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Administrative Review


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February 8, 2016

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of
Antidumping Duty Administrative Review: Polyethylene
Terephthalate Film From India; 2013 – 2014 Administrative
Review

Summary

The Department of Commerce (the Department) analyzed the case briefs submitted by interested parties in the administrative review of the antidumping duty (AD) order on polyethylene terephthalate film, sheet, and strip (PET Film) from India. As a result of this analysis, we have 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.

Background

On August 6, 2015, the Department published the *Preliminary Results*. The review covers six respondents, of which, Jindal Poly Films Limited (Jindal), and SRF Limited (SRF) were selected as the mandatory respondents. The Department rescinded the review with respect to MTZ Polyesters Ltd, and Uflex Ltd.² The period of review (POR) is July 1, 2013, through June 30,

¹ See *Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2013–2014*, 80 FR 46957 (August 6, 2015) (*Preliminary Results*).

For details of changes to the *Preliminary Results*, see Memoranda to File “Analysis Memorandum for the Final Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Jindal Poly Films Limited (Jindal)” (Jindal Final Results Calculation Memorandum) and “Analysis Memorandum for the Final Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: SRF Limited (SRF)” (SRF Final Results Calculation Memorandum) each dated concurrently with this memorandum.

² See *Preliminary Results*, 80 FR 46958.



2014. Petitioners submitted a case brief on September 15, 2015.³ Also, on the same day Jindal and SRF each submitted case briefs.⁴ On September 25, 2015, Jindal submitted a rebuttal brief in reply to Petitioners' case brief.⁵

Scope of the Order

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

Discussion of the Issues

Comment 1: Whether to Exclude Certain Sales from the Margin Calculation

SRF's Argument

- The Department has included eight U.S. sales in the margin calculations of the current review that had been reported in the prior review and had been used to calculate SRF's margin in that review.⁶ The invoices for these sales were within the 2012-2013 POR (June 2013), but the entry dates were after the POR (July & August 2013); that is, they were sold in the prior POR and entered in the current POR.”⁷
- SRF argues that these U.S. sales should be excluded from the current margin calculations as they were already examined in the prior review.⁸

Department's Position:

We agree that these sales were examined in a previous review and, therefore, have excluded these sales from the margin calculations for these Final Results.⁹

³ See Case Brief filed by DuPont Teijin Films, Inc., Mitsubishi Polyester Film, Inc., and SKC, Inc. (collectively Petitioners), dated September 15, 2015.

⁴ See Case Brief filed by Jindal Poly Films Ltd., dated September 15, 2015 (Jindal Case Brief) and Case Brief filed by SRF Limited, dated September 15, 2015.

⁵ See Rebuttal Brief filed by Jindal Poly Films Ltd., dated September 25, 2015.

⁶ See SRF Case Brief at 3.

⁷ *Id.*

⁸ *Id.* at 4.

⁹ See SRF Final Results Calculation Memorandum.

Comment 2: Whether to Grant a Quantity Discount Adjustment to Jindal

Petitioners' Argument

- Petitioners argue that the Department erroneously granted Jindal a quantity discount adjustment which is inconsistent with the Department's regulations or practice. Petitioners contend that Jindal did not meet the requirements of 19 CFR 351.409(b)(1) to qualify for the adjustment, because Jindal failed to demonstrate that the difference in the prices of sales with and without quantity discounts was related to the fact that the sales without a discount had a higher price related solely to the fact that the customer did not purchase sufficient quantities to warrant the discount.
- Petitioner cites to *Brass Sheet and Strip Netherlands* wherein the Department's position was: "it is not sufficient that, during the period of investigation, the respondent merely granted discounts of at least the same magnitude with respect to 20 percent or more of such or similar merchandise sold in the ordinary course of trade in the market used to establish foreign market value. The exporter must also demonstrate, using evidence such as a price list or quantity discount schedule, that it gave discounts on a uniform basis and that such discounts were available to substantially all home market customers."¹⁰
- Petitioners further cite to *Certain Polyester Staple Fiber from Taiwan*¹¹ where the Department did not make a quantity adjustment because that respondent did not have a uniform policy with regard to quantity discounts.¹² Similarly, in *Orange Juice from Brazil*,¹³ Petitioners note that the Department rejected a quantity adjustment because the respondent did not provide evidence showing the difference was attributable to difference in quantities between home market and U.S. sales. Petitioners also mention *Stainless Steel Round Wire from Canada*¹⁴ where the Department "{declined}" to grant a quantity discount because the respondent did not provide sufficient information demonstrating that such a discount was warranted."¹⁵
- Petitioners claim that the data provided by Jindal demonstrates that the quantity purchased did not trigger Jindal providing a quantity-based discount. Instead, according to Petitioners, by Jindal's own admission, it granted rebates to specific customers or groups of customers as a part of negotiations. Accordingly, the discount was not offered uniformly, as required under the Department's practice, and there is no basis for granting this discount.¹⁶

¹⁰ See *Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip from the Netherlands*, 53 FR 23,431, 23,433 (June 22, 1988), at Comment 2.

¹¹ See *Certain Polyester Staple Fiber from Taiwan: Final Results of Antidumping Duty Administrative Review*, 73 FR 46584 (July 27, 2010), and accompanying Issues and Decision Memorandum.

¹² See Petitioners' Case Brief at 3.

¹³ *Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 46,584 (August 11, 2008), and accompanying *Issues & Decision Memorandum*.

¹⁴ See *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Canada*, 64 FR 17324, 17329 (April 9, 1999).

¹⁵ See Petitioners' Case Brief at 3.

¹⁶ *Id.* at 4-5.

Jindal's Rebuttal

- Jindal argues that Petitioners' arguments are untimely and should be rejected. Jindal notes that by not rebutting Jindal's submissions at the appropriate time, *i.e.*, within the 14 days permitted for rebutting questionnaire responses, Petitioners have foreclosed Jindal from any possibility of filing any additional information or documentation that the Department might now consider necessary to refute Petitioners' allegations.¹⁷
- Jindal argues that there is precedent, from a prior review, for granting the quantity discount adjustment claimed; the Department granted the exact same adjustment to Jindal and Jindal presented its responses for that review in the exact same way¹⁸
- Jindal notes that it claimed the quantity discount adjustment under 19 CFR 351.409(b) part (1) and Petitioners conflate the requirements of part (2) with part (1).¹⁹
- Jindal refutes *Brass Sheet and Strip from the Netherlands*, stating that the Department rejected the discounts because they were not granted on a uniform basis. Jindal states that its discounts were granted on a uniform basis (given on more than 20 percent of home market sales), and that they were available to any customer who purchased the requisite quantities.²⁰
- Jindal further refutes *Polyester Staple Fiber from Taiwan*, stating that in that determination the Department denied the quantity adjustment claim because the respondent did not demonstrate that it granted quantity discounts during the POR.²¹ However, in the instant case, Jindal has demonstrated that it gave discounts based on quantity to numerous customers during the POR."²²
- Jindal distinguishes *Orange Juice from Brazil*, noting that the respondent company in that case did not report it granted quantity discounts during the POR. Jindal states that its situation is "just the opposite," and notes that their discounts are on the record in their Home Market Sales Database as well as on pages 25-26 of Jindal's Section B questionnaire response.²³ Similarly, Jindal notes that in *Stainless Steel Round Wire from Canada*, there were no quantity discounts, and thus, obviously the adjustment was denied; whereas, in this case, Jindal gave quantity discounts and the discounts exceeded by a significant margin the 20 percent threshold of the regulation."²⁴

¹⁷ *Id.* at 3.

¹⁸ See Jindal's Rebuttal Brief at 4.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 6.

²¹ See *Certain Polyester Staple Fiber from Taiwan*, I&D memo at Comment 2, page 4.

²² See Jindal Rebuttal Brief at 7.

²³ *Id.* at 7-8.

²⁴ *Id.* at 8.

- Jindal cites *Final Determination of Sales at Less than Fair Value: Brass Sheet and Strip from the Federal Republic of Germany* (52 FR 822) as a more representative ruling of Jindal's own situation. In that case the Department allowed an adjustment for differences in quantities because the Department found that at least 20 percent of the sales received a quantity discount on a uniform basis during the six-month period of investigation (POI). Jindal states that this finding applies far more to the instant situation than the cases cited by Petitioners.
- Contrary to Petitioners' claims, Jindal asserts the calculation of the percentage of sales receiving the discount is based directly on the home market sales database's quantity of sales receiving the quantity discount. Further, the discounts are uniformly offered, as Jindal explained in its response that any customer meeting the requirements for the quantity discount could receive the discount.
- Jindal rebuts that Petitioners' analysis of sales receiving the quantity discount does not support Petitioners' arguments, noting that the analysis is on one product code to a customer who received discounts versus sales to a customer who did not. However, Jindal adds that the analysis does show that in most instances the sale with the larger quantity received the discount and supports Jindal's previous explanation that the quantity discount is based on quantities purchased over a period of time.
- Lastly, Jindal states the Department erred in deducting the quantity discount adjustment while performing the cost test, and should not do so for the Final Results. Jindal explains that since it is an imputed expense and home market sales do not receive the actual discount, it should be excluded from the cost test."²⁵

Department's Position:

We have continued to grant a quantity adjustment to Jindal for these final results.

Section 773(a)(6)(C)(I) of the Tariff Act of 1930, as amended (the Act), provides that normal value (NV) may be adjusted to reflect the differences in quantities sold between the comparison market and the U.S. market. 19 CFR 351.409 lists the factors normally required to qualify for a quantity adjustment. Under 19 CFR 351.409(b), the Department will make a deduction for quantity discounts from NV only if: (1) an exporter or producer granted quantity discounts of at least the same magnitude on 20 percent or more of sales of the foreign like product for the relevant country during the period examined (or for a more representative period); or (2) if the exporter or producer demonstrates that the discounts reflect savings specifically attributable to the production of the different quantities. A respondent must demonstrate either that: 1) the respondent consistently granted discounts based on quantity for at least twenty percent of its sales of the foreign like product, or 2) the discounts are directly related to cost savings attributable to producing in larger quantities.

²⁵ *Id.* at 11.

Jindal reported in its questionnaire responses that it had a company policy of giving quantity discounts to its customers, and that these discounts were provided on more than 20 percent of its sales in the home market and were given uniformly throughout the entire POR.²⁶ Further, Jindal's home market sales database indicate that the discounts were granted on over twenty percent of the sales during the POR. Thus, Jindal has qualified for a quantity discount adjustment under 19 CFR 351.409(b)(1), and it is not necessary to additionally meet the criteria under (b)(2) as the requirements are either (1) or (2) of the regulation and not both.

We note the facts underlie the Departments denial of quantity adjustments in the various cases cited by Petitioners are distinguishable from those in the instant review. In *Brass Sheet and Strip Netherlands* the Department disallowed the quantity discount claim because the discounts were provided on a customer-specific basis to only two home market customers. Therefore, the Department concluded in that case that the discounts were neither uniform nor available to all home market customers. In *Certain Polyester Staple Fiber from Taiwan*, the Department determined that the respondent had not demonstrated that it granted quantity discounts throughout the POR. We note that initially, *Orange Juice from Brazil*, the Department rejected a quantity adjustment because the respondent "provided no evidence showing that this difference is attributable to any difference in quantities between home market and U.S. sales. Rather, {the respondent} merely provided conclusory statements without any supporting analysis."²⁷ Finally, in *Stainless Steel Round Wire from Canada*, the Department declined to grant a quantity discount adjustment; because "{the respondent} did not demonstrate that the difference in prices among its claimed quantity bands were wholly or partly due to the differences in quantities...{additionally, the respondent} did not demonstrate how any evidence on the record, such as price lists, supported its claim that prices varied by quantity."²⁸

With respect to Jindal's argument that Petitioners' arguments are untimely, we disagree. Pursuant to 19 CFR 351.309 any interested party may submit a case brief containing arguments on issues that are in its view relevant to the final results. Petitioner timely submitted its case brief on September 15, 2015.

With regard to Jindal's argument of excluding the quantity discount from the net price calculation for the cost test, we note that the Department's standard practice is to take into account discounts and rebates in this calculation. To conduct the cost test we compare home market prices, net of discounts and rebates, movement charges, and direct and indirect selling expenses, and thus we continue to do so for these final results.²⁹ While Jindal now appears to argue that the discount at issue is an imputed expense and its "home market sales do not receive the actual discount," we note that Jindal's response did not indicate that this was an imputed expense. In fact, Jindal's response gives considerable detail on how the discounts are granted to

²⁶ See Jindal's Section B questionnaire response dated February 6, 2015 at 26-27.

²⁷ See *Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 46,584 (Dep't Commerce August 11, 2008), and accompanying Issues and Decision Memorandum at Comment 13.

²⁸ See *Notice of Final Determination of Sales at Less Than Fair Value—Stainless Steel Round Wire from Canada*, 64 FR 17329 (Dep't of Commerce April 9, 1999).

²⁹ See, e.g., *Chlorinated Isocyanurates from Japan: Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 79 FR 22800 (April 24, 2014), and accompanying Preliminary Decision Memorandum at 16.

its home market customers and how they meet the requirements for the quantity discount adjustments as laid out in 19 CFR 351.409. We note that at that time, while Jindal also proffered that the Department should not consider the discounts in the cost test, it provided no explanation as to why, much less claim that the discount was an imputed expense and its “home market sales do not receive the actual discount.”³⁰ We intend to reexamine this issue more fully in the next administrative review.

Comment 3: G&A Expense and Interest Expense Ratio

Petitioners’ Arguments

- **Bank Charges:** Petitioner contends “in calculating the interest expense based on the consolidated statements, Jindal limited the expenses to the amounts recorded as financing on the consolidated statements plus the foreign exchange gains and losses. Jindal made no mention of bank charges...as bank charges are related to the production of the subject merchandise, the Department should have included these expenses in the G&A expense ratio.”³¹
- **Excluded Expenses:** Petitioners state that Jindal’s G&A expense “begins with total personnel and other expense totals to which Jindal made adjustments for amounts classified as manufacturing cost, selling expense or interest and to add depreciation costs. There are no other additions beyond depreciation, indicating that the costs reclassified from material to general expenses on Worksheet 1, were not included in the G&A expenses.”³²
- **Overstated G&A Denominator:** Petitioners state that the last adjustment to the total cost of goods sold (COGS)...includes two income amounts – sales considered as part of TOTCOM and other income, representing scrap values, and Jindal mistakenly considered these income amounts as expenses to be added to the cost of sales, when in fact the amounts are income that reduce the cost of sales.”³³
- **Overstated Interest Expense Ratio:** Petitioners contend that Jindal should have used consolidated figures for deductions and additions to the adjusted COGS, rather than the unconsolidated figures that it used. (See February 6, 2015 Section D Response at Exhibit D-17).³⁴

Jindal’s Rebuttal

- Jindal states that the revisions found by Petitioners are miniscule and will have no impact on the margin calculation. Jindal “might well be able to go through the G&A and interest

³⁰ Jindal’s Section B questionnaire response dated February 6, 2015 at 26-27.

³¹ *Id.* at 6.

³² *Id.* at 7.

³³ *Id.* at 8.

³⁴ See Petitioners’ Case Brief at 9.

expense calculations and find minor corrections here and there that would reduce – or eliminate – the slight increases (found by the petitioners).”³⁵

Department’s Position:

We disagree with Petitioners that bank charges should be included in G&A, but find that these expenses are more appropriately categorized as selling expenses rather than G&A. In prior cases the Department has considered such expenses to be direct selling expenses.³⁶ In fact, Jindal reported a portion of its bank charges in its questionnaire response as direct selling expenses (DIRSELU).³⁷ For the remaining portion of the bank charges that Jindal did not report under direct selling expenses, the information on the record does not indicate whether these charges are tied to specific sales or not.³⁸ Therefore, we are treating these bank charge expenses as indirect selling expenses, using the same allocation methodology Jindal used in reporting its other indirect selling expenses.³⁹

We have made certain revisions to the numerator and denominator of Jindal’s G&A expense ratio. Specifically, we have included “costs reclassified from material to general expenses” in the numerator and revised the COGS denominator to treat the amounts for scrap income and other income as offsets to the COGS, as these amounts were incorrectly treated as additions to the COGS. Finally we have also revised the interest expense ratio using the consolidated figures submitted by Jindal in its questionnaire response. For details on these adjustments, see Jindal Final Results Calculation Memorandum.

Comment 4: Differential Pricing

Jindal and SRF’s Arguments

- The Department stated that interested parties may present arguments and justifications in relation to the differential pricing approach used in the Preliminary Results. Jindal argues that the decline in Jindal’s prices over the POR is reflective of the decline in worldwide prices which required all sellers of PET film to reduce prices. Jindal’s explanation of declining prices must be taken into account in assessing whether and how to apply the “differential pricing” test, because the reduction in prices was necessitated by worldwide oversupply. The Department must recognize that Jindal had justification for its pricing patterns and was not engaging in “differential pricing.” Jindal should not be penalized

³⁵ See Jindal Rebuttal Brief. at 11.

³⁶ See *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India*, 69 FR 76916 (December 23, 2004) and accompanying IDM at Comment 15; see also *Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review*, 68 FR 47543 (August 11, 2003) and accompanying IDM at Comment 14.

³⁷ See Jindal Section C questionnaire response at C-40.

³⁸ See *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review*, 76 FR 36089 (June 21, 2011) and accompanying Issues and Decision Memorandum at Comment 7.

³⁹ See Jindal Final Results Calculation Memorandum.

with a finding of “differential pricing” and “zeroing” where it had no choice but to match prices in a declining market.⁴⁰

- If the Department does not accept Jindal’s justification, then the Department should modify its application of the Cohen’s *d* test. Jindal claims that the Department’s Preliminary Results show that Jindal’s total dumping duties owed as well as its weighted-average dumping margin are negative. This, therefore, demonstrates that Jindal is not engaging in price discrimination.⁴¹
- Jindal asserts that “[b]ecause the denominator in the Cohen’s *d* test says nothing about {the} relative magnitude” of the observed price differences, “tiny price differences can result in ‘passing’ Cohen’s *d* values.” Jindal provides a hypothetical example in which all U.S. prices and selling expense adjustments are identical. Then, Jindal applies the Cohen *d*’s test and notes that the result is one where the Department would still have found differential pricing and applied its zeroing methodology. Further, Jindal notes that setting all prices and expenses to identical figures yields a “pass” percentage that is higher than the percentage that is derived when Jindal’s actual prices and expenses are used; thus indicating that “Jindal’s pricing is offsetting some of naturally occurring exchange rate fluctuations.”⁴²
- The Department should modify its application of the Cohen’s *d* test. The Department’s Preliminary Results show that SRF’s total dumping duties owed, as well as its weighted-average dumping margin, are in fact negative. This, therefore, demonstrates that SRF is not engaging in price discrimination.⁴³
- Jindal and SRF state that, if the Department continues to use the Cohen’s *d* test, then it should only consider the lower-priced sales as passing the test. Jindal states that the Cohen’s *d* test does not distinguish between weighted-average prices that are lower or higher than the mean, and that targeting “is not pricing that is bi-directional.”⁴⁴ Jindal continues that a “‘targeter’ does not capture additional sales by raising prices.”⁴⁵
- Jindal further asks the question “where is the pattern to be found when some sales making up the so-called pattern are higher priced and some sales are lower priced” with the conclusion that this “is the antithesis of a pattern.” Jindal claims that simply having higher priced sales and lower priced sales cannot constitute a pattern, but that only the lower priced sales, or alternatively, only the higher priced sales can constitute a pattern. Accordingly, the Department should only consider lower-priced sales or higher-priced sales as constituting a pattern for the final results, but not both.

⁴⁰ See Jindal Case Brief at 4-7.

⁴¹ *Id.* at 5-8.

⁴² *Id.* at 10.

⁴³ See SRF Case Brief at 8.

⁴⁴ See Jindal Case Brief at 10-11; SRF Case Brief at 9.

⁴⁵ *Id.* at 11; see SRF Case Brief at 9.

- Jindal and SRF assert that “including {higher prices passing sales} in the calculation of the percentage sales that are priced higher than the mean and standard deviation is tantamount to double counting those higher priced sales” as well as “including lower priced sales in the calculation double counts the lower priced sales.”⁴⁶ Jindal and SRF conclude that “to avoid inappropriately counting the higher priced sales twice when calculating the magnitude of the differential pricing, the only sales that should be considered are those that pass with a positive value {i.e., the lower priced sales}.”⁴⁷
- SRF asks the same question as Jindal: “where is the pattern to be found when some sales making up the so-called pattern are higher priced and some sales are lower priced” with the conclusion that this “is the antithesis of a pattern.”⁴⁸ SRF claims that simply having higher priced sales and lower priced sales cannot constitute a pattern, but that only the lower priced sales, or alternatively, only the higher priced sales can constitute a pattern. Accordingly, the Department should only consider lower-priced sales or higher-priced sales as constituting a pattern for the final results, but not both.
- “If the Department uses the Cohen’s *d* test to find ‘differential pricing’ and ‘zeroes’ to prevent the average-to-average (A-to-A) method from masking targeted dumping, it should only zero those sales with prices that are below the standard deviation.”⁴⁹ Only lower-priced sales can be construed as having been “targeted,” whose definition “presupposes sales with prices that are lower than some benchmark” whereas “sales that are priced higher than the benchmark are not targeted.”⁵⁰
- By combining the results of the Cohen’s *d* test by purchaser, region or time period, the Department is mixing different pricing behaviors by these different categories, which is like comparing apples and oranges. Accordingly, for the final results, if the Department continues to use the Cohen’s *d* test, then it should modify the ratio test to limit the results used to determine the level of differential pricing to the highest category-specific percentage found.⁵¹ If sales separately pass the Cohen’s *d* test above 33 percent or above 66 percent by category (i.e., purchaser, region, or time period), then and only then should an alternative comparison method be considered.
- “[T]he Cohen’s *d* test is ill-suited for determining differential pricing that might constitute targeting using time periods ... because, regardless of a seller’s intentions, prices, expenses, and exchange rates inevitably fluctuate over time.”⁵² Therefore, the Department’s Cohen’s *d* test will almost invariably identify sales which pass the Cohen’s *d* test because of random fluctuations over time. Such fluctuations are outside of the control of the exporter. Therefore, Jindal asserts that the Cohen’s *d* test “is ill-suited to ferret out a real, meaningful pattern based on time periods.”

⁴⁶ *Id.* at 12; see SRF Case Brief at 10.

⁴⁷ *Id.* at 13; see SRF Case Brief at 11

⁴⁸ See SRF Case Brief at 12.

⁴⁹ See Jindal’s at 12-13; see SRF’s Case Brief at 13.

⁵⁰ *Id.* at 13; see SRF’s Case Brief at 13.

⁵¹ *Id.* at 16; see SRF’s Case Brief at 15.

⁵² *Id.* at 16.

- Furthermore, the Department’s use of quarters to define time periods in the Cohen’s *d* test is an artificial construct. One can also define time periods by weeks or months. If months or weeks were used, the results of the Cohen’s *d* test would likely be different from what is found using quarters because of exchange rates fluctuations. “This is especially true with respect to India where the rupee is a relatively unstable, devaluing currency.”⁵³
- Additionally, a sale occurring on the last day of one quarter may be compared to a sale on the first day of the next quarter. Although both sales may have the same price, because they are technically in “different” periods, the means, standard deviation and comparisons of the two quarters could lead to finding that the two sales are differentially priced.⁵⁴ Further, including sales that pass the test in the earlier and later quarters cannot be “differentially priced” because the later time period did not exist when the earlier sale was made, and the exporter could not have known its prices, expenses or exchange rates for a future period. Therefore, even if quarters are used, sales that pass in an earlier quarter should not be included when compared to sales in a later quarter.⁵⁵
- If the Cohen’s *d* test is used to determine differential pricing, the focus must be on “pricing,” *i.e.*, on what the purchaser actually pays, not expenses paid by the exporter. Thus, the Department must eliminate from the Net Price, expenses paid by Jindal and use only the actual price paid by the purchasers.⁵⁶ Because Jindal is the importer of record and paid all the expenses, it is inappropriate to deduct those expenses from the price that the purchaser did not pay.
- Jindal and SRF claim that the Department’s “differential pricing” analysis is flawed and simply represents a repackaging of “targeting” as provided in the SAA.⁵⁷ Jindal and SRF argue that the SAA establishes that

“Targeting” is, obviously, an action directed at a specific, limited goal, such as a particular group of customers. “Targeted dumping,” therefore, is the action of selling at lower prices to limited and identifiable category of entities within the whole population. Sales to particular customer or regions with prices that are at or above the “norm” are not “targeted.”⁵⁸

- Jindal and SRF assert that the Cohen’s *d* test is not a measure that identifies causal links or statistical significance. Rather, Cohen’s *d* is used to measure the size of a difference between the means of two groups relative to the population’s standard deviation. The convention of “small” or “large” adopted by the Department is simply relative to the

⁵³ *Id.* at 17.

⁵⁴ *Id.* at 18.

⁵⁵ *Id.* at 18-19.

⁵⁶ *Id.* at 20-21.

⁵⁷ *Id.* at 23 (citing SAA at 842-843). And *See* SRF’s Case brief at 18.

⁵⁸ *Id.* at 23; *see* SRF’s Case Brief at 18.

pooled standard deviation of the test and comparison groups and, as such, does not “capture meaningful pricing differentials in antidumping cases.”⁵⁹

- U.S. law dictates that, prior to applying the A-to-T method, the Department must explain why the use of the standard A-to-A method cannot account for the pricing differences. Simply comparing the weighted-average dumping margins calculated using the A-to-A method and an alternative comparison method “is a results-oriented tautology that cannot be what the framers of the targeting provision intended.”⁶⁰ Jindal and SRF point to *Beijing Tianhai*,⁶¹ where the Court said

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

Here, the Department has supplied a conclusion not an explanation.⁶²

- Jindal and SRF assert that the A-to-A method was “blessed” because it prevented “noise” which might create dumping margins. Jindal and SRF cite to *Live Swine from Canada*,⁶³ quoting that “the use of annual weighted averages tends to depress the overall margin of dumping {but that} the Department does not treat this depressive effect as a ‘distortion’ to be corrected in the weighted average dumping margin.”⁶⁴
- Jindal and SRF further assert that before the A-to-A method can be discarded, the Department must show why it cannot use some other form of A-to-A calculation in order to account for the price differences found by the Cohen’s *d* test. Options include adjusting the averaging groups; finding that the price differentials are not large or systematic; or finding alternative explanations for price differentials.⁶⁵
- Jindal and SRF also assert that the Department cannot use the A-to-T method with zeroing as the basis on which to determine whether the A-to-A method is appropriate because the A-to-T method with zeroing has been “discredited and finally banned by the WTO precisely because it was found to create artificially inflated dumping margins.”⁶⁶

Therefore, because the Department does not provide an adequate explanation of why the A-to-A method cannot account for the observed pattern of prices that differ significantly, it fails to meet the statutory prerequisite for considering the A-to-T method. In view of

⁵⁹ *Id.* at 24-25; see SRF’s Case Brief at 18-19.

⁶⁰ See Jindal’s Case Brief at 26; SRF’s Case Brief at 20.

⁶¹ See *Beijing Tianhai Indus. Co. v. United States*, 7 F. Supp. 3d 1318, 1332 (Ct. Int’l Trade 2014) (*Beijing Tianhai*).

⁶² See Jindal’s Case Brief at 27, quoting *Beijing Tianhai*.

⁶³ See *Notice of Final Determination of Sales at Less than Fair Value: Live Swine from Canada*, 70 FR 12181 (March 11, 2005) (*Live Swine from Canada*).

⁶⁴ See Jindal’s Case Brief at 28, quoting *Live Swine from Canada*. See also SRF’s Case Brief at 22, quoting *Live Swine from Canada*.

⁶⁵ See Jindal’s Case Brief at 28; SRF’s Case Brief at 22.

⁶⁶ See Jindal’s Case Brief at 28; SRF’s Case Brief at 23.

the Court's ruling in *Beijing Tianhai* and other points raised by Jindal, the Department should discontinue its current methodology. Accordingly, the Department should calculate Jindal's and SRF's weighted-average dumping margin using the A-to-A method.

- Jindal and SRF both point to the most recent case of *Apex Frozen Foods Private Ltd.*,⁶⁷ which was made public in August of this year. Based on their reading of the court opinion, Jindal and SRF speculate that the court might have ruled differently had Apex made one their arguments relating to the second prong, which they claim the court "clearly suggestions."⁶⁸

Department Position:

As discussed in the Preliminary Results, the differential pricing analysis requires a finding of a pattern of prices for comparable merchandise that differs significantly among purchasers, regions, or time periods. If such a pattern is found, then the differential pricing analysis evaluates whether such differences can be taken into account when using the average-to-average method to calculate the weighted-average dumping margin. The differential pricing analysis used here evaluates all purchasers, regions, and time periods to determine whether a pattern of prices that differ significantly exists. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. For each respondent, purchasers are based on the reported customer codes. For both respondents, regions are defined using the reported destination code (*i.e.*, zip code) and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the POR being examined based upon the reported date of sale. For purposes of analyzing sales transactions by purchaser, region and time period, comparable merchandise is considered using the product control number and any characteristics of the sales, other than purchaser, region and time period, that the Department uses in making comparisons between export price and NV for the individual dumping margins.

In the first stage of the differential pricing analysis used here, the "Cohen's *d* test" is applied. 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. First, for comparable merchandise, the Cohen's *d* coefficient is calculated when the test and comparison groups of data each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen's *d* coefficient is used 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. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen's *d* test: small, medium or large. Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. For this analysis, the difference

⁶⁷ See *Apex Frozen Foods Private Ltd. v. United States*, Slip Op. 15-81, __ CIT __ (July 27, 2015).

⁶⁸ See Jindal's Case Brief at 29. See also SRF Case Brief at 23.

was considered significant, and the sales in the test group were found to have passed the Cohen's *d* test, if the calculated Cohen's *d* coefficient is equal to or exceeds the large (*i.e.*, 0.8) threshold.

Next, the "ratio test" assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. If the value of sales to purchasers, regions, and time periods that passes the Cohen's *d* test accounts for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that passes the Cohen's *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method, and application of the average-to-average method to those sales identified as not passing the Cohen's *d* test. If 33 percent or less of the value of total sales passes the Cohen's *d* test, then the results of the Cohen's *d* test do not support consideration of an alternative to the average-to-average method.

If both tests in the first stage (*i.e.*, the Cohen's *d* test and the ratio test) demonstrate the existence of a pattern of prices that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, we examine whether using only the average-to-average method can appropriately account for such differences. In considering this question, the Department tests whether using an alternative method, based on the results of the Cohen's *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the average-to-average method only. If the difference between the two calculations is meaningful, this demonstrates that the average-to-average method cannot account for differences such as those observed in this analysis, and, therefore, an alternative method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if (1) there is a 25 percent relative change in the weighted-average dumping margin between the average-to-average method and the appropriate alternative method when both results are above the *de minimis* threshold, or (2) the resulting weighted-average dumping margin moves across the *de minimis* threshold.

For Jindal, for these final results, based on the results of the differential pricing analysis the Department finds that the value of U.S. sales passing the Cohen's *d* test is 85.62 percent, such that we should consider as an alternative comparison method applying the average-to-transaction method to its U.S. sales.⁶⁹ Further, the Department determines that the average-to-average method cannot appropriately account for such differences because there is a meaningful difference between the weighted-average dumping margin calculated using the average-to-average method and when using the alternative method, *i.e.*, the resulting weighted-average dumping margin using the average-to-transaction method moves across the *de minimis* threshold as compared to the average-to-average method.⁷⁰ Accordingly, the Department determines to use the average-to-transaction method for all U.S. sales to calculate the weighted-average dumping margin for Jindal.

⁶⁹ For additional detail, *see* Jindal Final Results Calculation Memorandum.

⁷⁰ *Id.*

The Department disagrees with Jindal’s assertion that the Department must consider reasons why an observed pattern of prices that differ significantly is evidenced in the respondent’s U.S. pricing behavior. There is no requirement, even in an investigation under section 777A(d)(1)(B)(i) of the Act, that the Department divine either the intent of the exporter or some other causal link that might explain the observed pattern of prices that differ significantly. Congress did not speak to the intent of the producer or exporter in setting export prices that exhibit a pattern of significant price differences. Nor is an intent-based analysis consistent with the purpose of the statutory provision which, as noted above, is to determine whether A-to-A is a meaningful tool to measure whether, and if so, to what extent, dumping is occurring. Consistent with the statute and the SAA, we determined whether a pattern of significant price differences exists. Neither the statute nor the SAA requires us to conduct an additional analysis to account for potential reasons for the observed pattern of prices that differ significantly, and the CIT has sustained this interpretation, albeit in the context of cases employing the *Nails* test.⁷¹ As described above, the first statutory requirement only identifies whether conditions are present (*i.e.*, a varying pricing behavior by the exporter) which would permit masked, or targeted dumping to be meaningful such that the A-to-A method would not be appropriate to gauge an exporter’s possible dumping in the U.S. market. Simply because the Department has identified a pattern of prices that differ significantly does not automatically result in the application of an alternative comparison method. The differential pricing analysis, as described above, also requires that not only must the conditions exist where masked dumping may be present, but also where the A-to-A method would not be appropriate because dumping is being masked by the A-to-A method.

The Department disagrees with Jindal that the weighted-average dumping margin calculated using the A-to-T method in the Preliminary Results should be “negative.” As shown in the printout included in Exhibit 2 of Jindal’s Case Brief, the “Total Amount of Dumping,” and thus the weighted-average dumping margin, is not negative because the A-to-T method does not provide offsets for non-dumped sales. Further, if one compared the sum of the “total positive comparison results” and “total negative comparison results” (*i.e.*, Jindal’s “negative” “total dumping duties owed”) using the A-to-T method and the A-to-A method⁷² these values are identical. Accordingly, the denial of offsets for non-dumped sales (*i.e.*, zeroing) as a part of the A-to-T method is required in order to provide meaning to section 777A(d)(1)(B) of the Act. Furthermore, the Federal Circuit has affirmed that denial of offsets for non-dumped sales is an integral part of the A-to-T method.⁷³

⁷¹ See *Apex* at 21-23 (rejecting notion that Department must consider seasonality of shrimp industry in its targeting analysis); *JBF RAK*, 991 F. Supp. 2d at 1355 (the statute “does not require Commerce to investigate the various reasons why a particular respondent’s U.S. sales demonstrate a pattern of targeted dumping”); *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 990 F. Supp. 2d 1384, 1389 (Ct. Int’l Trade 2014) (“Contrary to Borusan’s claim that targeted dumping connotes purposeful behavior, the language of the statute simply instructs Commerce to consider export sales price (or constructed export sales price) in its targeted dumping analysis . . . It does not require Commerce to undertake an investigation of the various reasons why a pattern of targeted dumping exists within a given time period. The SAA does not manifest such a requirement either”).

⁷² See Jindal Final Results Calculation Memorandum, Attachment 2.

⁷³ See *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013).

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

Section 777A(d)(1)(B)(ii) of the Act, the “explanation” requirement, then requires the Department to explain why the A-A method cannot account for “such differences,” *i.e.*, the conditions identified in the “pattern” requirement which may lead to hidden or masked dumping.

To consider this requirement, the Department uses a “meaningful difference” test where it compares the weighted-average dumping margin calculated using the A-A method only and the weighted-average dumping margin calculated using an appropriate alternative comparison method based on the application of the A-T method. The simple comparison of these two results belies all of the complexities in calculating and aggregating individual dumping margins. It is the interaction of these many comparisons of export or constructed export prices with normal values which determine whether there is a meaningful difference in these two results.

When using the A-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. This is reflected in the SAA, which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”⁷⁴ The comparison of a dumping margin based on a weighted-average U.S. price with a dumping margin based on the individual, constituent transaction-specific U.S. prices precisely examines the impact of the amount of dumping which is hidden or masked. Both the weighted-average U.S. price and the individual U.S. prices are compared to a normal value that is independent and constant because the characteristics of the individual U.S. sales remain constant whether a weighted-average U.S. price or individual U.S. prices are used in the analysis. Consider the simple situation where there is a single weighted-average U.S. price, this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the A-A method and the A-T method. The normal value used to calculate a dumping margin for these sales may fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

1) the normal value is less than all of the U.S. prices and there is no dumping;

⁷⁴ See SAA at 842.

- 2) the normal value is greater than all of the U.S. prices and all sales are dumped;
- 3) the normal value is nominally greater than the U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;
- 4) the normal value is nominally less than the U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the normal value is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

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

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

The Department disagrees with Jindal that the Department should not consider that higher-priced sales can contribute to a pattern of prices that differ significantly. As an initial matter, we note that Jindal's arguments have no grounding in the language of the statute. There is nothing in the statute that mandates how we measure whether there is a pattern of export prices that differs significantly. As explained in the Preliminary Results⁷⁵ and below, the differential pricing analysis used in this administrative review is reasonable, and the use of Cohen's *d* test as a component in this analysis is consistent with the purpose of the statutory provision concerning the application of an alternative comparison method.

⁷⁵ See *Preliminary Results* and accompanying Decision Memorandum at 3-5.

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

In part the reluctance to use an average-to-average methodology had been based on a concern that such a methodology could conceal “*targeted dumping*.” *In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.*⁷⁶

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

Contrary to Jindal's claim, the statute does not require that the Department consider only lower-priced sales when considering whether an alternative comparison method is appropriate. It is reasonable for the Department to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. Contrary to Jindal's claim, it is reasonable for the Department to consider both lower-priced and higher-priced sales in the Cohen's *d* analysis because higher-priced sales are equally capable as lower-priced sales to create a pattern of prices that differ significantly. Further, when greater than their normal value, higher-priced sales will offset lower-priced sales when using the A-to-A method, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, which can mask dumping. The statute states that the Department may apply the A-to-T method if “there is a *pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time,*” and the Department “*explains why such differences cannot be taken into account*” using the A-to-A comparison method.⁷⁷ The statute directs the Department to consider whether there exists a pattern of prices that differ significantly. The statutory language references prices that “differ” and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that the Department consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department explained that higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.⁷⁸ Higher- or lower-priced sales could be dumped or could be masking other dumped sales. However, the relationship between higher or lower U.S. prices and their comparable normal values is not relevant in the Cohen's *d* test and in answering the question of whether there is a pattern of prices that differ significantly because this analysis includes no comparisons with

⁷⁶ See Jindal's Case Brief at 23, quoting from the SAA at 842 (emphasis added by Jindal).

⁷⁷ See section 777A(d)(1)(B) of the Act (emphasis added).

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

normal values and section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons. By considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter's pricing to identify whether there is a pattern of prices that differ significantly.

In addition, the Department disagrees with Jindal's hypothesis that a pattern of prices that differ significantly must involve "targeting," thus implying that there must exist a reason behind the exporters pricing behavior, *i.e.*, a "'targeter' does not capture additional sales by raising prices",⁷⁹ and that targeted pricing behavior is not "bi-directional."⁸⁰ The statute does not include a requirement that the Department must account for some kind of causality or intent on the part of the respondent for any observed pattern of prices that differ significantly, such as increasing market share, changes in raw material costs, prices of natural gas, or fluctuations in exchange rates. Congress did not speak to the intent of the producers or exporters in setting export prices that exhibit a pattern of significant price differences. Nor is an intent-based analysis consistent with the purpose of the provision, as noted above, which is to determine whether averaging is a meaningful tool to measure whether, and if so, to what extent, dumping is occurring. Consistent with the statute and the SAA, the Department determined whether a pattern of significant price differences exists. Neither the statute nor the SAA requires the Department to conduct an additional analysis to account for potential reasons for the observed pattern of prices that differ significantly.

The Department also disagrees with Jindal's assertion that it has "double-counted" its higher-priced sales by including these sales in both a test group and as part of the comparison group when not being tested in the Cohen's *d* test. As stated in the *Preliminary Results*, the purpose of the Cohen's *d* test is "to evaluate the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise."⁸¹ Simply because certain sale prices are part of a test group in one instance and part of a comparison group in other instances does not constitute double counting. In the Cohen's *d* test, lower-priced sales are also included in both a test group and as part of the comparison group when not being tested. The Department's dumping analysis includes all information and data on the record of this administrative review, and the Department finds that selectively including or excluding certain sales is not supported by the statute.

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

⁷⁹ See Jindal's Case Brief at 11.

⁸⁰ *Id.*

⁸¹ See *Preliminary Results*, and accompanying Decision Memorandum at 4.

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

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

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

The Department disagrees with Jindal's assessment that a time-period-based analysis of a pattern of prices that differ significantly is somehow biased or systematically generates affirmative results in comparison with purchasers or regions, whether analyzed using the Cohen's *d* test or

some other approach. Likewise, no such concern is provided for in the statute. Further, the Department disagrees with Jindal's continued assertion that the reason behind a pattern of prices that differ significantly must be considered in the Department's analysis. As discussed above, no such requirement is provided for in the statute.

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

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

Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in these preliminary results, including arguments for modifying the group definitions used in this proceeding.⁸²

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

The Department disagrees with Jindal's argument that the prices used in the Cohen's *d* test should not include expenses incurred by the exporter and not the customer. The purpose of the differential pricing analysis is to determine whether the A-to-A method is appropriate to determine the amount of dumping exhibited by the respondent's pricing behavior. The relevant values that are the basis for this analysis are the net prices (*i.e.*, the consideration) due to the exporter. It is the pricing behavior of the exporter that is under examination, not the purchasing behavior of the customer. The pricing behavior of the exporter is reflective of the costs incurred by the exporter, whether it is to acquire and process the subject merchandise or to sell and transport the subject merchandise to the customer. In addition, because such prices are the prices upon which the margin of dumping is calculated, their application in the Cohen's *d* and ratio tests serve the purpose of that analysis, as noted, to determine whether the A-A method is a meaningful tool for measuring whether, and if so to what extent, dumping is occurring. Accordingly, the net prices used in both the Cohen's *d* test as well as the calculation of individual dumping margins reasonably include not only the discounts and rebates offered to the customer, which are costs to the exporter, but also other costs to the exporter that are incurred with other parties (*e.g.*, with a provider of transportation services). Accordingly, Jindal's

⁸² See *Preliminary Results*, and accompanying Decision Memorandum at 5.

argument to making a distinction between whether an exporter's costs are incurred with the customer as opposed to other parties is unpersuasive.

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

The Cohen's *d* test "is a generally recognized *statistical measure* of the extent of the difference between the mean of a test group and the mean of a comparison group."⁸³ Within the Cohen's *d* test, the Cohen's *d* coefficient is calculated based on the means and variances of the test group and the comparison group. The test and comparison groups include all of the U.S. sales of comparable merchandise reported by the respondent. As such, the means and variances calculated for these two groups include no sampling error. Statistical significance is used to evaluate whether the results of an analysis rises above sampling error (*i.e.*, noise) present in the analysis. The Department's application of the Cohen's *d* test is based on the mean and variance calculated using the entire population of the respondent's sales in the U.S. market, and, therefore, these values contain no sampling error. Accordingly, statistical significance is not a relevant consideration in this context.

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

⁸³ See *Preliminary Results*, and accompanying Decision Memorandum at 4 (emphasis added).

Jindal next contends that the Department's differential pricing analysis is suspect on its face because the Department now appears to find "differential pricing" more often than it found "targeted dumping" under the previous methodology. Jindal's analysis is flawed on its face, and its argument provides no reasoned basis for the Department to change its approach. First, the SAA expressly provides that "the Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."⁸⁴ This is precisely what the Department's differential pricing analysis does through the application of the Cohen's *d* and ratio tests, as explained fully in the *Preliminary Results*. Second, Jindal identifies no prior determination where the Department applied its differential pricing analysis and where that determination should have been decided differently, nor upon what basis the Department should have done so. Lastly, Jindal's analysis of prior determinations fails to take account of the fact that in the application of the previous methodology, the Department only engaged in such an analysis when it received a valid, substantiated allegation of targeted dumping. Based upon the Department's experience in this area, the Department decided to consider an alternative comparison method in every segment of a proceeding under its current methodology. To compare the results of the two approaches, as Jindal has in its case brief, fails to provide an accurate reflection of the Department's differential pricing analysis.

The Department disagrees with Jindal that it has failed to explain why the A-to-A method cannot account for Jindal's varying pricing behavior. As explained in the *Preliminary Results*, if the difference in the weighted-average dumping margins calculated using the A-to-A method and an appropriate alternative comparison method is meaningful, then this demonstrates that the A-to-A method cannot account for such differences and, therefore, an alternative method would be appropriate.⁸⁵ The Department determined that a difference in the weighted-average dumping margins is considered meaningful if: 1) there is a 25 percent relative change in the weighted-average dumping margin between the A-to-A method and the appropriate alternative method when both margins are above *de minimis*; or 2) the resulting weighted-average dumping margin moves across the *de minimis* threshold. Here, such a meaningful difference exists for Jindal because when comparing Jindal's weight-averaged dumping margin calculated pursuant to the A-to-A method and an alternative comparison method based on applying the A-to-T method to all U.S. sales, Jindal's weighted-average dumping margin moves across the *de minimis* threshold. This threshold is reasonable because comparing the weighted-average dumping margins calculated using the two comparison methods allows the Department to quantify the extent to which the A-to-A method cannot take into account different pricing behaviors exhibited by the exporter in the U.S. market. Therefore, for these final results, the Department continues to find that the A-to-A method cannot take into account the observed differences, and to apply the A-to-T method for all U.S. sales to calculate Jindal's weighted-average dumping margin.

⁸⁴ See SAA at 843.

⁸⁵ See *Preliminary Results*, and accompanying Decision Memorandum at 5.


Recommendation

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



Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance



(Date)