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International Trade Administration  
Washington, D.C. 20230

A-533-824

Administrative Review

POR: 07/01/2012-06/30/2013

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February 23, 2015

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of  
Antidumping Duty Administrative Review: Polyethylene  
Terephthalate Film From India; 2012 – 2013 Administrative  
Review

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### Summary

The Department of Commerce (the Department) analyzed the case brief and letter submitted by interested parties in the administrative review of the antidumping duty (AD) order on polyethylene terephthalate film, sheet, and strip (PET Film) from India. As a result of this analysis, we have not made changes to the Preliminary Results.<sup>1</sup> However, we have revised the margin calculations to account for revisions to the export subsidies found in the concurrent countervailing duty (CVD) administrative review.<sup>2</sup> We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

### Background

On August 25, 2014, the Department published the Preliminary Results. The review covers two respondents, Jindal Poly Films Limited (Jindal), and SRF Limited (SRF). The Department rescinded the review with respect to Polyplex Corporation Ltd., Garware Polyester Ltd., Ester

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<sup>1</sup> See Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2012–2013, 79 FR 50620 (August 25, 2014) (Preliminary Results).

<sup>2</sup> See Memoranda to File “Analysis Memorandum for the Final Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Jindal Poly Films Limited (Jindal)” (Jindal Final Results Calculation Memorandum) and “Analysis Memorandum for the Final Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: SRF Limited (SRF)” both dated concurrently with this memorandum.



Industries, Uflex Limited, MTZ Polyesters Ltd., and Vacmet.<sup>3</sup> The period of review (POR) is July 1, 2012, through June 30, 2013. Jindal submitted a case brief on October 1, 2014.<sup>4</sup> SRF submitted a letter in lieu of a case brief on the same day, agreeing with the Preliminary Results, and urging the Department to maintain its zero-margin finding for SRF.<sup>5</sup> None of the parties submitted rebuttal briefs.

### Scope of the Order

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

### Discussion of the Issues

#### **Comment 1: Quantity Discount Adjustment**

##### *Jindal's Arguments*

- The Department failed to grant Jindal a quantity discount adjustment in the Preliminary Results or address why it did not grant the adjustment.
- The Department should grant Jindal a quantity discount adjustment because Jindal meets the test for the adjustment set out in 19 CFR 351.409(a)(1) and there is no justification for denying the adjustment.<sup>6</sup>

#### **Department's Position:**

Contrary to Jindal's argument, we granted Jindal a quantity discount adjustment in the Preliminary Results. We noted this adjustment in the Preliminary Calculation Memorandum<sup>7</sup> and included it in the preliminary SAS calculations.<sup>8</sup> We continue to grant this adjustment for these final results.

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<sup>3</sup> See Preliminary Results, 79 FR 50620.

<sup>4</sup> See Case Brief filed by Jindal Poly Films Ltd., dated October 1, 2014 (Jindal Case Brief).

<sup>5</sup> See Letter filed by SRF Limited, dated October 1, 2014.

<sup>6</sup> Jindal Case Brief at 3-5.

<sup>7</sup> See Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office VII, Enforcement and Compliance "Analysis Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Jindal Poly Films Limited (Jindal)," at 5 (Preliminary Calculation Memorandum).

<sup>8</sup> See Jindal Preliminary Results SAS CM program at section 4-B-i 'Calculation of Aggregate Variables,' 'CMDISREB.'

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

### ***Jindal's Arguments***

- The statutory provision regarding the consideration of an alternative comparison method, section 777A(d)(1)(B) of the Act, is specific to antidumping duty investigations and not to antidumping duty administrative reviews. Therefore, the Department does not have the authority to consider an alternative comparison method in administrative reviews in general or to Jindal specifically.
- Congress did not intend for the Department to consider the application of an alternative comparison method in administrative reviews, otherwise it would create this exception in the parts of the statute that relate to administrative reviews. Instead, in sections 777A(d)(1)(B) of the Act, Congress specifically included an alternative comparison method to the normal procedure for determining less than fair value in investigations, and omitted this alternative in section 777A(d)(2) of the Act relating to reviews.
- In Gray Portland Cement, the CAFC held that “it is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission.”<sup>9</sup>
- In accordance with the Court’s ruling in Fag Italia S.p.A.,<sup>10</sup> the fact that the statute explicitly provides for the consideration of an alternative comparison method in less-than-fair-value investigations - but is silent on this matter with regard to administrative reviews - is not an adequate source of authority for the Department to consider an alternative comparison method in administrative reviews.
- In response to the Court’s decision in GPX International Tire Corp. v. US,<sup>11</sup> Congress amended the countervailing duty statute to allow its application to non-market economies. Accordingly, if the Department wishes to apply targeted dumping in administrative reviews, it must await a statutory amendment and Congressional authority to do so.<sup>12</sup>

### **Department Position:**

We disagree with Jindal’s assertion that the Department has no authority to consider the application of an alternative comparison method in administrative reviews. In a “swelling chorus” of cases, the Court of International Trade (CIT) has upheld the Department’s statutory

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<sup>9</sup> See Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 13 F.3d 398, 401 (Fed. Cir. 1994) (Grey Portland Cement).

<sup>10</sup> See Fag Italia S.p.A. v. United States, 291 F.3d 806, 816-817 (Fed. Cir. 2002) (Fag Italia S.p.A.).

<sup>11</sup> See GPX International Tire Corp. v. United States, 666 F.3d 732, 745 (Fed. Cir. 2011) (GPX International Tire Corp.).

<sup>12</sup> See Jindal Case Brief at 31-33.

authority to employ an alternative comparison method in administrative reviews and has rejected the arguments Jindal makes in this review regarding this point.<sup>13</sup>

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 normal value and export price or constructed export price. Before making the comparison called for, it is necessary to determine how to make the comparison.

Jindal argues that the Department has no statutory authority to consider the application of an alternative comparison method in administrative reviews. Jindal 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 average-to-average (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 average-to-transaction (A-to-T) method) that may be applied as an exception to the standard methods when certain criteria have been met. Section 777A(d)(2) of the Act discusses, for administrative reviews, the maximum length of time over which the Department may calculate weighted-average normal values when using the A-to-T method. Section 777A(d)(2) has no provision specifying the comparison method to be employed in administrative reviews.

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

To fill the gap in the statute, the Department has promulgated regulations to specify how comparisons between normal value and export price or constructed export price would be made in administrative reviews. With the implementation of the Uruguay Round Agreements Act (URAA), the Department promulgated the 1997, in which 19 CFR 351.414(c)(2) stated that the Department would normally use the A-to-T comparison method in administrative reviews. In 2010, the Department published its Proposed Modification for Reviews<sup>14</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

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<sup>13</sup> Apex Frozen Foods Private Ltd. v. United States, No. 13-00283, Slip Op. 14-138, at 8-9 (Ct. Int’l Trade December 1, 2014); see also DuPont Teijin Films China Ltd. v. United States, 7 F. Supp. 3d 1338, 1355-56 (Ct. Int’l Trade 2014); JB F RAK LLC v. United States, 991 F. Supp. 2d 1343, 1347-49 (Ct. Int’l Trade 2014); CP Kelco Oy v. United States, 978 F. Supp. 2d 1315, 1321-24 (Ct. Int’l Trade 2014); Timken Co. v. United States, 968 F. Supp. 2d 1279, 1286 n.7 (Ct. Int’l Trade 2014) (in well-reasoned dicta).

<sup>14</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).

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>15</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 antidumping investigations and administrative reviews (*i.e.*, A-to-A, T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons a comparison is made for each group of comparable export transactions for which the export prices, or constructed export prices, have been averaged together (*i.e.*, for an averaging group<sup>16</sup>). The Department does not interpret the Act or the SAA to prohibit the use of the A-to-A comparison method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T comparison method in administrative reviews. 19 CFR 351.414(c)(1) (2012) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both antidumping investigations and administrative reviews, the A-to-A method will be used “unless the Secretary determines another method is appropriate in a particular case.”<sup>17</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>18</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>19</sup> At that time, the Department also indicated that it would look to practices employed by the Department in antidumping investigations for guidance on this issue.<sup>20</sup>

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<sup>15</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>16</sup> See 19 CFR 351.414(d)(2).

<sup>17</sup> See 19 CFR 351.414(c)(1).

<sup>18</sup> See section 777A(d)(1)(B) of the Act; SAA, attached to H.R. No. 103-316, vol. 1 at 842-43 (1994), reprinted in 1994 U.S.C.C.A.N. 37773, 4163; 19 CFR 351.414.

<sup>19</sup> See Final Modification for Reviews, 77 FR at 8107.

<sup>20</sup> Id., 77 FR at 8102.

In antidumping investigations, the Department examines whether to use the A-to-T method consistent with section 777A(d)(1)(B) of the Act:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if:

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (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>21</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 antidumping investigations. Accordingly, the Department finds the analysis that has been used in antidumping investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. In less-than-fair-value investigations, the Department considered an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act.<sup>22</sup> Similarly, the Department considered an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1).<sup>23</sup> For this administrative review, the Department continues to find the consideration of an alternative comparison method to be a reasonable extension of the statute where the statute made no provision for the Department to follow.

The SAA does not demonstrate that the Department may consider the application of an alternative comparison method in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations.<sup>24</sup> 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

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<sup>21</sup> See section 777A(d)(1)(B) of the Act.

<sup>22</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 33350 (June 4, 2013) (Xanthan Gum).

<sup>23</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); see also 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).

<sup>24</sup> See SAA at 842.

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>25</sup> Like the statute, the SAA does not limit the Department to undertake such an examination in investigations only.<sup>26</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 Federal Circuit stated that the “court must, as we do, defer to Commerce’s reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency’s generally conferred authority and other statutory circumstances.”<sup>27</sup> Further, the court stated that this “silence has been interpreted as ‘an invitation’ for an agency administering unfair trade law to ‘perform its duties in the way it believes most suitable’ and courts will uphold these decisions ‘{s}o long as the {agency}’s analysis does not violate any statute and is not otherwise arbitrary and capricious.”<sup>28</sup> The Department filled a gap in the statute with a logical, reasonable and deliberative comparison method for administrative reviews.

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

As an initial matter, we note that Jindal’s arguments regarding the Department’s differential pricing analysis have no grounding in the language of the statute. Jindal does not argue that the Department’s reliance on the Cohen’s *d* and ratio tests along with the analysis of meaningful differences in the calculated weighted-average dumping margins, as parts of the differential pricing analysis applied in the Preliminary Results, violates the statutory language. There is nothing in the statute that mandates how the Department measures whether there is a pattern of prices that differs significantly and whether the A-to-A method or the T-to-T method can account for such differences. To the contrary, carrying out the purpose of the statute here is a gap filling exercise by the Department. As explained in the Preliminary Results and below, the Department’s differential pricing analysis is reasonable, and the use of the Cohen’s *d* and ratio tests and meaningful difference analysis as components in this analysis is in no way contrary to the law.

Jindal confuses the application of a differential pricing analysis or a determination of “differential pricing” with whether there exists a pattern of prices that differ significantly as examined with the Cohen’s *d* and ratio tests. Jindal omits the Department’s determination of whether the A-to-A method can account for such differences (*i.e.*, whether dumping is being masked to a sufficient extent that there is a meaningful difference in the results) before applying an alternative comparison method based on the A-to-T method.

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<sup>25</sup> Id. at 843.

<sup>26</sup> Id.

<sup>27</sup> See United States Steel Corp. v. United States, 621 F.3d 1351, 1357 (Fed. Cir. 2010).

<sup>28</sup> See Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1376-77 (Ct. Int’l Trade 2010) (citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996)).

For the first requirement, the Department uses the Cohen's *d* and ratio tests to examine whether there exists a pattern of prices that differ significantly. 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. "Effect 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>29</sup> In Xanthan Gum, we stated as follows:

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>30</sup>

The ratio test aggregates the results of the comparisons of the means between the test and comparison groups to gauge the extent of the significant differences in prices. The results then inform the Department whether consideration of an alternative comparison method is warranted, and if so, to what extent the A-to-T method should be applied in place of the standard A-to-A method. A determination that there exists a pattern of prices that differ significantly in no way indicates that dumping is being masked in a meaningful way. The results of the Cohen's *d* and ratio tests merely recognize that conditions may exist which could lead to the masking of dumping. Only when conditions exist that might lead to masked dumping, does the Department consider whether the varying pricing behavior of the respondent would render the A-to-A method not appropriate.<sup>31</sup>

If the Department has identified that the conditions exist where masked dumping may occur, then it examines whether that A-to-A method is an appropriate comparison method. As described in the Preliminary Results, the Department finds that the A-to-A method cannot appropriately account for the pricing behavior of the respondent when either

(1) there is a 25 percent relative change in the weighted-average dumping margin between the average-to-average method and the appropriate alternative method when both results are above the de minimis threshold, or (2) the resulting weighted-average dumping margin moves across the de minimis threshold.<sup>32</sup>

Only when the Department has found that conditions exists in which masked dumping may occur, and then separately finds that the A-to-A method cannot appropriately account for the varying pricing behavior of the respondent such that dumping is being masked, that the Department resorts to an alternative comparison method based on the A-to-T method.

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<sup>29</sup> See Xanthan Gum and the accompanying I&D Memo at Comment 3 (quoting from Coe, Robert, "It's The Effects Size, Stupid: What effect size is and why it is important," presented at the Annual Conference of British Educational Research Association (September 12-14, 2002)).

<sup>30</sup> Id. (footnote omitted and emphasis originally included).

<sup>31</sup> See 19 CFR 351.414(c).

<sup>32</sup> See Preliminary Results and the accompanying Decision Memorandum at 5.



For Jindal, based on the results of the differential pricing analysis, the Department finds that 70.74 percent of Jindal's U.S. sales pass the Cohen's *d* test and confirms the existence of a pattern of prices for comparable merchandise that differ significantly by purchaser, region or time period. Further, the Department determines that average-to-average method cannot appropriately account such differences because the resulting weighted-average dumping margins move across the de minimis threshold when calculated using the average-to-average method and an alternative method based on the average-to-transaction method applied to all U.S. sales. Accordingly, the Department has continued to use the average-to-transaction method for all U.S. sales to calculate the weighted-average margin of dumping for Jindal.

### ***Jindal's Arguments***

- The Department stated that interested parties may present arguments and justifications in relation to the differential pricing approach used in the Preliminary Results. Jindal argues that the decline in Jindal's prices over the POR is reflective of the decline in worldwide prices which required all sellers of PET film to reduce prices. Jindal's explanation of declining prices must be taken into account in assessing whether and how to apply the "differential pricing" test, because the reduction in prices was necessitated by worldwide oversupply. The Department must recognize that Jindal had justification for its pricing patterns and was not engaging in "differential pricing." Jindal should not be penalized with a finding of "differential pricing" and "zeroing" where it had no choice but to match prices in a declining market.
- If the Department does not accept Jindal's justification, then the Department should modify its application of the Cohen's *d* test. Jindal claims that the Department's Preliminary Results show that Jindal's total dumping duties owed, as well as its weighted-average dumping margin, are in fact negative. This, therefore, demonstrates that Jindal is not engaging in price discrimination and affirms that the only reason Jindal is assigned a positive margin is because the Department is relying on a flawed analysis and is biased toward zeroing.<sup>33</sup>
- Jindal asserts that "[b]ecause the denominator in the Cohen's *d* test says nothing about {the} relative magnitude" of the observed price differences, "tiny price differences can result in 'passing' Cohen's *d* values." Jindal provides a hypothetical example in which all U.S. prices and selling expense adjustments are identical. Then, Jindal applies the Cohen's *d* test and notes that the result is one where the Department would still have found differential pricing and applied its zeroing methodology. Further, Jindal notes that setting all prices and expenses to identical figures yields a "pass" percentage that is higher than the percentage that is derived when Jindal's actual prices and expenses are used; thus indicating that "Jindal is not 'differentially pricing' as the Department concludes, but rather its pricing is offsetting some of naturally occurring exchange rate fluctuations."<sup>34</sup>

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<sup>33</sup> See Jindal Case Brief at 5-8.

<sup>34</sup> Id. at 10.

- Jindal states that, if the Department continues to use the Cohen’s *d* test, then it should only consider the lower-priced sales as passing the test. Jindal states that the Cohen’s *d* test does not distinguish between weighted-average prices that are lower or higher than the mean, and that targeting “is not pricing that is bi-directional.”<sup>35</sup> Jindal continues that a “‘targeter’ does not capture additional sales by raising prices.”<sup>36</sup>
- Jindal further asserts that “including {higher prices passing sales} in the calculation of the percentage sales that are priced higher than the mean and standard deviation is tantamount to double counting those higher prices sales” as well as “including lower priced sales in the calculation double counts the lower priced sales.”<sup>37</sup> Jindal concludes that “to avoid inappropriately counting the higher priced sales twice when calculating the magnitude of the differential pricing, the only sales that should be considered are those that pass with a positive value {i.e., the lower priced sales}.”<sup>38</sup>
- Jindal further asks the rhetorical question “where is the pattern to be found when some sales making up the so-called pattern are higher priced and some sales are lower priced” with the conclusion that this “is the antithesis of a pattern.” Jindal claims that simply having higher priced sales and lower priced sales cannot constitute a pattern, but that only the lower priced sales, or alternatively, only the higher priced sales can constitute a pattern. Accordingly, the Department should only consider lower-priced sales or higher-priced sales as constituting a pattern for the final results, but not both.
- “If the Department uses the Cohen’s *d* test to find ‘differential pricing’ and ‘zeroes’ to prevent the average-to-average (A-to-A) method from masking targeted dumping, it should only zero only those sales with prices that are below the standard deviation.”<sup>39</sup> Only lower-priced sales can be construed as having been “targeted,” whose definition “presupposes sales with prices that are lower than some benchmark” whereas “sales that are priced higher than the benchmark are not targeted.”<sup>40</sup>
- By combining the results of the Cohen’s *d* test by purchaser, region or time period, the Department is mixing different pricing behaviors by these different categories, which is like comparing apples and oranges. Accordingly, for the final results, if the Department continues to use the Cohen’s *d* test, then it should modify the ratio test to limit the results used to determine the level of differential pricing to the highest category-specific percentage found.<sup>41</sup> If sales separately pass the Cohen’s *d* test above 33 percent or above 66 percent by category (i.e., purchaser, region, or time period), then and only then should an alternative comparison method be considered.

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<sup>35</sup> *Id.* at 10-11.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 12.

<sup>38</sup> *Id.* at 13.

<sup>39</sup> *Id.* at 14.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 15-16.

- “[T]he Cohen’s *d* test is ill-suited for determining differential pricing that might constitute targeting using time periods ... because, regardless of a seller’s intentions, prices, expenses, and exchange rates inevitably fluctuate over time.”<sup>42</sup> Therefore, the Department’s Cohen’s *d* test will almost invariably identify sales which pass the Cohen’s *d* test because of random fluctuations over time. Such fluctuations are outside of the control of the exporter. Therefore, Jindal asserts that the Cohen’s *d* test “is ill-suited to ferret out a real, meaningful pattern based on time periods.”
- Furthermore, the Department’s use of quarters to define time periods in the Cohen’s *d* test is an artificial construct. One can also define time periods by weeks or months. If months or weeks were used, the results of the Cohen’s *d* test would likely be different from what is found using quarters because of exchange rates fluctuations.
- Additionally, a sale occurring on the last day of one quarter may be compared to a sale on the first day of the next quarter. Although both sales may have the same price, because they are technically in “different” periods, the means, standard deviation and comparisons of the two quarters could lead to finding that the two sales are differentially priced.<sup>43</sup> Further, including sales that pass the test in the earlier and later quarters cannot be “differentially priced” because the later time period did not exist when the earlier sale was made, and the exporter could not have known its prices, expenses or exchange rates for a future period. Therefore, even if quarters are used, sales that pass in an earlier quarter should not be included when compared to sales in a later quarter.<sup>44</sup>
- If the Cohen’s *d* test is used to determine differential pricing, the focus must be on “pricing,” i.e., on what the purchaser actually pays, not expenses paid by the exporter. Thus, the Department must eliminate from the Net Price, expenses paid by Jindal and use only the actual price paid by the purchasers.<sup>45</sup> Because Jindal is the importer of record and paid all the expenses, it is inappropriate to deduct those expenses from the price that the purchaser did not pay.
- Jindal claims that the Department’s “differential pricing” analysis is flawed and simply represents a repackaging of “targeting” as provided in the SAA.<sup>46</sup> Jindal argues that the SAA establishes that

“Targeting” is, obviously, an action directed at a specific, limited goal, such as a particular group of customers. “Targeted dumping,” therefore, is the action of selling at lower prices to limited and identifiable category of entities within the whole population. Sales to particular customer or regions with prices that are at or above the “norm” are not “targeted.”<sup>47</sup>

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<sup>42</sup> *Id.* at 18.

<sup>43</sup> *Id.* at 19.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 20-21.

<sup>46</sup> *Id.* at 23-24 (citing SAA at 842-843).

<sup>47</sup> *Id.*

- Jindal asserts that the Cohen’s *d* test is not a measure that identifies causal links or statistical significance. Rather, Cohen’s *d* is used to measure the size of a difference between the means of two groups relative to the population’s standard deviation. The convention of “small” or “large” adopted by the Department is simply relative to the pooled standard deviation of the test and comparison groups and, as such, does not “capture meaningful pricing differentials in antidumping cases.”<sup>48</sup>
- Since the Department introduced its differential pricing analysis, it has been applied to over 125 cases. Of those cases, the Department found (1) that sales were “targeted” or “differentially priced” in all but six instances; and, in one instance, finding differential pricing for 100 percent of the sales; (2) “de minimis” amounts of differential pricing in very few instances; and (3) no targeting at all in six cases. Given how rarely targeting was found before the introduction of differential pricing, the fact that new analysis “now finds targeting so often should be viewed as suspect on its face,” and not because exporters are “targeting” more than before.<sup>49</sup> Such results demonstrate the current approach is biased towards finding “targeting” and, therefore, not the appropriate test to assess “targeting.”
- U.S. law dictates that, prior to applying the A-to-T method, the Department must explain why the use of the standard A-to-A method cannot account for the pricing differences. Simply comparing the weighted-average dumping margins calculated using the A-to-A method and an alternative comparison method “is a results-oriented tautology that cannot be what the framers of the targeting provision intended.”<sup>50</sup> Jindal points to Beijing Tianhai,<sup>51</sup> where the Court said

{I}f no explanation other than the bare-bones invocation of the differing measures of the A-to-A and A-to-T methodologies would suffice to satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(ii), as defendant {the United States} ... would have it, that statutory provision would be superfluous.

Here, the Department has supplied a conclusion not an explanation.<sup>52</sup>

- Jindal asserts that the A-to-A method was “blessed” because it prevented “noise” which might create dumping margins. Jindal cites to Live Swine from Canada,<sup>53</sup> quoting that “the use of annual weighted averages tends to depress the overall margin of dumping {but that} the Department does not treat this depressive effect as a ‘distortion’ to be corrected in the weighted average dumping margin.”<sup>54</sup>

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<sup>48</sup> Id. at 25.

<sup>49</sup> Id. at 25-26.

<sup>50</sup> Id. at 26.

<sup>51</sup> Beijing Tianhai Indus. Co. v United States, 7 F. Supp. 3d 1318, 1332 (Ct. Int’l Trade 2014).

<sup>52</sup> See Jindal’s Case Brief at 27, quoting Beijing Tianhai.

<sup>53</sup> See Notice of Final Determination of Sales at Less than Fair Value: Live Swine from Canada, 70 FR 12181 (March 11, 2005) (Live Swine from Canada).

<sup>54</sup> Id., and accompanying Issues and Decision Memorandum at Comment 5.

- Jindal further asserts that before the A-to-A method can be discarded, the Department must show why it cannot use some other form of A-to-A calculation in order to account for the price differences found by the Cohen's *d* test. Options include adjusting the averaging groups; finding that the price differentials are not large or systematic; or finding alternative explanations for price differentials.
- Jindal also asserts that the Department cannot use the A-to-T method with zeroing as the basis on which to determine whether the A-to-A method is appropriate because the A-to-T method with zeroing has been "discredited and finally banned by the WTO precisely because it was found to create inflated dumping margins."<sup>55</sup>

Therefore, because the Department does not provide an adequate explanation of why the A-to-A method cannot account for the observed pattern of prices that differ significantly, it fails to meet the statutory prerequisite for considering the A-to-T method. In view of the Court's ruling in Beijing Tianhai and other points raised by Jindal, the Department should discontinue its current methodology. Accordingly, the Department should calculate Jindal's weighted-average dumping margin using the A-to-A method.

### **Department's Position:**

The Department disagrees with Jindal's assertion that the Department must consider reasons why an observed pattern of prices that differ significantly is evidenced in the respondent's U.S. pricing behavior. There is no requirement, even in an investigation under section 777A(d)(1)(B)(i) of the Act, that the Department divine either the intent of the exporter or some other causal link that might explain the observed pattern of prices that differ significantly. Congress did not speak to the intent of the producer or exporter in setting export prices that exhibit a pattern of significant price differences. Nor is an intent-based analysis consistent with the purpose of the statutory provision which, as noted above, is to determine whether A-to-A is a meaningful tool to measure whether, and if so, to what extent, dumping is occurring. Consistent with the statute and the SAA, we determined whether a pattern of significant price differences exists. Neither the statute nor the SAA requires us to conduct an additional analysis to account for potential reasons for the observed pattern of prices that differ significantly, and the CIT has sustained this interpretation, albeit in the context of cases employing the Nails test.<sup>56</sup> As described above, the first statutory requirement only identifies whether conditions are present (i.e., a varying pricing behavior by the exporter) which would permit masked, or targeted dumping to be meaningful such that the A-to-A method would not be appropriate to gauge an exporter's possible dumping in the U.S. market. Simply because the Department has identified a pattern of prices that differ significantly does not automatically result in the application of an

<sup>55</sup> See Jindal's Case Brief at 29.

<sup>56</sup> See Apex at 21-23 (rejecting notion that Department must consider seasonality of shrimp industry in its targeting analysis); JB F RAK, 991 F. Supp. 2d at 1355 (the statute "does not require Commerce to investigate the various reasons why a particular respondent's U.S. sales demonstrate a pattern of targeted dumping"); Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States, 990 F. Supp. 2d 1384, 1389 (Ct. Int'l Trade 2014) ("Contrary to Borusan's claim that targeted dumping connotes purposeful behavior, the language of the statute simply instructs Commerce to consider export sales price (or constructed export sales price) in its targeted dumping analysis . . . It does not require Commerce to undertake an investigation of the various reasons why a pattern of targeted dumping exists within a given time period. The SAA does not manifest such a requirement either").

alternative comparison method. The differential pricing analysis, as described above, also requires that not only must the conditions exist where masked dumping may be present, but also where the A-to-A method would not be appropriate because dumping is being masked by the A-to-A method.

The Department disagrees with Jindal that the weighted-average dumping margin calculated using the A-to-T method in the Preliminary Results should be “negative.” As shown in the printout included in Exhibit 2 of Jindal’s Case Brief, the “Total Amount of Dumping,” and thus the weighted-average dumping margin, is not negative because the A-to-T method does not provide offsets for non-dumped sales. Further, if one compared the sum of the “total positive comparison results” and “total negative comparison results” (*i.e.*, Jindal’s “negative” “total dumping duties owed”) using the A-to-T method and the A-to-A method<sup>57</sup> these values are identical. Accordingly, the denial of offsets for non-dumped sales (*i.e.*, zeroing) as a part of the A-to-T method are required in order to provide meaning to section 777A(d)(1)(B) of the Act. Furthermore, the Federal Circuit has affirmed that denial of offsets for non-dumped sales is an integral part of the A-to-T method.<sup>58</sup>

The Department disagrees with Jindal that the differential pricing analysis does not take into account the relative magnitude of the observed price differences. The Cohen’s *d* coefficient measures the difference in the weighted-average prices between the test group and the comparison group relative to the distribution of prices within each group (*i.e.*, the variance or standard deviation). As a result, if prices within the test and comparison groups differ by only small amounts (such as in Jindal’s hypothetical example where the only difference is based on the differences in variable exchange rates applied to the freight expense denominated in rupees), then the variance within each group is small and there only needs to be a proportionally small difference in the weighted-average prices between the test group and the comparison group to identify a significant difference. Likewise, if there would be a wide dispersion of prices within either the test group or the comparison group, then a difference between the weighted-average prices between the test group and the comparison group would have to be correspondingly larger for the Cohen’s *d* test to identify this difference to be significant. The Department finds that this is a reasonable approach to examine whether U.S. prices between different purchasers, regions or time periods differ significantly – *i.e.*, whether conditions exist where dumping may be masked.

Whether these prices that differ significantly are meaningful, or whether the conditions identified as a pattern of prices that differ significantly are concealing dumping to a meaningful extent, is examined when the Department considers whether the A-to-A method can account for the varying pricing behavior exhibited by the respondent. This additional step is necessary because examining whether the conditions exist for the potential for masked dumping only considers differing U.S. prices and does not consider these prices relative to their corresponding normal value. Whether the significantly different U.S. prices is considered when the dumping margins are compared between the A-to-A method and the A-to-T method. Once the conditions exist which may mask dumping (*i.e.*, when there are significant price differences between different purchasers, regions and time periods), the following situations may arise:

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<sup>57</sup> See Jindal Final Results Calculation Memorandum, Attachment 2.

<sup>58</sup> *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013).

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

Under situations (1) and (2), either there is either no dumping or all U.S. sales are dumped such that there is no difference between the A-to-A method with offsets and the A-to-T method with zeroing – i.e., there is no meaningful difference as described above and in the Preliminary Decision Memorandum. Under situation (3), there is a minimal (i.e., de minimis) amount of dumping, such that the A-to-A method and the A-to-T method result in either a zero or de minimis weighted-average dumping margins which does not constitute a meaningful difference. Under situation (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., less than a 25% relative change or change from de minimis to non- de minimis) calculated using offsets or zeroing. Lastly, under situation (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.

Only under situations (3), (4) and (5) are the granting or denial of offsets relevant to whether dumping is being masked to an extent that the A-to-A method is not an appropriate comparison method. 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 does account for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under situation (5) will the Department find that the A-to-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.

The Department disagrees with Jindal that the Department should not consider that higher-priced sales can contribute to a pattern of prices that differ significantly. As an initial matter, we note that Jindal’s arguments have no grounding in the language of the statute. There is nothing in the statute that mandates how we measure whether there is a pattern of export prices that differs significantly. As explained in the Preliminary Results<sup>59</sup> and below, the differential pricing analysis used in this administrative review is reasonable, and the use of Cohen’s *d* test as a component in this analysis is consistent with the purpose of the statutory provision concerning the application of an alternative comparison method.

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<sup>59</sup> See Preliminary Results and accompanying Decision Memorandum at 3-5.

Further, the Department disagrees with Jindal's interpretation of the SAA. Indeed, Jindal quotes from the SAA:

In part the reluctance to use an average-to-average methodology had been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.<sup>60</sup>

However, Jindal only refers to "targeted dumping" as a situation where "an exporter may sell at a dumped price to particular customers or regions" while ignoring the second part of that sentence "while selling at higher prices to other customers or regions." Clearly the SAA recognizes that the concerns of the Department change in practice to using the A-to-A method and the potential for masked dumping (i.e., concealed targeted dumping) involves not only lower-priced (i.e., dumped) sales but also the higher priced sales which may be concealing the dumping of these lower priced sales.

Contrary to Jindal's claim, the statute does not require that the Department consider only lower-priced sales when considering whether an alternative comparison method is appropriate. It is reasonable for the Department to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. Contrary to Jindal's claim, it is reasonable for the Department to consider both lower-priced and higher-priced sales in the Cohen's *d* analysis because higher-priced sales are equally capable as lower-priced sales to create a pattern of prices that differ significantly. Further, when greater than their normal value, higher-priced sales will offset lower-priced sales when using the A-to-A method, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, which can mask dumping. The statute states that the Department may apply the A-to-T method if "there is a *pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time,*" and the Department "explains why *such differences* cannot be taken into account" using the A-to-A comparison method.<sup>61</sup> The statute directs the Department to consider whether there exists a pattern of prices that differ significantly. The statutory language references prices that "differ" and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that the Department consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department explained that higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.<sup>62</sup> Higher- or lower-priced sales could be dumped or could be masking other dumped sales. However, the relationship between higher or lower U.S. prices and their comparable normal values is not relevant in the Cohen's *d* test and in answering the question of whether there is a pattern of prices that differ significantly because this analysis includes no comparisons with normal values and section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons. By

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<sup>60</sup> See Jindal's Case Brief at 23, quoting from the SAA at 842 (emphasis added by Jindal).

<sup>61</sup> See section 777A(d)(1)(B) of the Act (emphasis added).

<sup>62</sup> See Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 58273 (September 23, 2013) and accompanying Issues and Decision Memorandum at Comment 5.



considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter's pricing to identify whether there is a pattern of prices that differ significantly.

In addition, the Department disagrees with Jindal's hypothesis that a pattern of prices that differ significantly must involve "targeting," thus implying that there must exist a reason behind the exporters pricing behavior, *i.e.*, a "'targeter' does not capture additional sales by raising prices"<sup>63</sup> and that targeted pricing behavior is not "bi-directional."<sup>64</sup> The statute does not include a requirement that the Department must account for some kind of causality or intent on the part of the respondent for any observed pattern of prices that differ significantly, such as increasing market share, changes in raw material costs, prices of natural gas, or fluctuations in exchange rates. Congress did not speak to the intent of the producers or exporters in setting export prices that exhibit a pattern of significant price differences. Nor is an intent-based analysis consistent with the purpose of the provision, as noted above, which is to determine whether averaging is a meaningful tool to measure whether, and if so, to what extent, dumping is occurring. Consistent with the statute and the SAA, the Department determined whether a pattern of significant price differences exists. Neither the statute nor the SAA requires the Department to conduct an additional analysis to account for potential reasons for the observed pattern of prices that differ significantly.

The Department also disagrees with Jindal's assertion that it has "double-counted" its higher-priced sales by including these sales in both a test group and as part of the comparison group when not being tested in the Cohen's *d* test. As stated in the Preliminary Results, the purpose of the Cohen's *d* test is "to evaluate the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise."<sup>65</sup> Simply because certain sale prices are part of a test group in one instance and part of a comparison group in other instances does not constitute double counting. In the Cohen's *d* test, lower-priced sales are also included in both a test group and as part of the comparison group when not being tested. The Department's dumping analysis includes all information and data on the record of this administrative review, and the Department finds that selectively including or excluding certain sales is not supported by the statute.

Further, the Department disagrees with Jindal that it must identify an unspecified "discernable pattern" in order to find that there exists a pattern of prices that differ significantly. As discussed above, section 777A(d)(1)(B)(i) of the Act provides that there be "a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions or periods of time." The statute does not direct the Department how this should be accomplished and left this to the Department's discretion. The statute states that a pattern of prices that *differs significantly*, which the Department has reasonably done in its application of the Cohen's *d* and ratio tests in this administrative review.

The Department disagrees with Jindal's argument that offsets for non-dumped sales should only be denied for lower-priced sales. As discussed above, the Department reasonably considers both

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<sup>63</sup> See Jindal's Case Brief at 11.

<sup>64</sup> *Id.*

<sup>65</sup> See Preliminary Results, and accompanying Decision Memorandum at 4.

higher-priced sales as well as lower-priced sales as potentially creating a pattern of prices that differ significantly. Accordingly, if the Department were to find such a pattern, then it would be appropriate to apply the A-to-T method to a portion of U.S. sales, or to all U.S. sales, based upon the results of the Cohen's *d* and ratio tests. As affirmed by the Federal Circuit, the denial of offsets for non-dumped sales is consistent with the comparison of weighted-average normal values with individual U.S. prices and the aggregation of these comparison results to derive the weighted-average dumping margin.

The Department disagrees with Jindal that it must consider the results of the Cohen's *d* and ratio tests by purchaser, region and time period independently of one another. The Department considered all information of the record of this review in its analysis and drew reasonable inferences as to what the data show. Second, Jindal's arguments appear to be focused on the concept of targeting alone, rather than on whether there is a pattern of prices that differ significantly among purchasers, regions or periods of time such that use of the A-to-A method does not provide a meaningful measure of dumping. Moreover, under the Cohen's *d* test and ratio tests, the Department considers the pricing of the producer or exporter in the U.S. market as a whole. The Department does not find the results of the Cohen's *d* test by purchaser, region or time period to be analogous to a comparison of "apples and oranges" but rather to be different aspects of a single pricing behavior of the producer or exporter. This analysis, based on the Cohen's *d* and ratio tests, informs the Department as to whether there exists a pattern of prices that differ significantly for the producer or exporter as a whole. Likewise, the results of the differential pricing analysis, including both criteria provided in the statute, will determine whether the A-to-A method is the appropriate comparison method with which the Department calculates a single weighted-average dumping margin for the producer or exporter.

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

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

that differ significantly must be considered in the Department's analysis. As discussed above, no such requirement is provided for in the statute.

With respect to Jindal's contention that sales that pass in an earlier quarter should not be included when compared to sales in a later quarter, we disagree. The same argument could be made when examining whether U.S. prices between purchasers or regions when such sales can also be segregated by differences in the timing of sales between different purchasers or regions. The statute provides simply for examining whether there exists a pattern of prices that differ significantly among purchasers, regions or time periods, and places no other conditions on the timing of such sales.

The Department also disagrees with Jindal's argument that it has "artificially" constructed the time based analysis on quarters while ignoring time periods by weeks or months. In describing the differential pricing analysis in the Preliminary Decision Memorandum, the Department stated that time periods will be based on the quarters during the POR. Furthermore, the Department states

Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in these preliminary results, including arguments for modifying the group definitions used in this proceeding.<sup>66</sup>

Thus, even though the Department's approach with the differential pricing analysis starts with defining time periods using the quarters during the POR, all parties are invited to provide arguments for an alternative basis for time periods. Jindal has provided no such information or argument to consider an alternative definition of time period besides the default definition of quarters during the POR.

The Department disagrees with Jindal's argument that the prices used in the Cohen's *d* test should not include expenses incurred by the exporter and not the customer. The purpose of the differential pricing analysis is to determine whether the A-to-A method is appropriate to determine the amount of dumping exhibited by the respondent's pricing behavior. The relevant values that are the basis for this analysis are the net prices (*i.e.*, the consideration) due to the exporter. It is the pricing behavior of the exporter that is under examination, not the purchasing behavior of the customer. The pricing behavior of the exporter is reflective of the costs incurred by the exporter, whether it is to acquire and process the subject merchandise or to sell and transport the subject merchandise to the customer. Accordingly, the net prices used in both the Cohen's *d* test as well as the calculation of individual dumping margins reasonably include not only the discounts and rebates offered to the customer, which are costs to the exporter, but also other costs to the exporter that are incurred with other parties (*e.g.*, with a provider of transportation services). Accordingly, Jindal's argument to making a distinction between whether an exporter's costs are incurred with the customer as opposed to other parties is unpersuasive.

To the extent that Jindal insists that the Department's analysis demonstrate causal links and statistical significance, the Department disagrees. There is no language in the statute that

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<sup>66</sup> See Preliminary Results, and accompanying Decision Memorandum at 5.

requires the Department to engage in the kind of analysis Jindal insists upon. If Congress had intended to require that a particular result demonstrate a certain causal link, or be obtained with a certain statistical significance for the price differences that mask dumping as a condition for applying an alternative comparison method, then Congress presumably would use language more precise than “differ significantly.” We do not interpret the term “significantly” in the statute to mean “statistically significant,” or that a causal link must be identified between prices that differ significantly and the intentions or motivations of the producer or exporter. The statute includes no such directive. The analysis employed by the Department, including the use of the Cohen’s *d* and ratio tests, reasonably informs the Department whether there exists a pattern of prices that “differ significantly.”

The Cohen’s *d* test “is a generally recognized *statistical measure* of the extent of the difference between the mean of a test group and the mean of a comparison group.”<sup>67</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. As such, the means and variances calculated for these two groups include no sampling error. Statistical significance is used to evaluate whether the results of an analysis rises above sampling error (*i.e.*, noise) present in the analysis. The Department’s application of the Cohen’s *d* test is based on the mean and variance calculated using the entire population of the respondent’s sales in the U.S. market, and, therefore, these values contain no sampling error. Accordingly, statistical significance is not a relevant consideration in this context.

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

Jindal next contends that the Department’s differential pricing analysis is suspect on its face because the Department now appears to find “differential pricing” more often than it found “targeted dumping” under the previous methodology. Jindal’s analysis is flawed on its face, and its argument provides no reasoned basis for the Department to change its approach. First, the

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<sup>67</sup> See Preliminary Results, and accompanying Decision Memorandum at 4 (emphasis added).

SAA expressly provides that “the Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.”<sup>68</sup> This is precisely what the Department’s differential pricing analysis does through the application of the Cohen’s *d* and ratio tests, as explained fully in the Preliminary Results. Second, Jindal identifies no prior determination where the Department applied its differential pricing analysis and where that determination should have been decided differently, nor upon what basis the Department should have done so. Last, Jindal’s analysis of prior determinations fails to take account of the fact that in the application of the previous methodology, the Department only engaged in such an analysis when it received a valid, substantiated allegation of targeted dumping. Based upon the Department’s experience in this area, the Department decided to consider an alternative comparison method in every segment of a proceeding under its current methodology. To compare the results of the two approaches, as Jindal has in its case brief, fails to provide an accurate reflection of the Department’s differential pricing analysis.

The Department disagrees with Jindal that it has failed to explain why the A-to-A method cannot account for Jindal’s varying pricing behavior. As explained in the Preliminary Results, if the difference in the weighted-average dumping margins calculated using the A-to-A method and an appropriate alternative comparison method is meaningful, then this demonstrates that the A-to-A method cannot account for such differences and, therefore, an alternative method would be appropriate.<sup>69</sup> The Department determined that a difference in the weighted-average dumping margins is considered meaningful if: 1) there is a 25 percent relative change in the weighted-average dumping margin between the A-to-A method and the appropriate alternative method when both margins are above de minimis; or 2) the resulting weighted-average dumping margin moves across the de minimis threshold. Here, such a meaningful difference exists for Jindal because when comparing Jindal’s weight-averaged dumping margin calculated pursuant to the A-to-A method and an alternative comparison method based on applying the A-to-T method to all U.S. sales, Jindal’s weighted-average dumping margin moves across the de minimis threshold. This threshold is reasonable because comparing the weighted-average dumping margins calculated using the two comparison methods allows the Department to quantify the extent to which the A-to-A method cannot take into account different pricing behaviors exhibited by the exporter in the U.S. market. Therefore, for these final results, the Department continues to find that the A-to-A method cannot take into account the observed differences, and to apply the A-to-T method for all U.S. sales to calculate Jindal’s weighted-average dumping margin.

Further, we disagree with Jindal’s reliance on Beijing Tianhai. In that underlying LTFV investigation, the Department did not explain why the A-to-A method could not account for such differences:

the Department finds that the pattern of price differences identified cannot be taken into account using the standard A-to-A method because the A-to-A method conceals differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Thus, the Department finds, pursuant to section 777A(d)(1)(B) of the Act, that application

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<sup>68</sup> See SAA at 843.

<sup>69</sup> See Preliminary Results, and accompanying Decision Memorandum at 5.

of the standard A-to-A method would result in the masking of dumping that is unmasked by application of the alternative A-to-T method when calculating BTIC 's weighted-average dumping margin.<sup>70</sup>

Accordingly, the Court remanded the question to the Department for an explanation, which it has provided. However, in this review, the Department has already provided an explanation why the A-to-A method cannot account for such differences:

Further, the Department preliminarily determines that the average-to-average method cannot appropriately account for such differences because there is a meaningful difference between the weighted-average dumping margin calculated using the average-to-average method and when using the alternative method, i.e., the resulting weighted-average dumping margin using the average-to-transaction method moves across the de minimis threshold as compared to the average-to-average method.<sup>71</sup>

Therefore, the deficiency found by the Court in Beijing Tianhai has already been addressed in the Preliminary Results of this review, and Jindal's argument is misplaced.

Additionally, in Apex Frozen Foods Private Ltd., the CIT ruled that the Department's comparison and explanation of the A-to-A and A-to-T rates sufficed to carry Commerce's burden under section 1677f-1(d)(1)(B)(ii).<sup>72</sup> Thus, similarly in the instant review, the Department has provided sufficient explanation as to why the A-to-A method cannot account for such pricing differences.

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
<sup>70</sup> See High Pressure Steel Cylinders From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 26739 (May 7, 2012), and accompanying Issues and Decision Memorandum at Comment IV.

<sup>71</sup> See Preliminary Results, and accompanying Decision Memorandum at 5.

<sup>72</sup> See Apex, Slip Op. 14-138, at 21.

### **Recommendation**

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

  
\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

  
\_\_\_\_\_  
Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

23 February 2015  
(Date)