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Administrative Review
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September 2, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman 
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

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

Summary

We analyzed the case and rebuttal briefs of interested parties in the 2013-2014 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from India. As a result of our analysis, we have not made changes to the Preliminary Results.¹ We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of issues in this administrative review for which we received comments from the interested parties:

Background

On March 6, 2015, the Department of Commerce (the Department) published the preliminary results of the 2013-2014 administrative review of the antidumping duty order on shrimp from India.² This review covers 211 producers/exporters. The respondents which the Department selected for individual examination are Devi Fisheries Limited (Devi Fisheries) and Falcon Marine Exports Limited and its affiliate K.R. Enterprises (collectively, Falcon). The period of review (POR) is February 1, 2013, through January 31, 2014.

We invited parties to comment on the Preliminary Results. We received case and rebuttal briefs from the American Shrimp Processors Association (ASPA) and 12 producers/exporters of

¹ See Certain Frozen Warmwater Shrimp From India; Preliminary Results of Antidumping Duty Administrative Review; 2013-2014, 80 FR 12147 (March 6, 2015) (Preliminary Results).

² Id.



shrimp (hereinafter, the respondents) on April 15 and April 20, 2015, respectively.³ Also on April 20, 2015, we received a rebuttal brief from the Ad Hoc Shrimp Trade Action Committee (the petitioner). After analyzing the comments received, we have not changed the weighted-average margins from those presented in the preliminary results.

Scope of the Order

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

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

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

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

³ These companies are: Devi Fisheries; Falcon; Ananda Group; Apex Frozen Foods Private Limited; Avanti Feeds Limited; Jayalakshmi Sea Foods Private Limited; Liberty Group; Nekkanti Sea Foods Limited; Nila Sea Foods Exports; Nila Sea Foods Private Limited; Sandhya Aqua Exports Private Limited; and Sandhya Marines Limited.

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

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

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

Discussion of the Issues

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

In the Preliminary Results, the Department applied a “differential pricing” analysis to determine whether to make average-to-average (A-to-A) or average-to-transaction (A-to-T) comparisons in its calculation of dumping margins. Our analysis showed that more than 66 percent of Devi Fisheries’ and Falcon’s U.S. sales passed the Cohen’s *d* test, which confirmed the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods for both respondents. We further determined that the A-to-A method could not appropriately account for such differences because the difference in the weighted-average margins computed using the A-to-A and the A-to-T methods was meaningful. Accordingly, we used the A-to-T method for all of Devi Fisheries’ and Falcon’s U.S. sales to calculate the respondents’ weighted-average dumping margins.

The respondents argue that the Department’s use of the “differential pricing” analysis to determine the existence of targeted dumping in the instant review is unlawful. Specifically, the respondents contend that section 777A(d)(1)(A) of the Tariff Act of 1930, as amended (the Act), the statutory provision governing the selection of the appropriate comparison method, pertains only to investigations. The respondents argue that, because the plain language of the Act is unambiguous, the Department cannot justify applying the so-called “targeted dumping” provision in administrative reviews on the grounds that the Act does not preclude its actions. According to the respondents, had Congress intended to authorize the Department to apply the

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

targeted dumping provision in administrative reviews, it would not have limited this provision in the Act to investigations.⁶ However, the respondents argue that the Act’s failure to provide a parallel provision for administrative reviews was intentional, given that, when the “targeted dumping” provision (*i.e.*, section 777A(d)(1)(B) of the Act) was written, the Department used the A-to-A method⁷ only in investigations. The respondents argue that, as a result, the development of a “targeted dumping” provision for administrative reviews was unnecessary.

The respondents also note that, under section 777(A)(d)(2) of the Act, the Department limited its averaging in administrative reviews to calendar months. Therefore, according to the respondents, Congress implicitly recognized that the Department has the tools it need to combat “masked” dumping in administrative reviews using the A-to-T method and monthly averaging periods.⁸

ASPA and the petitioner (collectively, the domestic industry) maintain that the Department has the authority to consider an alternative comparison method in administrative reviews,⁹ as the Court of International Trade (CIT) has affirmed.¹⁰ Furthermore, they assert that the Department’s interpretation of the Act is consistent with legislative intent. Specifically, the petitioner notes that, contrary to the respondents’ assertion, the SAA in fact shows that Congress considered the possibility of targeted dumping in administrative reviews; according to the petitioner, Congress made the A-to-T method the preferred comparison method in reviews because of its stated concern that the A-to-A method could conceal targeted, or masked, dumping.¹¹ Further, while the petitioner agrees that, at the time the URAA was enacted, the Department’s use of the A-to-T method obviated the need for the Act to address masked dumping in administrative reviews, it contends that such a need now exists. Indeed, the petitioner notes that the Court of Appeals for the Federal Circuit (CAFC) has rejected methodologies which “completely eviscerate” the statutory requirement for administrative reviews and frustrate the Congressional preference for use of the A-to-T method in

⁶ The respondents note that the courts have upheld the concept of Congressional intent in situations where Congress has included particular language in one section of a statute but excluded it from another, citing Bates v. United States, 522 U.S. 23 (1997) (Bates), at 29-30. Further, the respondents assert that administrative agencies, such as the Department, are limited to the exercise of powers delegated to them by Congress. See Civil Aeronautics Bd. v. Delta Air Lines, 36 U.S. 316, 322 (1961); and FAG Italia S.p.A. v. United States, 291 F.3d 806, 816 (Fed. Cir. 2002).

⁷ The respondents cite the Statement of Administrative Action (SAA) as support for their argument that the Department’s A-to-A method was the source of Congressional concern over masked dumping. See the SAA accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, vol. 1 (1994) at 842-843.

⁸ Id., at 843.

⁹ ASPA points out that the Department has addressed and rejected this argument in a previous review of this order. See Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination; 2011-2012, 78 FR 42492 (July 16, 2013), and accompanying Issues and Decision Memorandum at Comment 1 (Shrimp from India 2011-2012).

¹⁰ See CP Kelco Oy v. United States, 978 F. Supp. 2d 1315, 1321-1324 (CIT 2014) (Kelco); Apex Frozen Foods Private Ltd. v. United States, 37 F. Supp. 3d 1286 (CIT 2014) (Apex); and Timken Co. v. United States, 968 F. Supp. 2d 1279, 1286-1287 n.7 (CIT 2014) (Timken).

¹¹ See SAA at 842.

administrative reviews.¹² Thus, the petitioner maintains that the Department is precluded from adopting a comparison method in administrative reviews that fails to account for masked dumping.

Department's Position:

We disagree with the respondents' claim that the Department does not have the statutory authority to employ an alternative comparison method in administrative reviews. The CAFC recently rejected this exact argument and held in JBF RAK that the Department has the authority to apply the alternative A-to-T comparison method in administrative reviews.¹³ Specifically, the CAFC held that the statute does not "mandate which comparison methods Commerce must use in administrative reviews."¹⁴ The respondents argue that the lack of a statutory "exception" for administrative reviews prohibits the Department from using the A-to-T method; but, in fact, the only method the statute references with respect to administrative reviews is the A-to-T method, the precise method that respondents argue the statute prohibits. The provision states that "when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale."¹⁵

In JBF RAK, the CAFC held that the Department "exercised its gap-filling discretion" by applying the A-to-T method in administrative reviews, using a method similar to the one it applies in investigations and that this decision was "reasonable."¹⁶ The CAFC also held that the SAA "does not limit the proceedings in which Commerce may consider an alternative comparison method" when an A-to-A comparison "cannot account for a pattern of United States prices that differ significantly among purchasers, regions or time periods" in an administrative review.¹⁷ In multiple decisions, the CIT has also affirmed the Department's legal interpretation that it may apply the A-to-T method in administrative reviews.¹⁸

As the Federal Circuit recognized in JBF RAK, the statutory provisions at issue in this case are silent with respect to the comparison method the Department may employ in administrative reviews should it determine that a pattern of United States prices differ significantly among purchasers, regions, or time periods. Because Congress did not specify the comparison method for administrative reviews, the Department has great discretion in selecting the appropriate comparison method in administrative reviews. Therefore, the Department finds it has the

¹² See Floral Trade Council v. United States, 74 F. 3d 1200, 1204 (Fed. Cir. 1996).

¹³ See JBF RAK LLC v. United States, 790 F. 3d 1358 (Fed. Cir. 2015).

¹⁴ See JBF RAK, 790 F. 3d at 1368.

¹⁵ See Section 777A(d)(2) of the Act (emphasis added).

¹⁶ See JBF RAK, 790 F. 3d at 1364.

¹⁷ Id., at 1364-65.

¹⁸ See, e.g., Apex, 37 F. Supp. 3d at 1293; and Timken, 968 F. Supp. 2d at 1286-87 n.7.

authority to consider the application of the A-to-T method as an alternative comparison methodology in administrative reviews, which the CAFC and the CIT have affirmed.¹⁹

Regarding the respondents' argument that the use of the monthly A-to-A method in administrative reviews obviates the need to apply the A-to-T method, we disagree. There is no support in the statute or regulations for such a claim. As the CIT in Apex held: "By comparing Apex's A-A and A-T rates, Commerce already showed that A-A with monthly averages could not account for targeted dumping."²⁰ The fact that there is a "disparity between" rates calculated using the A-to-A method, calculated on a monthly average with offsets, and rates calculated using A-to-T, a "method that has neither average export prices nor offsets negative margins," demonstrates "that A-to-A with monthly averaging" accounts "for none of the dumping" caused by "targeting."²¹

Finally, in general, the CAFC in Union Steel addressed masked dumping, stating, "...when it comes to setting the final rates to be used for actual assessment, *i.e.*, the review rates, it is reasonable for the agency to look for more accuracy, which it achieves in some measure through monthly averaging, and also for the agency to look for the full measure of duties resulting therefrom, which it better achieves through zeroing."²² In other words, the CAFC held that the Department is better able to unmask dumping through the use of the A-to-T method with zeroing.

The Department's differential pricing analysis identified a pattern of prices that differ significantly not only by time period, but also by region and purchaser. Thus, even if the use of monthly averaging periods addressed potential implicit masking of dumping by time within period-wide averaging groups (albeit insufficiently as there may still be implicit masking of dumping within the monthly averaging groups), it does nothing to unmask dumping by purchaser or region, as provided for under section 777A(d)(1)(B) of the Act. As a result, we find that the mere usage of monthly weighted-average normal values and U.S. prices is insufficient to unmask the full amount of the respondents' dumping in either an investigation or an administrative review as provided for by the statute.

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

The Department withdrew its regulatory provision on targeted dumping in 2008;²³ however, in 2013, the CIT in Gold East²⁴ held that this withdrawal was invalid because the Department failed

¹⁹ See JBK RAK, 790 F. 3d 1358; Apex, 37 F. Supp. 3d at 1300; DuPont Teijin Films China Ltd. v. United States, 7 F. Supp. 3d 1338, 1355-56 (CIT 2014); and Kelco, 978 F. Supp. 2d at 1321-24.

²⁰ See Apex, 37 F. Supp.3d at 1300.

²¹ Id.

²² See Union Steel v. United States, 713 F.3d 1101, 1108 (Fed. Cir. 2013) (Union Steel) (citing Union Steel v. United States, 823 F. Supp. 2d 1346, 1359 (CIT 2012)).

²³ See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (December 10, 2008) (2008 Withdrawal).

to provide a notice and comment period as required by the Administrative Procedures Act (APA). In light of these facts, the respondents contend that the targeted dumping regulations remain in effect, and, if the Department continues to find that it has the authority to conduct a “targeted dumping” analysis in this administrative review, it must do so pursuant to its targeted dumping regulations at 19 CFR 351.414(f). The respondents contend that, consistent with 19 CFR 351.414(f)(2) (1997), the Department must first receive an allegation of targeted dumping and then limit its application of the A-to-T method only to those sales found to be targeted.²⁵

The respondents point out that, while the targeted dumping regulations are limited to investigations, the Department consistently relies on its targeted dumping policies for investigations in administrative reviews. According to the respondents, the Department claims that its authority to use a differential pricing analysis in this administrative review is based on its authority to do so in investigations. The respondents note that the Department has explained that it examines the same criteria in administrative reviews as it does in investigations.²⁶ Thus, the respondents contend that, because the Department itself has made its targeted dumping regulations and policies relevant in administrative reviews, it must either comply with them or explain why it is reasonable not to do so here.

The respondents claim that the Department itself has recognized that it is unduly punitive to apply the A-to-T method to all transactions, including sales it has not found to be targeted.²⁷ According to the respondents, the Preamble allows the Department to apply the A-to-T method to sales beyond those found to be targeted only under limited circumstances, such as situations where targeted dumping is so pervasive as to be administratively impractical to segregate such sales from normal pricing behavior.²⁸ Thus, the respondents argue that the Department itself believes that the Act requires that any targeted dumping remedy be as limited as possible.

The respondents argue that, by not limiting its application of the A-to-T method only to targeted sales, the Department increased Devi’s and Falcon’s dumping margins significantly. Thus, the respondents argue that, at a minimum, the Department should have explained why it was appropriate to apply the A-to-T method to all of Devi’s and Falcon’s sales, given the policies embodied in its targeted dumping regulations. Specifically, the respondents claim that, even if

²⁴ See Gold East Paper (Jiangsu) v. United States, 918 F. Supp. 2d 1317, 1327 (CIT 2013) (Gold East).

²⁵ The respondents point out that the Department attempted to cure the deficiencies of the 2008 Withdrawal by issuing Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 79 FR 22371 (April 22, 2014) (Non-Application Notice). The respondents note that this notice by its own terms only applies to cases initiated on or after May 22, 2014. Thus, because the Department initiated the instant administrative review before this date, the respondents argue that the targeted dumping regulation still applies.

²⁶ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews).

²⁷ See Antidumping Duties; Countervailing Duties: Final rule, 62 FR 27296, 27375 (May 19, 1997) (Preamble).

²⁸ Id.

the Department continues to find that its targeted dumping regulations are not applicable to administrative reviews, it must explain why it is appropriate to limit the application of the A-to-T method to targeted sales in investigations, but not in administrative reviews.

Finally, the respondents contend that, because the petitioners never filed a targeted dumping allegation in this case, the Department should not have conducted a targeted dumping inquiry under its regulations. The respondents note that, since adopting its differential pricing methodology, the Department now automatically conducts such an inquiry regardless of whether an allegation was made. According to the respondents, this practice is arbitrary, unfair, and inconsistent with the policies set forth in the Department's targeted dumping regulations. Consequently, the respondents insist that the Department must explain why it was appropriate to conduct a targeted dumping inquiry in this case without receiving an allegation.

The domestic industry disagrees, pointing out that 19 CFR 351.414(f) has been withdrawn and does not apply to this administrative review. According to ASPA, the court has affirmed the Department's determination that it is not required to apply this regulation in administrative reviews.²⁹ Furthermore, ASPA asserts that the court has upheld the Department's ability to adjust its targeted dumping methodology and apply it on a case-by-case basis, as long as the methodology is reasonable and sufficiently explained.³⁰

The petitioner notes that in Beijing Tianhai the court determined that the plaintiff could show no harm from its lost opportunity to comment on the Department's decision to withdraw its targeted dumping regulation.³¹ According to the petitioner, in the instant case the respondents have failed to either: 1) identify any comments they submitted regarding the Department's decision to withdraw this regulation; or 2) describe any arguments they would have made that were not presented by other parties. As a result, the petitioner asserts that, even assuming arguendo that the Department improperly withdrew its targeted dumping regulation, the respondents cannot demonstrate that they were harmed by the allegedly improper withdrawal.

Finally, the petitioner notes that the Department recently addressed many of the respondents' arguments at length regarding the 2008 Withdrawal in Nails from the PRC,³² as well as in numerous other cases including the previous administrative review of this order.³³ Thus, the petitioner maintains that the Department should continue to reject these arguments here.

²⁹ See Apex, 37 F. Supp.3d at 1303.

³⁰ See Timken, 968 F. Supp. 2d at 1290.

³¹ See Beijing Tianhai Indus. Co. Ltd. v. United States, 7 F. Supp. 3d 1318 (CIT 2014) (Beijing Tianhai).

³² See Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 18816 (April 8, 2015) (Nails from the PRC), and accompanying Issues and Decision Memorandum at Comment 8.

³³ See, e.g., Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Final Results of Antidumping Duty Administrative Review; 2012-2013, 79 FR 71087 (December 1, 2014), and accompanying Issues and Decision Memorandum at Comment 6; and Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review; 2012-2013, 79 FR 51309 (August 28, 2014) (2012-2013 Indian Shrimp AR), and accompanying Issues and Decision Memorandum at Comment 2.

Department's Position:

We disagree that the now-withdrawn targeted dumping regulations are applicable to this administrative review. As a general matter, we disagree with the respondents that the withdrawal of the targeted dumping regulations was invalid. Further, the targeted dumping regulations only applied in LTFV investigations, not administrative reviews.³⁴ Likewise, the ongoing Gold East judicial proceeding involves an LTFV investigation, not an administrative review.

Sections 777A(d)(1)(A) and (B) of the Act provide that the Department in antidumping investigations “shall determine whether the subject merchandise is being sold in the United States at less than fair value” using the A-to-A or T-to-T method, unless the factors that warrant the use of the exceptional A-to-T method apply. On the other hand, no similar limiting language exists with respect to administrative reviews conducted under section 777A(d)(2) of the Act. Moreover, the Department promulgated the regulations at issue to “implement” section 777A(d) of the Act, and hence they also do not further restrict administrative review methodologies and procedures.³⁵

The context in which the Department implemented the regulations underscores that they apply only to investigations. Before the Department implemented its Final Modification for Reviews, it “typically ha{d} compared normal value and export price using the average-to-transaction” method.³⁶ Thus, the “exception” language in the Act did not apply then because the Department was already making comparisons using an A-to-T method in reviews. Indeed, when the regulations were proposed in 1996, several commentators suggested that the Department nonetheless modify its regulations to have them address comparison methodologies used in administrative reviews, as well as investigations.³⁷ Specifically, those commentators argued that the Department’s regulations should “preclude use of the average-to-average method” with respect to administrative reviews.³⁸ The Department refused and stated that “neither the statute nor the SAA affect the Department’s preexisting authority under section 777A(a) of the Act to use the average-to-average method in reviews under the appropriate circumstances.”³⁹ Accordingly, the final regulation, by its terms, applied only to investigations.⁴⁰

Moreover, the Court in Apex held that the Department was not bound to observe the withdrawn regulations in administrative review.⁴¹ Therefore, the Department’s use of a

³⁴ See 2008 Withdrawal, 73 FR at 74931.

³⁵ See Antidumping Duties; Countervailing Duties, 61 FR 7308, 7348 (February 27, 1996) (proposed rules) (Proposed Preamble).

³⁶ Final Modification for Reviews, 77 FR at 8101.

³⁷ See Proposed Preamble, 61 FR at 7348.

³⁸ Id.

³⁹ Id.

⁴⁰ See 19 C.F.R. § 351.414(f) (2008).

⁴¹ See Apex, 37 F. Supp. 3d at 1303 (holding that the “Limiting Rule never controlled Commerce’s

differential pricing analysis in this administrative review contradicts no applicable statute or regulation and has been affirmed by the CIT.⁴²

Even assuming, *arguendo*, that the 2008 Withdrawal were relevant to administrative reviews, we would nonetheless disagree with the respondents that the 2008 Withdrawal was improper. The targeted dumping regulations were properly withdrawn pursuant to the APA. During the withdrawal process, the Department engaged the public to participate in its rulemaking process. Further, the Department stated in the 2008 Withdrawal that notice and an opportunity for public comment are not required under the APA's "good cause" exception. In fact, the Department's withdrawal of its regulations in December 2008 came after two rounds of soliciting public comments on the appropriate targeted dumping analysis. The Department solicited the first round of comments in October 2007, more than one year before it withdrew the regulation, by posting a notice in the Federal Register seeking public comments on what guidelines, thresholds, and tests it should use in conducting an analysis under section 777A(d)(1)(B) of the Act.⁴³ As the notice explained, because the Department had received very few targeted dumping allegations under the regulations then in effect, it solicited comments from the public to determine how best to implement the remedy provided under the statute to address masked dumping. The notice posed specific questions, and allowed the public 30 days to submit comments, which various parties did.⁴⁴

After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.⁴⁵ Among other things, the Department specifically sought comments "on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping."⁴⁶ Several of the submissions⁴⁷ received from parties explained that the Department's proposed methodology was inconsistent with the statute and should not be adopted.⁴⁸ Moreover, several entities explicitly stated that the Department should not establish minimum thresholds for accepting allegations of targeted dumping because the

conduct in reviews").

⁴² In fact, the Court in Timken II recently held that the Department's failure to perform the differential pricing analysis in the administrative review at issue in that case was unreasonable and an abuse of the Department's discretion. See The Timken Co. v. United States, Slip Op. 15-72, at 5 (CIT 2015) (Timken II).

⁴³ See Targeted Dumping in Antidumping Investigations; Request for Comment, 72 FR 60651 (October 25, 2007).

⁴⁴ Id.; see also Public Comments Received December 10, 2007, Department of Commerce, <http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html> (December 10, 2007) (listing the entities that commented).

⁴⁵ See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 FR 26371, 26372 (May 9, 2008).

⁴⁶ Id.

⁴⁷ The public comments received on June 23, 2008, and submitted on behalf of several domestic parties can be accessed at: <http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html>.

⁴⁸ See, e.g., Letter from AK Steel Corp., et al. to the Department: "Comments on Targeted Dumping Methodology, Comments," (AK Steel Comments) (June 23, 2008) at 2.

statute contains no such requirements.⁴⁹

These comments suggested that the regulation was impeding the development of an effective remedy for masked dumping. Indeed, after considering the parties' comments, the Department explained that because "the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."⁵⁰ For this reason, the Department determined that the regulation had to be withdrawn.⁵¹ Although this withdrawal was effective immediately, the Department again invited parties to submit comments and gave them a full 30 days to do so.⁵² The comment period ended on January 9, 2009, with several parties submitting comments.⁵³

The course of the Department's decision-making demonstrates that it actively sought to engage the public. This type of public participation is fully consistent with the APA's notice and comment requirement.⁵⁴ Moreover, various courts have rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.⁵⁵ Rather, where the public is given the opportunity to comment meaningfully, consistent with the statute, the APA's requirements are satisfied. The touchstone of any APA analysis is whether the agency, as a whole, acted in a way that is consistent with the statute's purpose.⁵⁶ Here, similar to the agency in Mineta, the Department provided the parties more than one opportunity to submit comments before issuing the final rule. As in Mineta, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in Mineta found all of those facts to indicate that the agency's actions were consistent with the APA, so too do the Department's actions here demonstrate that it fulfilled the notice and comment requirements of the APA.

⁴⁹ See, e.g., letter from Committee to Support U.S. Trade Laws, to the Department: "Comments on Targeted Dumping Methodology" at 25; see also AK Steel Comments at 29.

⁵⁰ See 2008 Withdrawal, 73 FR at 74831.

⁵¹ Id.

⁵² Id.

⁵³ See Public Comments received January 23, 2009, available at <http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html> (January 23, 2009) (listing the entities that commented).

⁵⁴ See, e.g., Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000), cert denied 532 U.S. 970 (U.S. 2001) (holding that the Environmental Protection Agency's decision to not implement a rule upon which it had sought comments did not violate the APA's notice and comment requirements because the parties should have understood that the agency was in the process of deciding what rule would be proper).

⁵⁵ See Fed. Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (Mineta) (holding that the Department of Transportation's promulgation of four rules, each with immediate effect, only after the issuance of which the public was given the opportunity to comment, afforded proper notice and comment).

⁵⁶ Id.

The APA does not require that a final rule that the agency promulgates be identical to the rule that it proposed and upon which it solicited comments.⁵⁷ Here, the Department actively engaged the public in its rulemaking process; it solicited comments and considered the submissions it received. In fact, that the numerous comments prompted the Department to withdraw the regulation demonstrates that the Department provided the public with an adequate opportunity to participate. In doing so, the Department fully complied with the APA.

Further, even if the two rounds of comments that the Department solicited before the withdrawal of the regulation were insufficient to satisfy the APA's requirements, the Department properly declined to solicit further comments pursuant to the APA's "good cause" exception. This exception provides that an agency is not required to engage in notice and comment if it determines that doing so would be "impracticable, unnecessary, or contrary to the public interest."⁵⁸ The CAFC recognized that this exception can relieve an agency from issuing notice and soliciting comment where doing so would delay the relief that Congress intended to provide.⁵⁹ In National Customs Brokers, the CAFC rejected a plaintiff's argument that the U.S. Customs Service failed to follow properly the APA in promulgating certain interim regulations when it had published these regulations without giving the parties a prior opportunity to comment. Moreover, although the U.S. Customs Service solicited comments on the published regulations, it stated that it "would not consider substantive comments until after it implemented the regulations and reviewed the comments in light of experience" administering those regulations.⁶⁰ The U.S. Customs Service explained that "good cause" existed to bypass the APA's usual notice and comment requirements because the new regulations did not impose new obligations on parties, and emphasized its belief that the regulations should "become effective as soon as possible" so that the public could benefit from "the relief that Congress intended."⁶¹ The Court recognized that this explanation was a proper invocation of the "good cause" exception and explained that soliciting and considering comments was *both* unnecessary *and* contrary to the public interest because the public would benefit from the amended regulations."⁶² For this reason, the Court affirmed the regulation against the plaintiff's challenge.⁶³

The regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to unmask dumping. Such an effect would have been contrary to congressional intent. The Department's revocation of such a regulation without additional notice and comment was based upon a recognized invocation of the "public interest"

⁵⁷ See, e.g., First Am. Discount Corp. v. CFTC, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

⁵⁸ See 5 U.S.C. §553(b)(B).

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

⁶⁰ Id., 59 F. 3d at 1220–21.

⁶¹ Id., 59 F. 3d at 1223.

⁶² Id., 59 F. 3d at 1224 (emphasis added).

⁶³ Id.

exception. However, as noted above, the regulation applied to LTFV investigations and not to administrative reviews. Therefore, its withdrawal is not relevant to this review.⁶⁴

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

Comment 3: Differential Pricing Analysis and the APA

The respondents argue that the Department developed its differential pricing practices in violation of the APA's notice and comment requirements.⁶⁵ According to the respondents, a rule is defined in the APA as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."⁶⁶ The respondents contend that the court has identified the following three broad elements of a rule: 1) an agency statement of general or particular applicability; 2) carrying future, rather than retroactive, effect; and 3) designed to implement, interpret, or describe agency procedure.⁶⁷ The respondents argue that the Department's targeted dumping and differential pricing methodologies meet all the elements of a rule because: 1) they apply generally and particularly to all antidumping administrative reviews; 2) the Department relies on them; and 3) the Department has applied these methodologies since their adoption in administrative reviews in a manner that carries the force of law. Thus, the respondents claim that the Department's actions are subject to the APA's rule making requirements.

The respondents note that the Department began using the differential pricing analysis instead of the Nails⁶⁸ test: 1) as part of an administrative proceeding;⁶⁹ and 2) without providing parties any formal notice or opportunity to comment.⁷⁰ The respondents take issue with the Department's

⁶⁴ As a result of the withdrawal of the targeted dumping regulation, we note that the Department no longer requires petitioners to submit an allegation of targeted dumping before conducting its analysis.

⁶⁵ See 5 U.S.C. § 553. See also Parkdale Int'l. Ltd. v. United States, 31 CIT 1229, 1246-47, 508 F. Supp. 2d 1338, 1355-56 (CIT 2007).

⁶⁶ See 5 U.S.C. § 551(5). See also Foshan Shunde Yongjian Housewares & Hardware Co. v. United States, 896 F. Supp. 2d 1313, 1323 (CIT 2013).

⁶⁷ See IPSCO, Inc. v. United States, 12 CIT 359, 373-74, 687 F. Supp. 614, 626-27 (CIT 1988).

⁶⁸ See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) (Nails from the PRC Investigation); and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, Nails).

⁶⁹ See, e.g., Polyvinyl Alcohol From Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2010-2012, 78 FR 20890 (April 8, 2013).

⁷⁰ The respondents note that the Department has recently requested comments on its differential pricing analysis. See Differential Pricing Analysis; Request for Comments, 79 FR 26720, 26722 (May 9, 2014) (Differential Pricing Comment Request). However, the respondents point out that the Department has not yet completed this process because it has neither published a final rule nor provided an explanation of its final decision.

justification for developing both the Nails test and the differential pricing methodology on a case by case basis in the context of its proceedings as a normal change in practice.⁷¹ According to the respondents, the Department not only failed to comply with the APA when adopting its policies, but it also compounded the problem by arbitrarily changing from the Nails test to its differential pricing analysis. The respondents point out that, because the Department's targeted dumping and differential pricing methodologies are complicated, the Department should seek input and comment on what is the best approach.⁷² Moreover, the respondents contend that, because the Department's targeted dumping and differential pricing analyses represent a major policy change, the Department should be compelled to follow the APA in order to fix the problem of masked dumping.

The respondents contend that, when an agency violates the APA's notice and comment requirements when promulgating a rule, that rule is unlawful and the agency's actions based on it are also invalid.⁷³ Thus, the respondents claim that the Department may not rely on its differential pricing analysis in this case. Instead, the respondents argue that the Department should wait until it has completed its review of the differential pricing methodology and adopted a final rule before applying it in this or any other case. Consequently, for purposes of the final results, the respondents contend that the Department should calculate Devi's and Falcon's margins using the A-to-A method (without zeroing) for all U.S. sales.

ASPA disagrees that the Department's differential pricing analysis is a rule requiring formal rulemaking under the APA. ASPA points out that the Department has previously considered and rejected arguments that the differential pricing test is a "rule" under the APA, finding that it is instead a practice which has evolved through its case-by-case application.⁷⁴ ASPA notes that, in the Final Modification for Reviews, the Department stated that it would address the application of alternative comparison methods on a case-by-case basis.⁷⁵ Further, ASPA notes that the CAFC has upheld the Department's ability to adjust its targeted dumping methodology and apply it on a case-by-case basis as long as the Department sufficiently explains its methodology.⁷⁶ Therefore, ASPA asserts that the Department should reject the respondents' argument that its differential pricing methodology is inconsistent with the APA.

⁷¹ See, e.g., 2012-2013 Indian Shrimp AR at Comment 3.

⁷² The respondents contend that this problem is of the Department's own making. The respondents point out that Congress enacted the targeted dumping provisions to deal with masked dumping in antidumping duty investigations as a result of adverse rulings at the WTO. See SAA at 842-843. However, the respondents argue that as a result of the WTO's rulings, the Department was not obligated to use the A-to-A method in administrative reviews. As a result, according to the respondents, Congress saw no need to include administrative reviews in the targeted dumping statute. By voluntarily switching to the A-to-A method from the A-to-T method in administrative reviews, the respondents claim that the Department potentially allows masked dumping to occur where there previously existed no such risk.

⁷³ See Mid Continent Nail Corp. v. United States, 999 F. Supp. 2d 1307, 1322-23 (CIT 2014).

⁷⁴ See e.g., 2012-2013 Indian Shrimp AR at Comment 3; and Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2012-2013, 79 FR 57047 (September 24, 2014), and accompanying Issues and Decision Memorandum at Comment 2C.

⁷⁵ See Final Modification for Reviews, 77 FR at 8107.

⁷⁶ See Timken, 968 F. Supp. 2d at 1290.

Department's Position:

We disagree with the respondents. We note that the notice and comment requirements of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁷⁷ Further, as the Department has noted, we normally make these types of changes in practice (e.g., the change from the targeted dumping analysis, including the Nails test, to the current differential pricing analysis) in the context of our proceedings, on a case-by-case basis.⁷⁸ As the CAFC has recognized, the Department is entitled to make changes and adopt a new approach in the context of its proceedings, provided it explains the basis for the change, and the change is a reasonable interpretation of the statute.⁷⁹ As with the Department's prior interpretation of the provision at issue, the Department adopted the targeted dumping analysis, including the Nails test, in the context of its proceedings.⁸⁰ There, the Department explained the basis for its interpretation and provided parties with an opportunity to comment. Similarly, with respect to the Department's differential pricing analysis, the Department has explained the basis for the change in practice and provided the respondents with an opportunity to comment on the Department's interpretation and methodology.

As the Department explained in the Preliminary Results, beginning with the antidumping duty investigation of xanthan gum from the People's Republic of China, the Department's practice has been to apply a differential pricing analysis “to determine whether the application of average-to-transaction comparisons is appropriate in a particular situation.”⁸¹

In Xanthan Gum, the Department explained that,

Given the Department's experience over the last several years, and based on the Department's research, further analysis and consideration of the numerous comments and suggestions on determining whether the criteria of section

⁷⁷ See 5 U.S.C. § 553(b)(A).

⁷⁸ See Differential Pricing Comment Request, 79 FR at 26722.

⁷⁹ See Saha Thai Steel Pipe Company v. United States, 635 F.3d 1335, 1341 (Fed. Cir. 2011) (where the CAFC held that “Commerce is entitled to change its views, and a new administrative policy based on a reasonable statutory interpretation is nonetheless entitled to Chevron deference.”); Huvis Corp. v. United States, 570 F.3d 1347, 1353 (Fed. Cir. 2009) (where the CAFC held that “Commerce need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology”); and Nippon Steel Corp. v. Int'l Trade Comm'n, 494 F.3d 1371, 1377 n.5 (Fed. Cir. 2007) (where the CAFC held that courts must give the agency deference when it decides to change its policies or practices as long as it has adequately explained the reason for the change).

⁸⁰ See Nails from the PRC Investigation, 73 FR 33977.

⁸¹ See Preliminary Results, and accompanying Preliminary Decision Memorandum at page 5 (citing Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013) (Xanthan Gum), and accompanying Issues and Decision Memorandum at Comment 3; and 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).

777A(d)(1)(B) of the Act have been satisfied, in this post-preliminary analysis in this investigation the Department is using a different approach for determining whether application of the average-to-transaction method is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act.⁸²

Subsequently, in the Xanthan Gum final determination, the Department addressed at length the parties' comments related to the Department's change in methodology.⁸³ Similarly, in the Differential Pricing Comment Request, the Department explained that it had implemented its change in practice to reflect "a more precise characterization of the purpose and application of" sections 777A(d)(1)(A) and (B) of the Act and then discussed the differential pricing analysis in depth.⁸⁴

As we explained in response to Comment 2 above, section 5 U.S.C. § 551(5)(b)(A) provides an exception to formal rulemaking for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Because the change from the targeted dumping analysis pre-Xanthan Gum to the differential pricing analysis post-Xanthan Gum was a modification of the Department's practice, rather than a "rule," we disagree that the Department was required to implement formal notice and comment procedures.

In its Differential Pricing Comment Request, the Department stated the following:

Normally, the Department makes these types of changes in the context of its proceedings, on a case-by-case basis. For these particular changes, however, the Department is seeking comments to further develop and/or refine its differential pricing analysis, even though the notice and comment requirements of the APA do not apply 'to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice' such as these. As the Department gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the average-to-average comparison method, the Department expects to continue to develop its approach with respect to the use of an alternative comparison method.⁸⁵

⁸² See the memorandum to Paul Piquado, Assistant Secretary for Import Administration, from Abdelali Elouaradia, Office Director, AD/CVD Operations, Office 4, entitled, "Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co, Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.," unchanged in Xanthan Gum.

⁸³ See also Xanthan Gum at Comment 3 (explaining also that the Department would continue to develop its methodology).

⁸⁴ See Differential Pricing Comment Request, 79 FR at 26722-23 (citing investigations and administrative reviews following Xanthan Gum in which the Department applied the differential pricing analysis, including Welded Carbon Steel Standard Pipe and Tube Products from Turkey, 78 FR 79665 (December 31, 2013)).

⁸⁵ See Differential Pricing Comment Request, 79 FR at 26722.

Further developments and changes, along with further refinements, are expected in the context of its proceedings based upon an examination of the facts and the parties' comments in each case. Accordingly, the Department's development of the differential pricing analysis and its application in this case are consistent with established law.

Comment 4: *Differential Pricing Analysis: Identification of a Pattern of Prices that Differ Significantly*

The respondents contend that the Department has failed to establish the existence of a pattern of prices that differ significantly, as required by the targeted dumping statute.^{86, 87} According to the respondents, the targeted dumping statute requires that the Department make any such finding based on the exporter's actual U.S. export prices. However, the respondents argue that the Department, in its differential pricing analysis, instead used various averages and arbitrary groupings of sales, creating phantom pricing differences where none actually exist. Pointing to the language of section 777A(d)(1)(B) of the Act, the respondents claim that it is clear that Congress intended that the Department use actual export prices, rather than "weighted average export prices."⁸⁸ Thus, the respondents argue that Congress intended that any such pattern of export prices that differ significantly must be based on the actual export prices themselves, rather than weighted averages. The respondents contend that, had Congress intended otherwise, it would have specifically said so.⁸⁹

Specifically, the respondents note that the Department uses various "default" weighted average data groupings in its differential pricing analysis. For example, the respondents state that the Department calculates a single annual weighted-average price by control number (CONNUM) for a given purchaser or region (or quarterly time period) and then compares that single weighted-average price by CONNUM to a corresponding single weighted-average price for the same CONNUM to determine if there are significant price differences.⁹⁰ The respondents contend that this methodology is highly distortive because it impermissibly uses annual (or quarterly) weighted-average prices as a surrogate for actual individual export prices. The respondents argue that there are too many normal price fluctuations during a one-year (or quarterly) time period to rely on average prices in the differential pricing analysis.⁹¹ The

⁸⁶ See section 777A(d)(1)(B)(i) of the Act.

⁸⁷ According to the respondents, because the word "differ" in the Act is plural, it refers to export prices, not the pattern.

⁸⁸ The respondents find the omission of the words "weighted average" from this section of the Act significant because Congress uses this phrase in three different parts of the same statutory provision.

⁸⁹ See, e.g., *Bates*, 522 U.S. at 29-30.

⁹⁰ For time periods in particular, the respondents note that the Department calculates a single weighted average price by CONNUM for a given quarterly time period, and then compares that price to the other weighted-average quarterly prices for the same CONNUM.

⁹¹ The respondents note that, as part of its differential pricing analysis, the Department calculates the standard deviation of each test group, showing the extent to which the individual export prices within the test group deviated from the annual average. The respondents argue that, because each test group which passed the Cohen's *d* test had a standard deviation, this fact demonstrates that individual export prices differed from the annual averages for all sales which the Department determined demonstrated a pattern of significant price differences.

respondents liken the Department's methodology to "masking" the individual sales prices, which should be used to determine if there are actual pricing differences. Furthermore, the respondents point out that the Department uses averages in other contexts to "smooth out" and eliminate differences in individual data points;⁹² the respondents note that, by their very nature, averages eliminate individual highs and lows in a given set of data by replacing them with one "contrived" average number. According to the respondents, while this average is broadly representative of the individual values in a dataset, it is not a substitute for them.⁹³

Moreover, the respondents note that the Department uses an "all or nothing" approach when determining which sales pass or fail the significant differences test. In other words, the respondents state that the Department treats all sales in a test group, regardless of their individual sales prices, as either passing or failing the significant differences test, artificially increasing the number of individual sales which "pass." The respondents claim that the Department compounds this distortion by giving each sale three chances to "pass" or "fail" (i.e., by customer, region, and time period), and the sale needs only to pass once for the Department to determine that it contributes to the existence of significant price differences. Thus, the respondents contend that the Department's methodology is arbitrary and distortive because it results in more sales passing the significant differences test than it would if the Department based its comparisons on individual export prices.⁹⁴

The respondents argue that the Department should discontinue its use of the "all or nothing" approach when determining which sales pass the significant differences test. However, if the Department continues to use an "all or nothing" approach, the respondents contend that it should at a minimum: 1) use monthly averages; and 2) limit its analysis to sales within the same month. According to the respondents, while the Department's use of annual or quarterly averages suggests an interrelationship between the Department's margin calculations and the significant differences test, the Department has failed to explain this interrelationship. The respondents claim that the Department's position -- that it is appropriate to use weighted-average prices in the significant differences test because the A-to-A method makes comparisons using such averages - - conflicts with its statement that its margin calculations and the significant differences test are discernable statutory tests answering entirely different questions.⁹⁵

Finally, the respondents similarly contend that the Department has failed to explain why it is appropriate to use annual or quarterly averages, rather than a more contemporaneous grouping of

⁹² As support for this assertion, the respondents cite Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment, 73 FR 26364, 26365 (May 9, 2008).

⁹³ The respondents also claim that an average weighted by volume is additionally distortive because it is further removed from the values of individual sales.

⁹⁴ The respondents claim that the Department failed to respond substantively to this argument in the 2012-2013 Indian Shrimp AR. Specifically, the respondents contend that the Department ignored the argument that, because the words "differ significantly" are in the plural, they clearly relate to the term "export prices," not the term "pattern." See 2012-2013 Indian Shrimp AR at Comment 4.

⁹⁵ Id.

sales such as monthly averages, when performing the significant differences test.⁹⁶ The respondents argue that, because the Department uses monthly averages as part of its standard methodology in administrative reviews, the use of annual or quarterly averages in the significant differences test also appears arbitrary. As a result, the respondents contend that, if the Department insists on using average prices in its targeted dumping analysis, rather than individual export prices, they should be monthly averages.

The petitioner disagrees, noting that the section 777A(d)(1)(B) of the Act simply requires the Department to demonstrate that there is a pattern of export prices that differ significantly. According to the petitioner, the Department in the Preliminary Results provided the statutorily-required explanation of how it identified this pattern.⁹⁷ The petitioner notes that the Department has previously observed that there is nothing in the statute that mandates how the Department measures whether there is a pattern of prices that differ significantly.⁹⁸ Thus, the petitioner asserts that the burden is on those challenging the Department to demonstrate how the agency's interpretation is unreasonable.⁹⁹ The petitioner points out that the respondents have not even attempted to meet this burden, but rather have simply recited what the law purportedly requires without tying their arguments to any statutory requirements, judicial precedent, or agency practice. As a result, the petitioner maintains that the Department should reject the respondents' arguments in the final results.

Department's Position:

As an initial matter, we note that the respondents do not argue that the Department's reliance on the Cohen's *d* test violates the language of the Act. Rather, the respondents put forth several reasons why they believe the Department should modify its approach from the preliminary results. In fact, there is no language in the Act that mandates the approach by which the Department should determine whether there exists a pattern of prices for comparable merchandise that differ significantly among purchasers, regions or periods of time.¹⁰⁰ In addition, although the respondents continually refer to the term "targeted dumping" for justifying their arguments, that term also does not appear in the Act.

The means of carrying out the purpose of the Act and the authority to create a reasonable approach to implement that purpose is specifically delegated to the Department. Thus, the threshold questions that the Department must determine is whether the differential pricing

⁹⁶ The respondents state that larger averaging periods tend to amplify distortions.

⁹⁷ See Preliminary Results, and accompanying Preliminary Decision Memorandum at pages 6-7. See also Nails from the PRC at Comment 9, where the Department discussed how it determined the existence of a pattern of prices that differed significantly.

⁹⁸ See Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 11160 (March 2, 2015), and accompanying Issues and Decision Memorandum at Comment 3.

⁹⁹ See United States v. Eurodif S.A., 555 U.S. 305, 316 (2009).

¹⁰⁰ See Sections 777A(d)(B)(i) of the Act.

analysis, including the Cohen's *d* test and meaningful difference analysis, is reasonable and satisfies the express requirements of the Act based on the record of this review.

In these final results, as in the Preliminary Results, the Department, using the Cohen's *d* test, analyzed the respondents' U.S. sale prices to determine whether there was a pattern of prices that differ significantly, and whether the Cohen's *d* coefficient met or exceeded the "large" (*i.e.*, 0.8) threshold which "provides the strongest indication that there is a significant difference between the means of the test and comparison groups."¹⁰¹ In the Preliminary Results, we concluded, "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."¹⁰² We continue to find the application of the Cohen's *d* test as used in this manner to be reasonable for purposes of determining if a pattern of prices for comparable merchandise differs significantly among purchasers, regions or periods of time in this review.

The Department disagrees with the respondents that it must examine individual U.S. sale prices to determine whether there exists a pattern of prices for comparable merchandise that differ significantly among purchasers, regions or time periods. The purpose of considering the application of an alternative comparison method is to determine whether the application of the A-to-A method is appropriate pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act. The A-to-A method compares "the weighted average of the normal values with the weighted average of the export prices (or constructed export prices) for comparable merchandise."¹⁰³ Consideration of an alternative comparison method in administrative reviews consistent with section 777A(d)(1)(B) of the Act involves an examination of whether there exists a pattern of prices that differ significantly among purchasers, regions or time periods within these weighted-average prices. Thus, the Department has divided the weighted-average price used in the calculation of individual dumping margins into a weighted-average price to a given purchaser (or region or time period) – *i.e.*, the test group – and a weighted-average price to all other purchasers (or regions or time periods) – *i.e.*, the comparison group – in order to examine whether there is a pattern of prices that differ significantly among purchasers, regions or time periods. This is the same approach used by the Department in the Nails test with the targeted dumping analysis, where the Department used weighted-average prices for purchasers, regions and time period in both the "standard deviation test" and the "gap test" of the Nails test.¹⁰⁴ We have determined that the use of weighted-average CONNUM-specific export prices "in determining whether there exists a pattern of prices that differ significantly" is appropriate, given that the A-to-A comparison method also uses weighted-average CONNUM-specific export prices.

¹⁰¹ See Preliminary Results, and accompanying Preliminary Decision Memorandum at page 6.

¹⁰² *Id.*

¹⁰³ See section 777A(d)(1)(A)(i) and 19 CFR 351.414(b)(1).

¹⁰⁴ See Certain Frozen Warmwater Shrimp From India; Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 15691 (March 12, 2013) and the accompanying Preliminary Decision Memorandum at page 8; unchanged in Shrimp from India 2011-2012, 78 FR 42492.

Furthermore, neither the statute nor the regulations specify how the Department should examine whether there exists a pattern of prices that differ significantly. As noted above, the respondents provided no support for their argument that the differential pricing analysis, the Cohen's *d* test, or the use of weighted-average prices (rather than transaction-specific prices) in any way violates the statute or regulations; they just disagree with the Department's approach in this administrative review.

The respondents argue that the Department's methodology is unlawful because section 777A(d)(1)(B)(i) of the Act uses the term "export prices" and not "weighted average export prices," and therefore the Department allegedly should not have compared weighted-average CONNUM-specific export prices in applying the Cohen's *d* test, but instead should have compared individual transactions. However, as the CIT recently held, section 777A(d)(1)(B)(i) of the Act does not use the term "individual transactions" any more than it uses the term "weighted-average."¹⁰⁵ At issue in Samsung was the Department's application of its earlier "targeted dumping" methodology, commonly known as the Nails test, in which the Department also compared CONNUM-specific weighted-average export prices to determine if a pattern of export prices existed (pursuant to the same statutory provision at issue in this case). The CIT held that "Congress could have used either modifier {that is, the terms 'weighted-average' and 'individual transactions'}, but chose not to. This omission is critical because both appear in the immediately preceding segment of the statute."¹⁰⁶

Furthermore, Congress, when addressing the Department's analysis of a "pattern of prices that differ significantly," made no reference either to the use of CONNUM-specific weighted-average export prices, or to the use of individual transactions in the SAA.¹⁰⁷ Accordingly, the CIT in Samsung held that because "Congress remained silent" as to the appropriate methodology to apply to determine a pattern of export prices, "Commerce's decision to use weighted average prices therefore controls so long as it is reasonable."¹⁰⁸

Similarly, the respondents provided no support for their argument that the Department, if it continues to use weighted-average prices at all in its analysis, should use monthly weighted averages. In fact, there is no provision in the statute or regulations that requires the Department to use monthly, rather than annual or quarterly, weighted-average export prices in applying the Cohen's *d* test pursuant to its analysis under section 777A(d)(1)(B)(i) of the Act. Therefore, the Department finds that its use of weighted-average prices in determining whether there exists a pattern of prices that differ significantly is reasonable and appropriate, and has continued to use this approach for these final results.

The Department also disagrees with the respondents' claim that, because each sale has three chances to "pass" the Cohen's *d* test, more sales pass the significant differences test, thereby distorting the results. Each of the tests (i.e., by customer, region, and time period) performed as

¹⁰⁵ See Samsung Elecs. Co. v. United States, No. 13-00098, Slip Op. 15-58, at 8-9 (CIT 2015) (Samsung).

¹⁰⁶ Id., at 8 (emphasis in original) (referring to the use of both terms in section 777A (d)(1)(B) of the Act).

¹⁰⁷ See SAA at 843.

¹⁰⁸ See Samsung, Slip Op. 15-58, at 9.

part of the Cohen's *d* test determines whether there exists a pattern of prices that differ significantly among either customers, regions, or time periods. Each of these tests is distinct and is based upon different groupings of sales. Therefore, we disagree with respondents that, by performing the significant differences test in this manner, the results of this test are distorted. The respondents argue that the Department's use of weighted-average CONNUM-specific export prices is impermissible because it smooths out and eliminates differences in individual data points. However, there is no language in the statute that requires transaction-specific analysis of export prices, and in fact, the use of weighted-average prices, rather than individual transactions, appears throughout the statute and in the Department's proceedings.¹⁰⁹ It is also consistent with the CIT's authorization of the Department's use of weighted-average CONNUM-specific export prices for the same purposes under the Nails test.¹¹⁰

Correspondingly, in Samsung, the CIT rejected the argument that "averaging prices masks the true nature of the underlying data because it hides variability from one transaction to another."¹¹¹ Specifically, the Court upheld the Department's explanation that "the focus of the statute is not . . . on the variation of transaction-specific sales per se, or even on a difference between individual transactions in a group," but instead is focused on differences among groups of purchasers, groups of regions, or various time periods.¹¹² The Court also held that the statute "requires Commerce to identify a pattern of prices that 'differ significantly,' but does so without describing the thing from which those prices must differ or how great that difference must be."¹¹³ Thus, the Court ruled that the Department's use of CONNUM-specific weighted-average export prices in its targeted dumping methodology was consistent with its authority to fill gaps in the statute.¹¹⁴ Consequently, the Department has continued to use CONNUM-specific weighted-average export prices in its Cohen's *d* analysis for purposes of the final results.

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

¹⁰⁹ See, e.g., section 735(c)(1)(B)(i) of the Act (directing the Department to determine an "estimated weighted average dumping margin for each exporter and producer individually investigated"); and section 735(c)(5)(A) of the Act (stating that the "estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated . . .").

¹¹⁰ See Gold East, 918 F. Supp. 2d at 1328 (holding that statute does not require the Department to use individual transaction prices); Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1380 (CIT 2010) (sustaining the Department's overall targeted dumping practice using weighted-average prices); and Samsung, Slip Op. 15-58, at 9 (in which the Court held that the Department's conclusion that "'the relevant price variance . . . is the variance in price across purchasers, time periods, and regions, not across transactions' was reasonable").

¹¹¹ See Samsung, Slip Op. 15-58, at 10.

¹¹² Id., at 10-11.

¹¹³ Id., at 11 (emphasis in original).

¹¹⁴ Id.

Comment 5: *Differential Pricing Analysis: Whether the A-to-A Method Can Account for Significant Price Differences*

The respondents argue that section 777A(d)(1)(B)(ii) of the Act requires that, before applying the alternative method, the Department must explain why its standard method cannot account for significant price differences. According to the respondents, the Department failed to provide this explanation as required by law.¹¹⁵ Rather, the respondents claim that the Department used a results-oriented approach that largely measures the impact of zeroing, instead of the extent to which using the A-to-T method unmasks dumping on targeted sales.

The respondents contend that Department wrongly included all sales (both targeted and non-targeted) in its analysis of meaningful differences, instead of limiting its analysis only to targeted sales. According to the respondents, the point of applying the A-to-T method is to unmask dumping on targeted sales. Therefore, the respondents claim that the Department must: 1) explain why all of a respondent's sales (both targeted and non-targeted) are relevant to the Department's analysis of meaningful differences; 2) explain how non-targeted sales contribute to masked dumping;¹¹⁶ and 3) support its findings with substantial evidence. The respondents argue that record evidence demonstrates that Devi's and Falcon's non-targeted sales are not, in fact, responsible for masked dumping. The respondents point to an analysis of Devi's and Falcon's sales contained in Exhibit 1 of their case brief, which they maintain shows that: 1) the respondents' targeted sales have both positive and negative margins; 2) the overall margin for targeted sales is negative. The respondents state that this demonstrates that any masked dumping within the targeted sales group occurs because of the negative dumping margins calculated for these sales. Thus, the respondents claim there is no justification for the Department to include non-targeted sales in its analysis of meaningful differences.

The respondents argue that, after making the changes to its analysis outlined above, the Department should recalculate whether there are meaningful differences in the margins based on the extent of the dumping on targeted sales unmasked using the A-to-T method. The respondents claim that, as a result of its revised analysis, the Department should determine that the margins calculated for Devi and Falcon using the A-to-T and the A-to-A methods do not move across the de minimis threshold.¹¹⁷ Consequently, the respondents contend that the Department should apply the A-to-A method in its final results margin calculations for Devi and Falcon.

¹¹⁵ See section 777A(d)(1)(B) of the Act. See also Beijing Tianhai, 7 F. Supp. 3d at 1326-27, 1331-32 (noting that the targeted dumping statute requires the Department to explain why differences in patterns of prices cannot be taken into account using standard methodologies).

¹¹⁶ The respondents argue that sales which do not pass the Cohen's *d* test signify that they do not potentially conceal targeted dumping. See SAA at 842.

¹¹⁷ The respondents point to Exhibit 2 of their case brief, which they state demonstrates the results of their proposed changes to the Department's methodology on Devi's and Falcon's margin calculations by: 1) comparing the A-to-A and A-to-T methods while employing zeroing on both sides of the equation; and 2) isolating the positive difference in dumping on sales found to be targeted on a sale-by-sale basis between these two methods. According to the respondents, this is the only way to reveal masked dumping.

ASPA disagrees that the Department failed to explain why the A-to-A method cannot account for the existing patterns of prices that differ significantly. Therefore, ASPA asserts that the Department should not change its methodology for purposes of the final results.

Department's Position:

We disagree with the respondents that the Department failed to explain why its standard method cannot account for significant price differences. In the Preliminary Results we explained our rationale as follows: "...the Department determines that the A-to-A method cannot appropriately account for such differences because the resulting weighted-average dumping margins are below de minimis when calculated using the A-to-A method and are above de minimis when calculated using an alternative method based on the A-to-T method as applied to all U.S. sales."¹¹⁸ We believe that this explanation satisfies the requirements of section 777A(d)(1)(B)(ii) of the Act.

Further, with respect to the arguments pertaining to masked dumping, for these final results, the Department considered all of the U.S. sales information on the record for the respondents in its analysis and to draw reasonable inferences as to what the data show. The purpose of considering an alternative comparison method is to examine whether the A-to-A method is appropriate to measure each respondent's amount of dumping, some of which may be hidden because of masked dumping. Masked dumping is the result of two concurrent situations: dumped sales and non-dumped sales. One, without the other, does not result in masked dumping. The existence of both dumped and non-dumped sales is necessary to have the potential for masked dumping, and one must consider both low-priced and high-priced sales when determining whether a pattern of prices that differ significantly exists and whether masking is occurring. When the Department looks for a pattern of prices that differ significantly, a pattern can involve prices that are lower than the comparison price or higher than a comparison price. Lower, higher, or both are all possibilities for establishing a pattern consistent with section 777A(d)(1)(B)(i) of the Act.

Notably, the language of the Act directs the Department to consider whether a pattern of prices that differ significantly exists. The statutory language references prices that "differ" and does not specify whether the prices differ by being lower or higher than the remaining prices. The Act does not direct the Department to consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor does the Act specify whether the difference must be the result of certain sales being priced higher or lower than other sales. Whether sales are higher or lower priced, they can still evince a pattern of export prices that differ significantly.

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

¹¹⁸ See Preliminary Results, and accompanying Preliminary Decision Memorandum at page 7.

significance of the differences, in the prices within the two groups. Thus, when the variance of prices is small within these two groups, then a small difference between the weighted-average sales prices of the two groups may represent a significant difference, but when the variance within the two groups is larger (i.e., the dispersion of prices within one or both of the groups is greater), then the difference between the weighted-average sales prices of the two groups must be larger in order for the difference to be significant. This is true whether the export sales used in the analysis are higher or lower priced.

Therefore, we disagree with the respondents that we incorrectly included both targeted and non-targeted sales in the analysis of meaningful differences. In Apex, the Court determined that the Department's decision to apply the A-to-T method to all sales was reasonable, holding that:

Commerce explained in the I&D Memo that applying A-T to all sales was “more consistent with the Department’s approach to selection of the appropriate comparison method” than applying A-T only to targeted sales. I&D Memo at 18. Because Commerce applies A-A to all sales under § 1677f-1(d)(1)(A), the agency found it equally fair to apply A-T to all sales under § 1677f-1(d)(1)(B). But more importantly, Commerce noted that applying A-T to all sales

eliminates the masked dumping by exposing 1) any implicit masking within the weighted-average U.S. sales price by basing the comparison on the transaction specific U.S. sales price rather than the weighted-average U.S. sales price, and 2) any explicit masking between individual comparison results by not providing offsets for negative comparison results.

Id. at 19. More succinctly, Commerce applied A-T across the board to reveal dumping hidden by sales that were neither targeted nor dumped. This approach served the statute’s purpose and warrants appropriate deference.¹¹⁹

Likewise in Samsung, the CIT held that the “statute’s clear language does not prohibit application of the A-to-T methodology to all sales” and does not “instruct Commerce on how to apply the A-to-T methodology.”¹²⁰ The Court also held that the statute does not specify whether the export prices or constructed export prices that are compared to the weighted average of the normal values under the A-to-T method must be drawn only from targeted sales.¹²¹ Had Congress intended for the Department to apply the A-to-T method only to a subset of “targeted” transactions as the respondents argue, Congress could have provided explicitly for such an analysis in the statute, but it did not. Therefore, consistent with the Department’s normal practice, we properly applied the A-to-T method to all of the respondents’ sales.

¹¹⁹ See Apex, 37 F. Supp. 3d at 1302.

¹²⁰ See Samsung, Slip Op. 15-58, at 24-25.

¹²¹ Id. (citing section 777A(d)(1)(B) of the Act).

Comment 6: Differential Pricing Analysis: The Impact of “Zeroing”

The respondents contend that the Department’s analysis of meaningful differences is further distorted because it compares the margins calculated using the A-to-A method without zeroing, to the A-to-T method with zeroing. Thus, according to the respondents, the Department is measuring the impact of zeroing, rather than whether the A-to-A method can unmask dumping on targeted sales.¹²² The respondents argue that the Department has not explained how differences based largely on zeroing are “meaningful” for purposes of applying an alternative comparison methodology and it must do so now in these final results. The respondents claim that the Department must eliminate the distortive impact of zeroing in its analysis of meaningful zeroing by either not zeroing at all, or by zeroing on both sides of the equation.¹²³

ASPA disagrees that the Department’s comparison of the weighted-average dumping margins calculated using the A-to-A and A-to-T methods only measures differences attributable to zeroing. According to ASPA, the respondents ignore the fact that, without zeroing, the results of the A-to-A and A-to-T methods are basically identical and it is the A-to-T method with zeroing that allows dumped sales to be unmasked. Thus, ASPA maintains that, where the Department has found masked dumping, the application of the A-to-T method with zeroing is a reasonable and appropriate means to expose and remedy that dumping. In any event, ASPA notes that the Department has stated in previous cases that it would be illogical to determine whether the A-to-A method is inadequate by comparing it to methodologies different from the court-upheld methodologies the Department actually uses.¹²⁴ ASPA maintains that, when the Department chooses between two permissible methodologies, it is reasonable for the Department to compare the outcomes of those methodologies as they exist.

ASPA points out that the CAFC found that the A-to-A method may mask dumped sales and, by using the A-to-T method and zeroing, the Department may identify merchants who intermittently engage in dumping.¹²⁵ ASPA notes that, as a result, the CAFC has upheld the Department’s use of zeroing when applying the A-to-T method, and of not zeroing when applying the A-to-A method, finding that these comparison methods calculate weighted-average dumping margins in different ways and for different reasons.¹²⁶ Thus, ASPA asserts that the Department should continue its use of zeroing when applying the A-to-T method in the final results.

¹²² The respondents state that they do not contest the Department’s authority to employ zeroing as part of the A-to-T method, noting that the Courts have recognized the Department’s authority to use zeroing in its “remedy” phase. Rather, the respondents find the Department’s use of zeroing improper only when determining whether the A-to-A method can account for masked dumping on targeted sales.

¹²³ The respondents propose that, if the Department believes that zeroing on both sides of the equation yields the same result, it should control for zeroing by not using it on either side of the equation.

¹²⁴ See Shrimp from India 2011-2012 at Comment 1.

¹²⁵ See Koyo Seiko Co., Ltd. v. United States, 20F.3d 1156, 1159 (Fed. Cir. 1994). See also Union Steel, 713 F. 3d at 1109.

¹²⁶ See Union Steel, 713 F.3d at 1109.

Department's Position:

As an initial matter, the CAFC and the CIT both have sustained the Department's use of zeroing in connection with the A-to-T method. In Union Steel, the CAFC held that the statute permits the Department to use zeroing when applying the A-to-T method in the context of reviewing whether it was reasonable for the Department to apply zeroing in administrative reviews that employ the A-to-T method, but not in investigations using A-to-A comparisons.¹²⁷ Answering that question in the affirmative, the Court made clear that zeroing is a natural product of the A-to-T comparison method that the Department employs.¹²⁸ Specifically, the Court held that "Commerce's decision to use or not use the zeroing methodology reasonably reflects unique goals in differing comparison methodologies."¹²⁹ Moreover, the Court determined that not applying zeroing in the context of A-to-A comparisons makes sense because that methodology relies on averaging groups of sales, and so inherently allows higher-priced sales to offset lower-priced ones.¹³⁰

Similarly, the CAFC explained in U.S. Steel Corp. that the Department's intention to continue zeroing in the context of A-to-T comparisons performed under section 777A(d)(1)(B) of the Act ensured that the domestic industry would continue to have an adequate remedy to address masked dumping:

[T]he exception contained in § 1677f-1(d)(1)(B) indicates that Congress gave Commerce a tool for combatting targeted or masked dumping by allowing Commerce to compare weighted average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time. Commerce has indicated that it likely intends to continue its zeroing methodology in those situations, thus alleviating concerns of targeted or masked dumping. . . . By enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist.¹³¹

Moreover, in Apex, the CIT held that "{i}t was reasonable, as a legal matter, for Commerce to compare a zeroed A-T rate to a non-zeroed A-A rate to decide whether A-A could account for Apex's targeting."¹³²

¹²⁷ See Union Steel v. United States, 713 F.3d 1101, 1108-09 (Fed. Cir. 2013).

¹²⁸ Id.

¹²⁹ Id., at 1109.

¹³⁰ Id.

¹³¹ See U.S. Steel Corp. v. United States, 621 F.3d 1351, 1361 (Fed. Cir. 2010).

¹³² See Apex, 37 F. Supp.3d at 1295.

Regarding the respondents' claim that the Department should not have used zeroing "at all" on either side of its comparisons, as the Department explained in Washers from Korea, when the A-to-T comparisons "are used in situations of targeted dumping, the results of not applying [a] zeroing methodology when aggregating those comparisons results as well as when aggregating average-to-average comparison results would be the same" in every case.¹³³ Thus, the Department explained that the "provision for different comparison methods under section 777A(d) of the Act would be meaningless" if the Department did not apply zeroing in the context of the A-to-T method because the results of the A-to-T method and A-to-A method would always be mathematically equivalent, obviating any benefit derived from having an alternative comparison methodology in the statute.¹³⁴ The same holds true in administrative reviews.¹³⁵

Such a meaningless application of the A-to-T method would be inconsistent with the canon of statutory construction that a statutory provision must be interpreted in a manner that is consistent with the statute as a whole. This is because it would be illogical for Congress to enact into law an alternative comparison method to the standard methods that, when implemented in every situation, made no difference in the ultimate result of the calculations.¹³⁶ In other words, it is unreasonable to believe that once the Department determines that the A-to-A method cannot "account for" price differences, Congress intended for the Department to use an alternative method that nonetheless always resulted in the exact same outcome as the A-to-A method.¹³⁷

Therefore, consistent with the Department's normal practice, we properly applied the A-to-T method to the respondents' sales. Further, in doing so, we properly denied offsets for non-dumped transactions as part of the A-to-T method.

¹³³ Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers From the Republic of Korea, 77 FR 75988 (December 26, 2012), and accompanying Issues and Decision Memorandum at Comment 4.

¹³⁴ Id.

¹³⁵ See Light-Walled Rectangular Pipe and Tube From Mexico; Final Results of Antidumping Duty Administrative Review, 77 FR 1915 (January 12, 2012), and accompanying Issues and Decision Memorandum at Comment 1.

¹³⁶ See United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (explaining that statutory construction is a "holistic endeavor" and that proper interpretation is one that is "compatible with the rest of the law").

¹³⁷ See the memorandum from Stephen A. Banea, International Trade Compliance Analyst, Office II, AD/CVD Operations, to the file, entitled, "Calculations for Falcon Marine Exports Limited for the Preliminary Results," dated March 6, 2015, at Attachment II (Falcon's margin calculation program); and the memorandum from Blaine Wiltse, Senior International Trade Compliance Analyst, Office II, AD/CVD Operations, to the file, entitled, "Calculations for Devi Fisheries Limited for the Preliminary Results," dated March 6, 2015, at Attachment II (Devi Fisheries' margin calculation program). A comparison of the A-to-T and A-to-A comparison results for both respondents in this review demonstrates that the result would be the same if the Department were to employ zeroing on both sides of the equation.

Comment 7: *Differential Pricing Analysis: Thresholds in the “Ratio Test”*

The respondents argue that the 33 and 66 percent thresholds used in the “ratio test” are arbitrary. The respondents claim that the Department must explain why these thresholds are relevant to its stated goal of unmasking dumping, especially given the SAA’s directive that the Department must proceed on a case-by-case basis when determining patterns of price differences.^{138, 139}

According to the respondents, the Department has repeatedly stated in this and other cases that it will continue to develop its targeted dumping and differential pricing methodologies. Therefore, the respondents argue that the Department should follow its stated intention and reevaluate its use of these arbitrary benchmarks for purposes of the final results of this case.

Notwithstanding this argument, the respondents state that they do not take issue with the Department’s 33 percent lower threshold. The respondents assert that it is reasonable for the Department to use this threshold in determining the level of targeting which does not justify the use of the A-to-T method. According to the respondents, when the pattern occurs at levels below this threshold, there may either be no targeted dumping at all, or it may not be masking dumping.

However, the respondents disagree that this reasoning applies to the Department’s higher thresholds (*i.e.*, between 33 and 66 percent and above 66 percent). The respondents agree, in theory, that that Department may determine whether to use the A-to-T method on those targeted sales which exceed the 33 percent threshold, but they argue that it is arbitrary to apply the A-to-T method to the 33 percent of sales which it already determined were not significant enough to warrant the application of the A-to-T method.¹⁴⁰ According to the respondents, such an “all or nothing approach” is contrary to the SAA and its requirement that the Department analyze the extent to which the A-to-T method might be unmasking dumping on targeted sales. Therefore, in order in order to apply the ratio test fairly, the respondents contend that the Department should apply: 1) the A-to-T method only to targeted sales which exceed the 33 percent benchmark; and 2) the A-to-A method to the percentage of sales which do not.¹⁴¹

The petitioner asserts that the respondents have inaccurately characterized the Department’s “ratio test.” According to the petitioner, the “ratio test” in fact represents a move away from an “all or nothing” approach to targeted dumping. The petitioner explains that, under the Nails test, the Department applied the A-to-T method to all U.S. sales when it found a pattern of prices that differed significantly and the A-to-A method could not account for such differences. As a result of revising its methodology to use the “ratio test” as part of the Cohen’s *d* test, the petitioner

¹³⁸ According to the respondents, the Department has collapsed the “pattern” requirement of the significant differences test (*i.e.*, the identification of targeting) with its “meaningful difference” test (*i.e.*, the remedial phase).

¹³⁹ See SAA at 843.

¹⁴⁰ The respondents describes the Department’s approach for sales passing the 66 percent threshold as “even more arbitrary,” in that the Department not only: 1) applies the A-to-T method to the 33 percent of sales which it had previously found insufficient to warrant the application of the A-to-T method; but also 2) applies the A-to-T method to all sales, regardless of targeting.

¹⁴¹ According to the respondents, the Department should never apply the A-to-T method to all of a respondent’s sales, or any of its non-targeted sales.

points out that the Department now varies its approach in the application of the A-to-T method based on the pattern of prices that differ significantly on the record of each proceeding.¹⁴² Therefore, the petitioner maintains that the Department should not revise the “ratio test” as proposed by the respondents in its margin calculations for the final results.

Department’s Position:

We disagree with the respondents’ claim that the thresholds provided for in the differential pricing analysis regarding the results of the ratio test, and the identification of an appropriate alternative comparison, if any, are arbitrary. Neither the Act nor the SAA provides any guidance in determining how to apply the A-to-T method once the requirements of sections 777A(d)(1)(B)(i) and (ii) of the Act have been satisfied. Accordingly, the Department has reasonably created a framework to determine how the A-to-T method may be considered as an alternative to the standard A-to-A method based on the extent of the pattern of prices that differ significantly as identified by 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.”¹⁴³ When 66 percent or more of the value of a respondent’s U.S. sales are found to establish a pattern of prices that differ significantly, then the Department determines that considering the application of the A-to-T method to all U.S. sales to be reasonable. When between 33 percent and 66 percent of the value of a respondent’s U.S. sales constitute a pattern of prices that differ significantly, then the Department considers the application of the A-to-T method as an alternative comparison method to this limited portion of a respondent’s U.S. sales. Further, when 33 percent or less of the value of a respondent’s U.S. sales constitute the identified pattern of prices that differ significantly, then the Department has not considered the application of the A-to-T method as an alternative comparison method. In this review, no party has suggested that the Department consider changing the 33 and 66 percent thresholds to determine an appropriate alternative comparison method, if appropriate.

Therefore, as discussed in Comment 5, above, we continued to apply the A-to-T method to all of the respondents’ U.S. sales, in accordance with our normal practice. Consequently, for purposes of the final results, we neither modified the thresholds used in the “ratio test,” nor the application of the A-to-A or A-to-T methods based on these thresholds, as described above.

Comment 8: Other Arguments Related to Differential Pricing Analysis

The respondents argued that the Department should not apply the “mixed alternative” differential pricing methodology. Because we did not apply this methodology either in our Preliminary Results or in these final results, this argument is moot and we have not addressed it.

¹⁴² See Shrimp from India 2011-2012 at Comment 7. See also Nails from the PRC at Comment 9, where the Department discusses the ratios used in the Cohen’s *d* test.

¹⁴³ See Preliminary Results, and accompanying Preliminary Decision Memorandum at page 6.

Comment 9: *Whether to Include Certain Costs Incurred by KR Enterprises in Falcon's Reported Cost of Manufacturing*

ASPA alleges that Falcon excluded certain relevant costs incurred by its affiliate, KR Enterprises, from its reported cost of manufacturing. While ASPA acknowledges that KR Enterprises' primary business is shrimp feed trading and certain of its costs should not be allocated to shrimp production, it contends that Falcon excluded two general cost items which appear related to all of KR Enterprises' operations (*i.e.*, "Carriage & Freight" and "Loading and Unloading"). ASPA argues that Falcon provided no basis for the Department to conclude that these costs do not pertain to shrimp processing and storage. Therefore, ASPA claims that the Department should allocate a portion of the "Carriage & Freight" and "Loading and Unloading" costs to Falcon's cost of manufacturing. According to ASPA, this will ensure that KR Enterprises' shrimp production costs are not artificially reduced.

The respondents disagree, noting that ASPA has not substantiated its claims that these items are related to KR Enterprises' total operations. The respondents point out that the Department verified Falcon's reported costs and did not question this aspect of Falcon's cost reporting methodology. In any event, the respondents assert that ASPA's contentions regarding these costs are incorrect. According to Falcon, it is clear from its response that: 1) KR Enterprises separately accounted for the "Carriage and Freight" costs incurred for its feed trading and frozen shrimp processing operations;¹⁴⁴ and 2) Falcon has already included KR Enterprises' "Carriage and Freight" costs related to frozen shrimp processing in variable overhead.¹⁴⁵ Finally, regarding KR Enterprises' "Loading and Unloading" costs, Falcon states that it did not report such costs because it did not incur any for its frozen shrimp operations. As a result, Falcon asserts that the Department should not adjust its reported costs in the final results margin calculations.

Department's Position:

We disagree with ASPA that the Department should include KR Enterprises' "Carriage & Freight" and "Loading and Unloading" costs in Falcon's cost of manufacturing. KR Enterprises provided processing and storage services to Falcon during the POR. For cost-reporting purposes, we instructed Falcon to report the actual cost of the services incurred by KR Enterprises, rather than the toll manufacturing charges which Falcon paid KR Enterprises. KR Enterprises' primary business function is feed trading and, thus, Falcon excluded from its reported shrimp manufacturing cost any expenses KR Enterprises incurred for its feed trading operations. Therefore, we disagree with ASPA's contention that Falcon incorrectly excluded KR Enterprises' "Carriage & Freight" and "Loading and Unloading" costs; we find that Falcon has satisfactorily accounted for these cost items. At verification, we found no basis to determine that Falcon's

¹⁴⁴ See the Letter from Kutak Rock LLP to the Department entitled, "Frozen Warmwater Shrimp from India: Section D Response of Falcon Marine Exports Limited," dated July 18, 2014 (Falcon Section D Response), at Exhibit D-22.

¹⁴⁵ See the Falcon Section D Response at Exhibit D-56.

was inappropriate. We verified Falcon's reported manufacturing costs at all four plants that produced shrimp, including the plant owned by KR Enterprises, and noted that Falcon included a portion of KR Enterprises' "Carriage & Freight" expenses in its reported variable overhead.¹⁴⁶ Accordingly, we have continued to rely on Falcon's reported costs for purposes of the final results.

Recommendation

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

Agree ✓

Disagree _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Enforcement and Compliance

2 SEPTEMBER 2015
(Date)

¹⁴⁶ See the Memorandum to the File from Gary W. Urso and Laurens Van Houten, Senior Accountants, entitled, "Verification of the Cost Response of Falcon Marine Exports Ltd. in the Antidumping Duty Review of Frozen Shrimp from India," dated January 20, 2015, at verification exhibit 12.