sale priced above normal value.⁴¹ The petitioner argues that the Department should articulate in the final results the same explanation affirmed in Apex 2014 and Apex 2016 that the A-A methodology could not account for dumped sales.⁴² In other words, when averaging is used, a substantial volume of dumped sales in Electrolux's U.S. sales database is masked.

According to the petitioner, Electrolux's pricing behavior is precisely what the statute intended to remedy and precisely what the CIT has affirmed as a reasonable explanation for applying the A-T comparison methodology.

³⁷ See Electrolux Case Brief at 8 (citing DS464 Panel Report at para. 7.75).

³⁸ Id., at 10 (citing Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1191 (Fed. Cir. 1990)).

³⁹ See Petitioner's Rebuttal Brief at 8 (citing JBF RAK, 790 F. 3d 1358; and Borusman Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States, 608 Fed. Appx. 948 (Fed. Cir. 2015)).

⁴⁰ Id., at 9 (citing SAA at 843).

⁴¹ Id., at 10-11 (citing Apex 2014, 37 F. Supp. 3d at 1295-96; Mid-Continent Nail Corp. v. United States, 113 F. Supp. 3d 1318 (CIT 2015); and Apex 2016, 144 F. Supp. 3d at 1332-1334).

⁴² Id., at 12-13 (citing Apex 2016, 144 F. Supp. 3d at 1333 n. 24).

The Department's Position:

As a general matter, the Department disagrees with Electrolux's claims that the application of a differential pricing analysis, including the Cohen d and ratio tests, is incomplete and inconsistent with the statute. Nothing in the statute or the SAA mandates how the Department measures whether there is a pattern of prices that differ significantly, how the Department explains why one of the standard comparison methods (*i.e.*, the A-A method or the T-T method) cannot account for such differences, or how the Department applies the average-to-transaction (A-T) method as an alternative comparison method. Accordingly, the Department has reasonably created a framework to determine whether the A-A method is appropriate,⁴³ and if it is determined not to be appropriate, then the A-T method may be considered an alternative to the standard A-A method based on the extent of the pattern of prices that differ significantly, as identified by the Cohen's d test.

Furthermore, the Department's application of the A-T method as an alternative comparison method to the A-A method is reasonable and consistent with a series of decisions from the CAFC and the CIT, including JBF RAK in which the CAFC held that the Department may apply the A-T method in administrative reviews and that the Act does not "mandate which comparison methods Commerce must use in administrative reviews."⁴⁴ In that decision the CAFC also held that the SAA "does not limit the proceedings in which Commerce may consider an alternative comparison method" when an A-A comparison "cannot account for a pattern of United States prices that differ significantly among purchasers, regions or time periods" in an administrative review.⁴⁵

Aggregation of the results of the Cohen's d Test.

Electrolux argues that "the statute is looking for a single 'pattern of prices,'" whereas the Department has identified "an almost-infinite series of different patterns" which it has simply aggregated in its analysis.⁴⁶ The statute requires a pattern of prices that differ significantly. The Department disagrees that the result of each comparison of the weighted-average price of the sales in a test group with the weighted-average price of the sales in the comparison group in the Cohen's d test, in and of itself, represents "a pattern" as provided in the statute. Electrolux misunderstands the purpose and meaning behind both the Cohen's d test and the ratio test.

The Cohen's d test evaluates whether sales of comparable merchandise to a particular purchaser, region or time period exhibit prices that are significantly different from sales to all other purchasers, regions or time periods, respectively.⁴⁷ Thus, if the value of the calculated Cohen's d coefficient is equal to or greater to 0.8 (*i.e.*, the large threshold), then the prices to a particular purchaser, region or time period in the test group are found to differ significantly from the prices to all other purchasers, regions or time periods, respectively, for comparable merchandise.⁴⁸

⁴³ See 19 CFR 351.414(c)(1).

⁴⁴ See JBF RAK, 790 F.3d 1358.

⁴⁵ Id.

⁴⁶ See Electrolux Case Brief at 6-7.

⁴⁷ See Preliminary Results Decision Memorandum at 6.

⁴⁸ Id. ("For this analysis, the difference was considered significant, and the sales in the test group were found to pass the Cohen's d test, if the calculated Cohen's d coefficient is equal to or exceeds the large (*i.e.*, 0.8 threshold).")

This analysis was done for each group of comparable merchandise and each purchaser, region or time period in order to identify Electrolux's U.S. sale prices which differed significantly.

The ratio test then aggregates the sales which are at prices that differ significantly (*i.e.*, that pass the Cohen's *d* test) to understand the extent of the significance of the price differences relative to all of the respondent's U.S. sales. From Webster's dictionary,⁴⁹ "pattern" has several meanings, including "(8) a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group, or institution (behavior pattern) (spending pattern)" and "(12) frequent or widespread incidence (a pattern of dissent)."

In the case of identifying a pattern of differing prices, "a pattern" is a reliable sample of traits, acts, tendencies or other observable characteristics, with frequent or widespread incidences. As described above, the ratio test quantifies the extent of the significant differences which have been identified by the Cohen's *d* test. The Department finds that this definition of "pattern" supports the Department's approach.

As stated above, the results of the Cohen's *d* test determine whether the sales in the test group are at prices which differ significantly from the prices in the comparison group of sales. Both the test group and the comparison group are composed of multiple U.S. sales with individual prices; these are not the patterns to which the Act refers. The Act refers to "a" pattern for the respondent. This pattern is manifested to the extent that prices for comparable merchandise differ significantly among purchasers, regions or time periods. The Department's Cohen's *d* and ratio tests are consistent with this idea of "a" pattern found in the language of the Act. Furthermore, the CIT has affirmed the Department's use of weighted-average export prices to determine a pattern "in the Cohen's *d* test" as consistent with the discretion which Congress provided the Department through statute.⁵⁰ Accordingly, the Department disagrees with Electrolux's argument that Department should not aggregate the results of the Cohen's *d* test when examining the pattern requirement.

Explanation of why the A-A method cannot account for such pricing differences.

We disagree with Electrolux's assertion that the Department failed to explain why the significant pattern of price differences cannot be accounted for when using the A-A method, pursuant to section 777(A)(d)(1)(B)(ii) of the Act. Section 777A(d)(1)(B)(i) of the Act, the "pattern" requirement, requires that the Department examine whether there exists a pattern of prices that differ significantly among purchasers, regions or time periods. The Department considers whether the respondent's pricing behavior has created conditions in the U.S. market in which dumping may be "targeted" or masked. This is the result of higher U.S. prices offsetting lower U.S. prices where the dumping which may be found on lower-priced U.S. sales is hidden by the higher U.S. prices, such that the A-A method would be unable to account for such conditions. This relationship is specifically recognized in the SAA as where "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."⁵¹ The SAA states that consideration of the A-T method, as an alternative

⁴⁹ See Webster's Ninth New Collegiate Dictionary (1989) at pages 863-864.

⁵⁰ See *Apex 2016*, 144 F. Supp. 3d at 1326 – 1328.

⁵¹ See SAA at 842.

comparison method, is in response to such concerns, and that this is “where targeted dumping *may* be occurring.”⁵²

Section 777A(d)(1)(B)(ii) of the Act, the “explanation” requirement, then requires the Department to explain why the A-A method cannot account for “such differences,” *i.e.*, the conditions identified in the “pattern” requirement which may lead to hidden or masked dumping. To consider this requirement, the Department uses a “meaningful difference” test where it compares the weighted-average dumping margin calculated using the A-A method only and the weighted-average dumping margin calculated using an appropriate alternative comparison method based on the application of the A-T method.⁵³ The simple comparison of these two results belies all of the complexities in calculating and aggregating individual dumping margins. It is the interaction of these many comparisons of export or constructed export prices with NVs which determine whether there is a meaningful difference in these two results.

When using the A-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. This is reflected in the SAA, which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”⁵⁴ The comparison of a dumping margin based on a weighted-average U.S. price with a dumping margin based on the individual, constituent transaction-specific U.S. prices precisely examines the impact of the amount of dumping which is hidden or masked. Both the weighted-average U.S. price and the individual U.S. prices are compared to a NV that is independent and constant because the characteristics of the individual U.S. sales remain constant whether a weighted-average U.S. price or individual U.S. prices are used in the analysis.

Consider the simple situation where there is a single weighted-average U.S. price, this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the A-A method and the A-T method. The NV used to calculate a dumping margin for these sales may fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

- 1) the NV is less than all of the U.S. prices and there is no dumping;
- 2) the NV is greater than all of the U.S. prices and all sales are dumped;
- 3) the NV is nominally greater than the U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;
- 4) the NV is nominally less than the U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the NV is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

⁵² *Id.* at 843 (emphasis added).

⁵³ The CIT has affirmed the Department’s “meaningful difference” test as reasonable and consistent with the requirements of the statute. *See Apex 2016*, 144 F. Supp. 3d at 1333, n. 14; *Timken Co. v. United States*, Slip Op. 16-47, at *33-*37.

⁵⁴ *See SAA* at 842.

Under scenarios (1) and (2), either there is no dumping or all U.S. sales are dumped, such that there is no difference between the A-A method with offsets and the A-T method with zeroing – i.e., there is no meaningful difference. Under scenario (3), there is a minimal (i.e., de minimis) amount of dumping, such that the A-A method and the A-T method result in either a zero or de minimis weighted-average dumping margin which also does not constitute a meaningful difference between the results of the two comparison methods. Under scenario (4), there is a significant (i.e., non-de minimis) amount of dumping with only a minimal amount of non-dumped sales, such that there is not a meaningful difference in the weighted-average dumping margins (i.e., there is less than a 25 percent relative change or no change from de minimis to non-de minimis) calculated using offsets or zeroing. Lastly, under scenario (5), there is a significant, non-de minimis amount of dumping and a significant amount of offsets generated from non-dumped sales such that there is a meaningful difference in the weighted-average dumping margins calculated using offsets and zeroing (i.e., there is at least a 25 percent relative change in the dumping margin or there is a change from de minimis to non-de minimis).

Only under scenarios (3), (4) and (5) are the granting or denial of offsets relevant to whether dumping is being masked, as there are both dumped and non-dumped sales. Under scenario (3) there is only a de minimis amount of dumping such that the extent of available offsets will have no impact on this outcome. Under scenario (4), there exists an above-de minimis amount of dumping, and the offsets are not sufficient to meaningfully change the results. Only with scenario (5) is there an above-de minimis amount of dumping with a sufficient amount of offsets such that the weighted-average dumping margin will change by at least 25 percent or the weighted-average dumping margin crosses the de minimis threshold.

This example demonstrates that there must be a significant and meaningful difference in U.S. prices in order to resort to an alternative comparison method. These differences in U.S. prices must be large enough, relative to the absolute price level in the U.S. market, where not only is there a non-de minimis amount of dumping, but that there also is a meaningful amount of offsets to impact the identified amount of dumping. Furthermore, the NV must fall within an even narrower range of values (i.e., narrower than the price differences exhibited in the U.S. market) such that the limiting circumstances are present (i.e., scenario (5) above). This required fact pattern must then be repeated across averaging groups in the calculation of the weighted-average dumping margin in order to result in an overall weighted-average dumping margin which changes to a meaningful extent. Further, for each individual dumping margin which does not result in this set of circumstances, the “meaningfulness” of the difference in the weighted-average dumping margins between the two comparison methods will be diluted. Thus, the Department disagrees with Electrolux’s claim that the Department has failed to adequately explain why the A-A method cannot account for such differences.

Moreover, the extent of the amount of dumping and potential offsets for non-dumped sales is measured relative to the total export value (i.e., the denominator of the weighted-average dumping margin) of the subject merchandise. Thus, the differential pricing analysis accounts for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under scenario (5) will the Department find that the A-A method is not appropriate – where there is an above-de minimis amount of dumping along with an amount of potential offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful

Only under scenario (5) will the Department find that the A-A method is not appropriate – where there is an above-de minimis amount of dumping along with an amount of potential offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount. Both of these amounts are measured relative to the total export value (i.e., absolute price level) of the subject merchandise sold by the exporter in the U.S. market. That is the situation in this review.

In sum, we met the requirement of an “explanation,” as set forth under section 777(A)(d)(1)(B)(ii) of the Act, and continue to find that the A-A method cannot take into account the observed pattern of significant price differences.

Relevance of the DS464 Panel Report

The Department notes Electrolux’s purported reliance on the DS464 Panel Report. However, once again, that panel report has not been adopted by WTO Members, and the manner in which any eventual report might be implemented by the United States is “far from clear.”⁵⁵ In any event, “WTO decisions are ‘not binding on the United States . . .’”⁵⁶ Indeed, the SAA explicitly states that “WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.”⁵⁷

VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions in the final results. If this recommendation is accepted, we will publish the final results of this review and the final weighted-average dumping margin for Electrolux in the Federal Register.



Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

30 August 2016

(Date)

⁵⁵ See NSK, 510 F.3d at 1380.

⁵⁶ See Corus Staal, 395 F.3d at 1348 (quoting Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004)).

⁵⁷ See SAA at 659.