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Administrative Review  
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Office VII: AH

DATE: April 23, 2014

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

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

SUBJECT: Antidumping Duty Administrative Review of Polyethylene  
Terephthalate Film, Sheet, and Strip from the United Arab  
Emirates: Issues and Decision Memorandum for the Final Results

## I. Summary

We analyzed the comments of the interested parties in the administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (PET Film) from the United Arab Emirates (UAE) covering the period of review (POR), November 1, 2011, through October 31, 2012. As a result, we made changes to the margin calculation for the respondent, FLEX Middle East FZE (FLEX). There have been no changes to the margin calculation for the respondent JBF RAK LLC (JBF). We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

## II. Background

On December 24, 2013, the Department published the preliminary results of the administrative review of the antidumping duty order on PET Film from the UAE.<sup>1</sup> The Department received timely filed case briefs from Mitsubishi Polyester Film, and SKC Inc. (Petitioners), and JBF on January 23, 2014. Petitioners filed a timely rebuttal brief on January 28, 2014. We received no briefs from FLEX.

Based on our analysis of all the comments received, the weighted average dumping margin for JBF has not changed from the rate calculated in the Preliminary Results. We changed the margin calculation for FLEX to account for certain errors in the SAS programming. The revised weighted average dumping margin is published in the accompanying Federal Register notice.

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<sup>1</sup> See Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 77 FR 77649 (December 24, 2013) (Preliminary Results).



### **III. Discussion of the Issues**

#### **Comment 1: Correction of Certain Errors in FLEX's SAS Program**

##### *Petitioner's Comments*

In its case brief, Petitioners identify two alleged errors in the SAS programming related to FLEX's margin calculation. First, Petitioners contend that the Department neglected to convert indirect selling expenses into per kilogram amounts. FLEX reported its U.S. sales data in U.S. dollars (USD) or UAE dirham (AED) per pound. The Department converted this data, with the exception of indirect selling expenses, into USD or AED per kilogram. As a result, Petitioners argue that the preliminary results understate the indirect selling expense deduction. Therefore, the Department should convert indirect selling expenses from pounds to kilograms. Second, Petitioners claim that the Department incorrectly identified the field for U.S. other transportation expenses this field as USOTHRUUSD, rather than the correct field name reported by FLEX, USOTHRU, and as a result this expense was not deducted from U.S. price. Petitioners urge the Department to correctly identify this field in the SAS program for the final results.

No other party commented on this issue.

##### **Department Position:**

The Department agrees with Petitioners that indirect selling expenses, which were reported on a per pound basis, should be converted to per kilograms amounts to allow for comparison with home market data, which were reported on a per kilogram basis. The Department also agrees with Petitioners that the field for U.S. other transportation expenses was misidentified in the program as USOTHRUUSD rather than USOTHRU. Accordingly, the Department made these changes to the SAS programming for FLEX to correct these errors.<sup>2</sup>

#### **Comment 2: Consideration of an Alternative Comparison Method in Administrative Reviews**

##### *JBF's Comments*

JBF asserts that section 777A(d)(1)(B) of the Act (i.e., the consideration of the average-to-transaction (A-to-T) method as an alternative to either the average-to-average (A-to-A) method or the transaction-to-transaction (T-to-T) method) only applies in less-than-fair-value investigations and not in administrative reviews. Therefore, there is no statutory authority for the Department to apply a "targeted dumping" or "differential pricing" analysis in an administrative review. FAG Italia S.p.A. v. United States, 291 F.3d 806 (Fed. Cir. 2002) (FAG Italia) demonstrates that any claim that the Department has authority in reviews to consider the allegation by virtue of the statutory authority in investigations must fail. Citing Nken v. Holder, 556 U.S. 418, 430 (2009) (Nken) and Brown v. Gardner, 513 U.S. 115, 120 (1994) (Brown), JBF contends further that the Department cannot consider the statutory provisions for investigations to fill in a presumed gap in the statutory authority.

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<sup>2</sup> See Memorandum to Mark Hoadley, "Final Analysis Memorandum for FLEX Middle East FZE," April 23, 2014.

### *Petitioner's Comments*

Petitioner rebuts JBF's claim stating that the Department addressed the legality of considering an alternative comparison method and applying a differential pricing analysis, including the use of the Cohen's *d* test in numerous recent proceedings.<sup>3</sup> However, JBF made no argument that specifically rebuts the Departments analysis in such proceedings.

### **Department Position:**

The Department disagrees with JBF's claim that it does not have the authority to consider 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." By definition, a "dumping margin" requires a comparison of normal value (NV) and export price (EP) or constructed export price (CEP). Before making the comparison required, it is necessary to determine how to make the comparison.

JBF argues that the Department has no statutory authority to consider the application of an alternative comparison method in administrative reviews. JBF also states that Congress made no provision for the Department to apply an alternative comparison method in an administrative review under section 777A(d) of the Act. Indeed, section 777A(d)(1) of the Act applies to "Investigations" and section 777A(d)(2) of the Act applies to "Reviews." Section 777A(d)(1) of the Act discusses, for investigations, the standard comparison methods (*i.e.*, the A-to-A method or the 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 statute, the Department promulgated regulations to specify how comparisons between NV and EP or CEP would be made in administrative reviews. With the implementation of the Uruguay Round Agreements Act ("URAA"), the Department promulgated 19 CFR 351.414(c)(2) (1997), which 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>4</sup> pursuant to section 123(g)(1) of the URAA. This proposal was in reaction to several World Trade Organization (WTO) Dispute Settlement Body panel reports which had found that the denial of offsets for non-dumped sales in administrative reviews to be inconsistent with the WTO obligations of the United States. When considering the proposed

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<sup>3</sup> See, e.g., Xanthan Gum From the People's Republic of China: Final Results of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013) (Xanthan Gum Final Determination), and accompanying Issues and Decisions Memorandum at Determination of the Comparison Method; Polyvinyl Alcohol From Taiwan: Preliminary Results of Antidumping Duty Administrative Review, 2010-2012, 78 FR 20890 (April 8, 2013).

<sup>4</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).

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>5</sup> These revisions were effective for all preliminary results of review issued after April 16, 2012, as is the situation for this administrative review.

19 CFR 351.414(b) describes the methods by which NV may be compared to EP or CEP in less-than-fair-value investigations and administrative reviews (*i.e.*, A-to-A, T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons a comparison is made for each group of comparable export transactions for which the export prices, or constructed export prices, have been averaged together (*i.e.*, for an averaging group).<sup>6</sup> The Department does not interpret the Act or the Statement of Administrative Action accompanying the URAA (SAA) to prohibit the use of the A-to-A comparison method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T comparison method in administrative reviews. 19 CFR 351.414(c)(1) (2012) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both less-than-fair-value 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>7</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 statute addresses this issue specifically in regards to investigations, the statute conspicuously leaves a gap to fill on this same question in regards to administrative reviews.<sup>8</sup> In light of the statute’s silence on this issue, the Department indicated that it would use the A-to-A method as the default method in administrative reviews, but would consider whether to use an alternative comparison method on a case-by-case basis.<sup>9</sup> At that time, the Department also indicated that it would look to practices employed by the Department in less-than-fair-value investigations for guidance on this issue.<sup>10</sup>

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<sup>5</sup> See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews).

<sup>6</sup> See 19 CFR 351.414(d)(2).

<sup>7</sup> See 19 CFR 351.414(c)(1).

<sup>8</sup> See section 777A(d)(1)(B) of the Act; SAA, H.R. Doc 103-316, vol. 1 (1994), at 842-43; and 19 CFR 351.414.

<sup>9</sup> See Final Modification for Reviews, 77 FR at 8107.

<sup>10</sup> Id., 77 FR at 8102.

In less-than-fair-value 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>11</sup>

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review to be analogous to the issue in less-than-fair-value investigations. Accordingly, the Department finds the analysis that has been used in less-than-fair-value investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. In less-than-fair-value investigations, the Department considers an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act.<sup>12</sup> Similarly, the Department considers an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1).<sup>13</sup> For this administrative review, the Department continues to find the consideration of an alternative comparison method to be reasonable where the statute made no provision for the Department to follow.

The SAA does not demonstrate that the Department may consider the application of an alternative comparison method in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) of the Act does not require or prohibit the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an A-to-A or T-to-T comparison methodology cannot account for a pattern of prices that

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<sup>11</sup> See section 777A(d)(1)(B) of the Act.

<sup>12</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 Final Determination.

<sup>13</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); Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review, 2010–2011, 77 FR 73013 (December 7, 2012); Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review; 2011–2012, 78 FR 65272 (October 31, 2013).

differ significantly among purchasers, regions or time periods.”<sup>14</sup> Like the statute, the SAA does not limit the Department to undertake such an examination in investigations only.<sup>15</sup>

The silence of the statute with regard to the application of an alternative comparison method in administrative reviews does not preclude the Department from applying such a practice in this situation. Indeed, the U.S. Court of Appeals for the Federal Circuit (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 statutory circumstances.”<sup>16</sup> Further, the U.S. Court of International Trade (CIT), quoting the CAFC, stated that this “silence has been interpreted as ‘an invitation’ for an agency administering unfair trade law to ‘perform its duties in the way it believes most suitable’ and courts will uphold these decisions ‘{s}o long as the {agency}’s analysis does not violate any statute and is not otherwise arbitrary and capricious.”<sup>17</sup> The Department filled a gap in the statute with a logical, reasonable and deliberative comparison method for administrative reviews.

Notably, the CIT recently recognized that section 777A(d)(2) of the Act is “completely silent as to how Commerce should conduct its determination of less than fair value in reviews, leaving Commerce substantial discretion as to the methodologies it wishes to employ.”<sup>18</sup> The Court reasoned that “{i}n the light of this broad discretion, Commerce acted reasonably and did not abuse its discretion by basing its practice in reviews on its practice in investigations, which includes the use of the targeted dumping analysis.”<sup>19</sup> Although Timken was decided in the context of upholding the Department’s ability to apply an alternative comparison method based on a targeted dumping analysis pursuant to section 777A(d)(1)(B) of the Act in the context of an administrative review by looking to its practice in investigations, the Court’s rationale applies equally to consideration of an alternative comparison method based on a differential pricing analysis, as in this administrative review, which derives from the same statutory provision.

JBF’s arguments on this issue are unavailing. With respect to FAG Italia, JBF mischaracterizes the Federal Circuit’s holding. In that case, concerning duty absorption inquiries of transition orders, the Federal Circuit determined that the statute unambiguously did not provide the Department with the authority to take action because the “absence of a statutory probation cannot be the source of agency authority.”<sup>20</sup> Congress provided the authority for such inquiries in administrative reviews, and did not provide authority for the same undertaking, i.e. a transition order, in a wholly different proceeding. Here, unlike in FAG Italia, section 751(a)(2)(A) directs the Department to determine the NV and EP (or CEP) of each entry of subject merchandise and the resulting dumping margin for each entry in administrative reviews. Thus, the Act provides the Department with the authority to engage in comparisons between NV and EP to calculate

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<sup>14</sup> See SAA, at 843.

<sup>15</sup> Id.

<sup>16</sup> See United States Steel Corp. v. United States, 621 F.3d 1351, 1357 (Fed. Cir. 2010).

<sup>17</sup> See Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010) (quoting U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996)).

<sup>18</sup> See Timken Co. v. United States, slip op. 2014-24 at 12 n.7 (CIT February 27, 2014)

<sup>19</sup> Id.

<sup>20</sup> See FAG Italia, 296 F.3d at 815-16.

dumping margins. The Act is silent only as to the method the Department must use in so doing. Therefore, the Department reasonably fills that gap to allow it to use the A-to-T comparison method when it encounters certain patterns of export prices. Because the Act explicitly provides the Department with authority and is only silent as to the method, FAG Italia is inapposite to the current proceeding.<sup>21</sup> Similarly, in Brown, the Supreme Court found the relevant statutory language at issue to include express terms that resolved the inquiry.<sup>22</sup> However, as explained above, the provision at issue in this proceeding does not expressly resolve the issue. Moreover, the issue in Brown concerned an interpretation of a claimant's statutory burden of proof. Here, the issue concerns the Department's chosen methodology to carry out its statutory obligations. Interpreting a statutory burden of proof is far different than an agency's authority to act in pursuit of its statutory obligations, carrying with each a unique set of understandings and concerns. Consequently, Brown does not support JBF's arguments. Finally, as to Nken, that case did not involve an interpretation of a statute under the Chevron<sup>23</sup> framework by which the Department also must interpret the Act and, thus, concerns a different scenario than that faced by the Department in this proceeding.<sup>24</sup>

### **Comment 3: Differential Pricing Analysis**

In its case brief, JBF argued that the Department's use of its differential pricing analysis was incorrectly applied and arbitrary. JBF contends that:

- The Cohen's *d* test is not a test for statistical significance. Cohen's *d* is a test for measuring effect size, rather than for statistical significance. The measurements of the Cohen's *d* test may be the result of chance or statistically insignificant.
- Further, the Cohen's *d* coefficient is being calculated incorrectly and uses sample sizes that are too small. The methodology used by the Department has no underlying statistical basis and is arbitrary.
- To apply the A-to-T method to U.S. sales which did not pass the Cohen's *d* test is impermissibly punitive. Citing to Bestpak,<sup>25</sup> JBF asserts that the antidumping statute is remedial and not intended to punish. The Cohen's *d* test is intended to reveal masked dumping. The decision to apply the A-to-T method to all U.S. sales, including those the Department determined are not "masked dumping sales," is punitive, which is unreasonable and contrary to law. In the final results the Department should apply the A-to-T method for sales passing the Cohen's *d* test, and the A-to-A method to sales that do not pass the Cohen's *d* test.
- There is no evidence that the pattern found is an attempt to mask dumping. JBF's selling practices (i.e., selling to U.S. customers on a sale-by-sale basis) do not allow it to create a

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<sup>21</sup> See Timken, slip op. 2014-24, at 12 & n.7 (finding a respondent's reliance on FAG Italia "misplaced" in the context of its argument that the Department is precluded by statute from considering an alternative comparison method based on a targeted dumping analysis in administrative reviews because the Department "certainly has a general authority to conduct an administrative review," and section 777A(d) of the Act "does nothing more than clarify that the averaging period in reviews should be monthly. It places no other limits on the methodologies that Commerce may employ in reviews, leaving Commerce discretion as to the choice of methodologies").

<sup>22</sup> See 513 U.S. at 120.

<sup>23</sup> See Chevron U.S.A. Inc. v. Natural Resources Defense Council (Chevron), 467 U.S. 837 (1984).

<sup>24</sup> See Nken, 556 U.S. at 430.

<sup>25</sup> See Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States, 783 F.Supp.2d 1343 (CIT 2011) (Bestpak).

pattern to mask dumping. While the Department asserts that it has no obligation to explain why a pattern exists, the Department has not held that it can and will ignore cases where the alleged pattern cannot be an attempt to mask dumped sales.

In their rebuttal brief, petitioners state that the Department's use of its differential pricing analysis is neither contrary to law, nor otherwise impermissible. Petitioners submit that:

- JBF's argument that the Department should not use the A-to-T method for sales that pass the Cohen's *d* test fails to acknowledge that the Department compares all sales on an A-to-T basis when there is persuasive evidence that greater than 66 percent of sales pass the Cohen's *d* test.
- JBF's assertion that its pricing practices do not allow for differential pricing is subjective analysis belied by the results of the Preliminary Results.

### **Department Position:**

The Department disagrees with JBF's assertion that the Cohen's *d* test is incorrectly applied. The analysis employed by the Department, including the use of the Cohen's *d* and ratio tests, reasonably informs the Department whether there exists a pattern of prices that "differ significantly." The Cohen's *d* test "is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group".<sup>26</sup> Within the Cohen's *d* test, the Cohen's *d* coefficient is calculated based on the means and variances of the test group and the comparison group. The test and comparison groups include all of the U.S. sales of comparable merchandise reported by the respondent and there is no relevance with respect to sample size. 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 means and variances calculated using the entire population of the respondent's sales in the U.S. market, and, therefore, these values contain no sampling error. Accordingly, sample size and statistical significance are not relevant considerations in this context.

Further, just because the Cohen's *d* test is based upon statistics (*i.e.*, sale prices, quantities, *etc.*) and the Cohen's *d* coefficient is a statistical measure, this does not imply that there must be a statistical significance associated with these measurements.

The Department disagrees with JBF's argument that applying the A-to-T method to U.S. sales which did not pass the Cohen's *d* test (*i.e.*, the Department applied the A-to-T method to all of JBF's U.S. sales) is punitive. Section 777A(d)(1)(B) of the Act allows the Department to consider application of the A-to-T method as an alternative to the standard A-to-A method or the T-to-T method in less-than-fair-value investigations once the two criteria provided therein have been satisfied. This provision does not specify how the Department can or must apply the A-to-T method. Accordingly, the Department filled the silence of the statute with deliberative and reasoned practice when using section 777A(d)(1)(B) of the Act to address its concerns regarding whether the standard A-to-A method is an appropriate tool with which to measure whether a

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<sup>26</sup> See Preliminary Results, and accompanying Decision Memorandum at 6.

respondent is dumping in the U.S. market, and if so, to what extent. Further, the practice of how to apply the A-to-T method to address this question changed over time as the Department's knowledge and experience in this area grew. With 19 CFR 351.414(c)(1), the Department now must consider similar questions in administrative reviews and address them accordingly.

When the Department applied a differential pricing analysis in this review,<sup>27</sup> it established three bands by which to categorize the results of the Cohen's *d* test as represented by the number reported as the ratio test.<sup>28</sup> The Department reasonably defined these bands to be (1) 0 percent to 33 percent, (2) between 33 percent and 66 percent, and (3) 66 percent and greater. With the results of the ratio test, the Department determines how to apply the A-to-T method as an alternative to the standard A-to-A method based on which category is identified – *i.e.*, apply the A-to-T method to none, some, or all, respectively, of the respondent's U.S. sales. The Department believes that this is a reasonable and proportional approach to addressing the silence in the statute with regard to the application of the alternative A-to-T method. For the upper band, as is relevant for JBF, the Department finds that the extent of the pattern of prices that differ significantly is so pervasive that the Department finds average export prices to not appropriately represent the pricing behavior under examination, and therefore application of A-to-A comparisons for the limited quantity of non-differentially priced sales is not appropriate. Further, the Department invited parties to comment on the application of the differential pricing analysis in this administrative review.<sup>29</sup> For JBF in the Preliminary Results and for these final results, the Department found that 68.99 percent of its sales by value passed the Cohen's *d* test. Further, JBF presented no argument or support for altering the Department's approach set forth in the Preliminary Results except to decry it as "punitive." Accordingly, based on the factual information on the record of this administrative review and the Department's analysis of such information, the Department continued to apply the alternative A-to-T method to all of JBF's U.S. sales in the final results.

With respect to JBF's argument that the antidumping duty law is intended to be remedial, not punitive, we agree. The CIT expressly recognized that the antidumping duty law "is intended to be remedial, not punitive." This is precisely the Department's goal in examining whether the A-to-A method, or the A-to-T method, is the appropriate tool to quantify the full extent of JBF's dumping, consistent with 19 CFR 351.414(c)(1).

We reject JBF's arguments that the Department should not use an alternative methodology because there is no evidence that the pattern found is an attempt to mask dumping, and that JBF's pricing practice does not allow it to create a pattern to mask dumping. The Department's purpose in applying a differential pricing analysis in this review is to assess whether the A-to-A method is an appropriate tool with which to measure JBF's amount, if any, of dumping. As part of applying its practice from less-than-fair-value investigations in this administrative review, the Department evaluated whether there exists a pattern of prices that differ significantly based on

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<sup>27</sup> The Department used this approach in other administrative reviews, *see, e.g.*, Polyester Staple Fiber from Taiwan: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 38938 (June 28, 2013); Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 79665 (December 31, 2013); Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Antidumping Duty Administrative Review; 2011-2012, 79 FR 11406 (February 28, 2014).

<sup>28</sup> See Preliminary Results, and accompanying Decision Memorandum at 5.

<sup>29</sup> Id.

the Cohen's *d* and ratio tests. This is a factual determination where, as recognized by JBF, the statute does not require the Department to consider the intent or motivations of the respondent in establishing its pricing behavior. As the Department stated in Circular Welded Carbon Steel Pipes and Tubes from Turkey:

The Act and the regulations do not provide detailed guidance on comparing different sets of U.S. prices for purposes of determining the existence of targeted dumping. The only obligations imposed on the Department in its analysis appear in section 777A(d)(1)(B) of the Act. Section 777A(d)(1)(B) of the Act requires the Department (1) to examine whether there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods and, if such a pattern exists, (2) to explain why such differences cannot be taken into account using the average-to-average or transaction-to-transaction comparison methods. The Act does not require the Department to discern why such patterns arise. Instead, the Act asks the Department to focus on U.S. sales prices alone; *i.e.*, export price or constructed export price.<sup>30</sup>

Further, the statute does not require that the Department consider whether sales have been dumped to be considered part of a pattern of prices that differ significantly. The statute provides no such consideration of NVs in section 777A(d)(1)(B)(i) of the Act, only "export prices (or constructed export prices)." While higher or lower priced sales could be dumped or could be providing offsets for other dumped sales, this is immaterial in the Department's analysis, including the use of the Cohen's *d* test in this administrative review, and in answering the question of whether there is a pattern of export prices that differ significantly. This analysis includes no comparisons with NVs and section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons. For these reasons, we reject JBF's arguments.

#### **Comment 4: Alleged Error in Department's SAS Programming**

##### *JBF Comments*

In their case brief, JBF alleged that there is an error in the Department's program resulting in a comparison of prices that do not exist. A printout in the Preliminary Analysis for JBF entitled "THE COHENS-D TEST OVERALL STATISTICS FOR EACH CONTROL NUMBER" shows a sale price lower than those calculated for U.S. Net Price. This indicates an error in the computer program, which should be corrected in the final results.

##### *Petitioner's Comments*

Petitioners contend that there is no error in the Department's program. The net price used in differential pricing is net of selling expenses, and the net price in export transactions sales is inclusive of selling expenses, which accounts for the difference observed by JBF.

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<sup>30</sup> See Circular Welded Carbon Steel Pipes and Tubes From Turkey; Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 77 FR 72818 (December 6, 2012), and accompanying Issues and Decision Memorandum (IDM) at Comment 1.

## Department Position

The Department disagrees with JBF's assertion that there is an error in the Department's SAS program, which resulted in prices that do not exist. JBF failed to note that the calculation of the net price for the Cohen's *d* test is different than the U.S. net price used in the margin calculation. The net price for the Cohen's *d* test deducts all appropriate expenses from the reported gross unit price in order for U.S. and home market net prices to be comparable irrespective of whether they are based on EPs or CEPs. Expenses may be accounted for differently for the purpose of calculating the U.S. net price used in the dumping margin calculation. When calculating dumping margins, section 772(d)(1) of the Act directs the Department to make certain deductions from U.S. price for CEP sales (e.g., imputed credit expenses); however, for EP sales, these expenses would be accounted for by increases to the NV pursuant to section 773(a)(6)(C) of the Act. Therefore, although some expenses may be accounted for differently for purposes of calculating dumping margins, the Department made all such adjustments to the U.S. price in order for all prices of comparable merchandise to be comparable in the differential pricing analysis and not to create artificial differences.

## Comment 5: Grade A and Grade B Sales

### *JBF's Comments*

JBF asserts that the Department erred in failing to match home market sale of non-prime merchandise to U.S. sales of prime quality merchandise. JBF notes that the designation of prime and non-prime film is based on customer specifications, rather than JBF's specifications. JBF requests that the Department match prime and non-prime products of the same CONNUM in the final results.

### *Petitioner's Comments*

Petitioners argue that the Department should continue to distinguish between prime and non-prime merchandise for the final results. Petitioners note that the terms "prime" and "non-prime" are intended to capture products that either do or do not meet product specifications. Failure to meet specifications is an indication that there is a physical or chemical defect in the product that prevents the product from being used as intended. For this reason, the Department has long distinguished between products based upon specifications in its margin analysis. Petitioners note that the Department rejected JBF's arguments regarding prime and non-prime merchandise in the previous review. JBF offered no additional arguments in this review to explain how merchandise sold in the domestic market and coded as non-prime, were, in fact, commercial quality.

## Department Position:

Consistent with the Department's established practice to consider grade when matching PET film products,<sup>31</sup> and previous segments of this proceeding,<sup>32</sup> the Department has not made JBF's suggested changes. The physical characteristics identify grade as the first and most important criterion.<sup>33</sup> JBF states in its case brief that it distinguishes grade A PET film from grade B PET film on the basis of "customer's specification" (i.e., grade B PET film is film that does not meet a particular customer's specifications), but that grade B PET film "could" meet JBF's own specifications for PET film.<sup>34</sup> As an initial matter, JBF failed to document the extent of the differences or similarities between grade A PET film and grade B PET film. Moreover, while JBF indicates that it has its own specifications for PET film, it does not cite any record evidence that discusses the parameters of its specifications.<sup>35</sup> Further, there is no information on the record regarding whether the PET film JBF identified as grade B in its questionnaire responses meets its own specifications.

Therefore, because JBF has not identified evidence on the record in support of its claim, the Department finds no basis to depart from its practice in past proceedings involving PET film and to change the matching criteria for these final results.

## Comment 6: 15-Day Liquidation Policy

### *JBF's Comments*

In its case brief, JBF noted that, in the Preliminary Results, the Department stated its intention to send assessment instructions to U.S. Customs and Border Protection fifteen days after publication of the final results, while section 516A(a)(2)(A)(i)(I) of the Act allows parties thirty days to bring an action in the CIT. JBF maintains that the Department's 15-day policy is unlawful, citing to SKF USA Inc. v. United States, 659 F. Supp. 2d 1338, 1351 (CIT 2009) (SKF USA Inc.) in support of its position. Consequently, JBF proffers that the Department should state that it intends to issue assessment instructions no earlier than the day after the expiration of

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<sup>31</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip From India, 67 FR 34899 (May 16, 2002) and accompanying IDM at comment 5; Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results of Antidumping Duty Administrative Review, 71 FR 47485, and accompanying IDM at comment 4.

<sup>32</sup> See Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 73 FR 55036 (September 24, 2008); Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review, 77 FR 20357 (April 4, 2012).

<sup>33</sup> See Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review, 76 FR 76365, 76366 (December 7, 2011) ("We have relied on five criteria to match U.S. sales of subject merchandise to comparison-market sales: grade, specification, thickness, thickness category, and surface treatment.").

<sup>34</sup> See "Response to the Sections B, C and D of the Questionnaire by JBF RAK LLC," April 26, 2013 at 11.

<sup>35</sup> See "Polyethylene Terephthalate (PET) Film, Sheet and Strip from the United Arab Emirates (A-520-803); Case Brief of JBF RAK," January 23, 2014 at 9.

time to commence action contesting the final results; that is, 30 days after the publication of the final results.

No other party commented on this issue.

### **Department Position:**

The Department disagrees with JBF's claim that the 15-day policy is unlawful. The statute establishes a period within which entries must be liquidated, but is silent regarding a minimum amount of time to refrain from liquidation.<sup>36</sup> In light of this statutory silence, the Department established a practice of issuing "liquidation instructions 15 days after publication unless we are aware that an injunction has been filed or is imminent."<sup>37</sup> Indeed, as we stated previously:

{o}ur practice of issuing liquidation instructions 15 days after publication of the final results is based upon administrative necessity, namely that we must provide CBP with sufficient time to liquidate all entries, particularly in large and complex cases like the instant reviews, before the entries are deemed liquidated. Extreme consequences follow from deemed liquidation, specifically the government's inability to collect duties calculated. Furthermore, our current policy is in accordance with the CIT's statement that we must provide "some reasonable opportunity in which a plaintiff may seek to obtain the specific type of injunction described in {section 516A(c)(2)}."<sup>38</sup>

The instant review similarly involves a number of entries and complex issues, and we continue to harbor the same concerns about deemed liquidation. Finally, through the 15-day policy, we continue to provide interested parties with a reasonable opportunity to obtain injunctive relief. The 15-day policy affords interested parties a reasonable amount of time to study the Department's final results, to determine whether they intend to appeal the determination, and to inform the Government that it imminently seeks to protect its entries from liquidation.

With regard to JBF's other arguments on the 15-day policy, we also disagree. As an initial matter, the opinion to which JBF cites, SKF USA Inc., concerns a practice no longer followed by the Department. In that case, the CIT addressed the Department's former practice of issuing liquidation instructions within 15 days.<sup>39</sup> As explained above, that practice changed, and the Department now issues liquidation instructions 15 days after publication absent an injunction or notice that such request for injunction relief is imminent. And while the Department recognizes that the CIT subsequently issued decisions after SKF USA Inc. that find our current 15-day policy unlawful,<sup>40</sup> we recognize that the same issue remains pending in other cases and, "{t}here

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<sup>36</sup> See section 751(a)(3)(B) of the Act.

<sup>37</sup> See, e.g., Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Revocation of an Order in Part, 74 FR 44819 (August 31, 2009) (Ball Bearings), and accompanying IDM at comment 3.

<sup>38</sup> See id.

<sup>39</sup> See SKF USA Inc., 659 F. Supp. 2d at 1361.

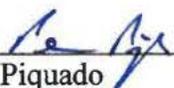
<sup>40</sup> See, e.g., SKF USA Inc. v. United States, 800 F. Supp. 2d 1316, 1326-28 (CIT 2011).

is no binding decision declaring Commerce's policy unlawful."<sup>41</sup> With respect to JBF's argument that the Department should wait 30 days to issue liquidation instructions because section 516A(a)(2)(A)(i)(I) of the Act allows parties thirty days to bring an action in the CIT, this claim finds no support in the text of section 751(a)(3)(B) of the Act. We reached a similar conclusion in Ball Bearings, explaining that the CIT in SKF USA Inc. rejected a similar argument.<sup>42</sup> Finally, we note that the Department's prior policy of issuing liquidation instructions within 15 days of publication of its final results has been sustained by the CIT as a reasonable interpretation of the statute.<sup>43</sup> Consequently, it stands to reason that the Department's interpretation of the statute allowing for the issuance of liquidation instructions after that time similarly is reasonable.

#### IV. Recommendation

We recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of this review and the final weighted-average dumping margin for the reviewed companies in the Federal Register.

Agree  Disagree

  
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Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

23 APRIL 2014  
Date

<sup>41</sup> See JBF RAK LLC v. United States, 961 F. Supp. 2d 1274, 1280-81 (CIT 2014) (finding that JBF RAK failed to exhaust its administrative remedies with regard to its argument that the Department's 15-day liquidation policy was unlawful).

<sup>42</sup> See Ball Bearings, 74 FR 44819, and accompanying IDM at comment 3.

<sup>43</sup> See Mittal Steel Galati S.A. v. United States, 502 F. Supp. 2d 1295, 1313-14 (Ct. Int'l Trade 2007).