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Administrative Review
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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 2014-2015 administrative review of the antidumping duty order covering certain frozen warmwater shrimp (shrimp) from India. As a result of our analysis, we 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:

General Issues

1. Whether the Department Should Revise its Differential Pricing Analysis
2. Whether to Use Entry Date to Define Time Periods for the Differential Pricing Analysis

Company-Specific Issues

3. Ministerial Errors for the Liberty Group

¹ See Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments; 2014-2015, 81 FR 12705 (March 10, 2016) (Preliminary Results).

Background

On March 10, 2016, the Department of Commerce (the Department) published the preliminary results of the 2014-2015 administrative review of the antidumping duty order on shrimp from India.² This review covers 223 producers/exporters. The producers/exporters which the Department selected for individual examination are Falcon Marine Exports Limited and its affiliate K.R. Enterprises (collectively, Falcon) and the Liberty Group.³ The period of review (POR) is February 1, 2014, through January 31, 2015.

We invited parties to comment on the Preliminary Results. On April 15, 2016, we received a case brief from various producers/exporters of shrimp in India (hereinafter, the respondents).⁴ On April 22, 2016, we received rebuttal briefs from the Ad Hoc Shrimp Trade Action Committee (the petitioner) and the American Shrimp Processors Association (ASPA). We held a public hearing in July 2016. After analyzing the comments received, we 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,⁵ 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

² Id.

³ The Liberty Group consists of: Devi Marine Food Exports Private Ltd.; Kader Exports Private Limited; Kader Investment and Trading Company Private Limited; Liberty Frozen Foods Pvt. Ltd.; Liberty Oil Mills Ltd.; Premier Marine Products Private Limited; and Universal Cold Storage Private Limited.

⁴ These companies are: Falcon; the Liberty Group; Apex Frozen Foods Private Limited and its affiliate Apex Exports; Asvini Fisheries Private Limited; Devi Fisheries Group (including Devi Fisheries Limited, Satya Seafoods Private Limited, and Usha Seafoods); Jayalakshmi Sea Foods Private Limited; Nekkanti Sea Foods Limited; Sagar Grandhi Exports Private Limited; Sai Marine Exports Private Limited; Sai Sea Foods; Sandhya Marines Limited; and Sprint Exports Private Limited.

⁵ “Tails” in this context means the tail fan, which includes the telson and the uropods.

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 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.⁶

Margin Calculations

We calculated export price (EP) and normal value (NV) for Falcon and the Liberty Group using the same methodology stated in the Preliminary Results, except as follows:

- We revised the margin program for both respondents to correct an error in the calculation of the assessment rates. For further discussion, see the memorandum to the file from

⁶ 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).

Elizabeth Eastwood, Senior Analyst, entitled “Calculations for Falcon Marine Exports Limited (Falcon) for the Final Results of the 2014-2015 Administrative Review,” dated September 6, 2016 (Falcon’s Final Calculation Memorandum); and the memorandum to the file from Blaine Wiltse, Senior Analyst, entitled, “Calculations for the Liberty Group for the Final Results of the 2014-2015 Administrative Review,” dated September 6, 2016 (the Liberty Group’s Final Calculation Memorandum).

- We revised the margin program for both respondents to define the time periods for our differential pricing analysis using entry date, rather than sale date. See Comment 2.
- We corrected certain ministerial errors in our calculations for the Liberty Group. See Comment 3.
- We revised the comparison market program for the Liberty Group to use the revised cost database submitted on March 3, 2016.

Discussion of the Issues

General Issues

Comment 1: *Whether the Department Should Revise its Differential Pricing Analysis*

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 between 33 and 66 percent of Falcon’s U.S. sales and more than 66 percent of the Liberty Group’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, to calculate the respondents’ weighted-average dumping margins, we preliminarily applied the A-to-T method to those U.S. sales that passed the Cohen’s *d* test and the A-to-A method to those sales that did not pass the Cohen’s *d* test for Falcon; while we applied the A-to-T method to all U.S. sales for the Liberty Group.⁷

The respondents disagree with the methodology the Department uses to determine whether there is a meaningful difference in the margins calculated using the A-to-A and A-to-T methods (i.e., the “meaningful difference” test).⁸ According to the respondents, the “meaningful difference”

⁷ In the final results, the differential pricing analysis for Falcon did not change meaningfully. However, for the Liberty Group we found that between 33 and 66 percent of the Liberty Group’s U.S. sales passed the Cohen’s *d* test. Therefore, for purposes of the final results, we applied the A-to-T method to those U.S. sales that passed the Cohen’s *d* test and the A-to-A method to those sales that did not pass the Cohen’s *d* test for the Liberty Group.

⁸ The respondents note that, when calculating margins using the A-to-A method, the Department offsets positive margins with negative ones; however, the respondents point out that, when calculating margins using the A-to-T method, negative margins are set to zero (a practice known as zeroing).

test must satisfy two prongs: 1) it must determine whether the A-to-A method can account for the significant price differences; and 2) it must sufficiently explain its determination under the first prong in order to apply the A-to-T method. The respondents argue that not only does the Department's current "meaningful difference" test fail to satisfy both of these prongs, but also it is unreasonable and arbitrary in two additional ways. Specifically, the respondents contend that the test: 1) analyzes all sales, both those found to exhibit a pattern of significant price differences and those which were not; and 2) wrongly uses zeroing in the A-to-T method, but not the A-to-A method, when comparing the two margins.

The respondents argue that, by using all sales in the "meaningful difference" test, the Department has unreasonably interpreted and applied section 777A(d)(1)(B)(ii) of the Act. According to the respondents, this section of the Act makes clear that the Department must determine the adequacy of the A-to-A method to account for significant price differences in relation to "such differences." The respondents contend that the term "such differences" in the Act directly relates to the export sales that demonstrated significant price differences. The respondents point out that the point of applying the A-to-T method is to unmask dumping on sales which exhibit significant price differences. Thus, the respondents claim that the question of whether the A-to-A method can account for significant price differences should relate only to those sales demonstrating such differences, not to all sales.⁹

Furthermore, the respondents claim that the Department's use of zeroing in the A-to-T, but not the A-to-A, methods in the "meaningful difference" test is arbitrary, unlawful, and distortive. The respondents note that the Department's "meaningful difference" test is a threshold determination distinct from the Department's margin calculations used to determine which margin calculation method to apply. The respondents argue that the margins calculated using the A-to-A method are decreased because the Department does not apply zeroing in the A-to-A method (*i.e.*, in the A-to-A method positive dumping margins are offset with negative dumping margins, thereby reducing the weighted average margin of dumping, provided negative dumping margins are present). Thus, according to respondents the Department obliterates the amount of dumping captured by the A-to-A method, which is exactly the information the Department should be using to determine its adequacy.¹⁰ According to the respondents, unless the

⁹ The respondents also point to their analysis of the margins calculated for the Liberty Group in this administrative review. See the respondents' case brief at Exhibits 3 and 4. According to the respondents, this analysis shows that, within the Liberty Group's sales found to exhibit significant price differences, there are both dumped and non-dumped transactions. The respondents contend that, because the net margin on these sales is positive, any targeted dumping within these sales was masked by non-dumped sales within this group. Therefore, the respondents claim that the Liberty Group's sales which did not exhibit significant price differences did not mask dumping on any of the sales which did exhibit significant price differences. As a result, the respondents argue that there is no need for the Department to include the sales which did not exhibit significant price differences in its "meaningful difference" test.

¹⁰ The respondents provide an analysis of the Liberty Group's data regarding this point. See the respondents' case brief at Exhibit 4. The details of this analysis contain business proprietary information which cannot be discussed here. See the respondents' case brief, at 24-25. In sum, the respondents argue that the Department has found that the A-to-T method unmasks a greater amount of dumping when compared to the A-to-A method because of the granting of offsets for non-dumped transactions under the A-to-A method. According to the respondents, the Liberty Group's margin is negative under the A-to-A method as the result of granting offsets for non-dumped transactions. Thus, the respondents claim that the Department's analysis does not identify the extent to

Department uses zeroing in both the A-to-A and A-to-T methods, it is impossible to know if one comparison method is masking dumping. The respondents argue that, when properly calculated, the amount of dumping unmasked by the A-to-T method for both respondents is insignificant and does not result in the margin moving across the de minimis threshold.

The respondents also claim that the Department has misconstrued the purpose of zeroing in the “meaningful difference” test. According to the respondents, the Department improperly conflates zeroing for purposes of the “meaningful difference” test with zeroing for purposes of the margin calculated using the A-to-T method. The respondents claim that, for those sales which exhibit a pattern of significant price differences, it is appropriate to apply zeroing to isolate the positive margins using the A-to-A method. Next, the respondents claim that, in order to determine whether the A-to-A method captured the entire amount of dumping within the sales exhibiting significant price differences, it is appropriate to apply zeroing under the A-to-T method and isolate the positive margins under this method. According to the respondents, only by comparing the positive margins isolated under both of these methods can the Department reveal the extent of the dumping captured using the A-to-A method, and any additional dumping revealed by using the A-to-T method.¹¹ The respondents contend that, if the Department finds that the A-to-A method cannot account for the dumping found on sales which exhibit significant price differences, it may then apply the A-to-T method, including zeroing, based on the results of its pattern test. However, the respondents point out that the Department did not conduct such an analysis when performing the “meaningful difference” test. Instead, the respondents note that the Department simply applied the results of its margin calculations using the A-to-T method to determine whether the A-to-A method can account for the dumping found on sales exhibiting significant price differences. The respondents contend that doing so is arbitrary and unreasonable.

Moreover, the respondents take issue with the Department’s assertion that margins calculated using zeroing under the A-to-A and A-to-T methods will give the same results. According to the respondents, while this may be so in most instances when all sales are used, it is not true when applied to a subset of sales. The respondents note that, in this case, only a subset of Falcon’s and the Liberty Group’s sales were found to exhibit significant price differences and, if zeroing is applied to this subset, the margins calculated using the A-to-A and A-to-T methods with zeroing are not the same.¹² Therefore, the respondents argue that the Department should determine whether the A-to-A method can account for significant price differences as part of the “meaningful difference” test by zeroing only those sales found to exhibit significant price differences under both the A-to-A and A-to-T methods. The respondents contend that such an

which the A-to-A method masks dumping when compared to the A-to-T method, but instead merely shows that zeroing creates larger margins.

¹¹ Otherwise, the respondents argue that when applying zeroing under the A-to-T, but not the A-to-A, methods, the Department inflates the additional dumping captured under the A-to-T method by the amount of the negative dumping accounted for under the A-to-A method, a result which is clearly distortive, unreasonable, and arbitrary.

¹² See the respondents’ case brief at Exhibit 4. The respondents argue that this analysis gives the only true measure of the additional dumping unmasked by the A-to-T method for sales which exhibit significant price differences, which is the point of the Department’s differential pricing analysis.

analysis demonstrates that the Department should calculate Falcon's and the Liberty Group's margins using the standard A-to-A method in the final results.

Finally, the respondents argue that the Department arbitrarily and unreasonably applied the A-to-T method to all of the Liberty Group's sales when it found that more than 66 percent of the Liberty Group's sales passed the Cohen's *d* test. According to the respondents, the Department in its margin calculations precisely determined the universe of sales which exhibited significant price differences. Thus, the respondents argue that the Department should calculate the Liberty Group's margin based on the "mixed" methodology, by only applying the A-to-T method to those sales which passed the Cohen's *d* test, exhibiting significant price differences. The respondents claim that applying the A-to-T method to all of the Liberty Group's sales goes beyond the remedy necessary to unmask dumping, artificially inflating the company's margin. The petitioners disagree with the respondents' contention that the Department has failed to provide an explanation of how the "meaningful difference" test does not account for significant price differences, noting that the respondents have not actually argued this point. Instead, the petitioners point out that the respondents make arguments regarding the use of all sales in the "meaningful difference" test and the use of zeroing in the A-to-A and A-to-T methods.

In response, the petitioners maintain that the U.S. Court of International Trade (CIT) addressed and rejected similar arguments in litigation regarding the eighth administrative review of this antidumping order.¹³ The petitioners note that the respondents not only ignored Apex in their case brief, but also failed to provide any additional arguments that would undermine the CIT's ruling in that case. Thus, the petitioners assert that the respondents have provided no basis for the Department to modify the methodology it uses in the "meaningful difference" test.

ASPA disagrees with the respondents' arguments regarding zeroing. ASPA points out the Court of Appeals for the Federal Circuit (CAFC) has explained that the A-to-A method may mask dumping and this dumping can be identified by using the A-to-T method.¹⁴ According to ASPA, the respondents' arguments ignores the fact that without zeroing the A-to-A and A-to-T methods are basically identical and it is zeroing that allows for dumped sales to be unmasked. ASPA maintains that, when masked dumping has been found (as is the case here), application of the A-to-T method is a reasonable and appropriate means to expose and remedy that dumping. Moreover, ASPA notes that the Department has previously held that it would be illogical for the agency to determine whether the A-to-T method is inadequate by comparing methods which are different from the ones it actually uses and the courts have upheld.¹⁵ ASPA asserts that, when choosing between two permissible methodologies, it is reasonable for the Department to

¹³ See the petitioners' rebuttal brief, at 12-15 (citing Apex Frozen Foods Private Ltd. v. United States, 144 F. Supp.3d 1308, 1330 (CIT 2016) (Apex)).

¹⁴ See ASPA rebuttal brief, at 2-3 (citing Koyo Seiko Co., Ltd. v. United States, 20 F.3d 1156, 1159 (CAFC 1994) (Koyo Seiko); and Union Steel v. United States, 713 F.3d 1101, 1109 (CAFC 2013) (Union Steel)).

¹⁵ See ASPA rebuttal brief, at 3 (citing Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination; 2011-2012, 78 FR 42492, and accompanying Issues and Decision Memorandum at Comment 1; and Apex Frozen Foods Private Ltd. v. United States, 37 F.Supp.3d 1286, 1295-1296 (CIT 2014)).

compare the outcomes of those methodologies as they exist. Therefore, ASPA maintains that because the use of zeroing in the A-to-T method is reasonable and has been upheld by the courts, the Department should continue to apply it in the final results.

Finally, the petitioners disagree with the respondents' contention that the Department should limit the application of the A-to-T method for the Liberty Group to only those sales which passed the Cohen's *d* test, noting that the CIT has already rejected this argument.¹⁶ Therefore, the petitioners assert that, because the respondents have not provided a basis for the Department to alter its approach, the respondents' argument should be rejected.

Department's Position:

As an initial matter, we note that there is nothing in section 777A(d) of the Act that mandates how the Department measures whether there is a pattern of prices that differs significantly or explains why the A-to-A method or the transaction-to-transaction (T-to-T) method cannot account for such differences. On the contrary, carrying out the purpose of the statute¹⁷ here is a gap filling exercise properly conducted by the Department.¹⁸ As explained in the Preliminary Results, as well as in various other proceedings,¹⁹ the Department's differential pricing analysis is reasonable, including the use of the Cohen's *d* test as a component in this analysis, and it is in no way contrary to the law.

With Congress' enactment of the Uruguay Round Agreements Act (URAA), section 777A(d) of the Act states:

(d) Determination of Less Than Fair Value.-- (1) Investigations.--

¹⁶ See the petitioners' rebuttal brief, at 16 (citing Tri Union Frozen Products Inc. v. United States, 2016 CIT LEXIS 37, *138-139 (Apr. 6, 2016)).

¹⁷ See Koyo Seiko, 20 F.3d at 1159 ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as 'masked dumping.' By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result." (internal citations omitted)).

¹⁸ See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (Chevron) (recognizing deference where a statute is ambiguous and an agency's interpretation is reasonable); see also Apex, 37 F. Supp. 3d at 1302 (applying Chevron deference in the context of the Department's interpretation of section 777A(d)(1) of the Act).

¹⁹ See, e.g., Welded Line Pipe From the Republic of Korea: Final Determination of Sales at Less Than Fair Value, 80 FR 61366 (October 13, 2015), and accompanying Issues and Decision Memorandum at Comment 1; Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 32937 (June 10, 2015), and accompanying Issues and Decision Memorandum at Comments 1 and 2, and Welded ASTM A-312 Stainless Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014, 81 FR 46647 (July 18, 2016), and accompanying Issues and Decision Memorandum at Comment 4.

(A) In General. In an investigation under subtitle B, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value--

- (i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or
- (ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

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

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

(2) Reviews.--In a review under section 751, 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.

The Statement of Administrative Action (SAA) expressly recognizes that:

New section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an A-to-A or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, i.e., where targeted dumping may be occurring.²⁰

The SAA further discusses this new section of the statute and the Department's change in practice to using the A-to-A method:

In part the reluctance to use the A-to-A methodology had been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an

²⁰ See URAA, SAA, H.R. Doc. No. 103-316 at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161.

exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”²¹

With the enactment of the URAA, the Department’s standard comparison method in a less-than-fair-value investigation is normally the A-to-A method. This is reiterated in the Department’s regulations, which state that “the Secretary will use the {A-to-A} method unless the Secretary determines another method is appropriate in a particular case.”²² The Department now also follows this approach in administrative reviews.²³ As recognized in the SAA, the application by the Department of the A-to-A method to calculate a company’s weighted-average dumping margin has raised concerns that dumping may be masked or hidden. The SAA states that consideration of the A-to-T method, as an alternative comparison method, may respond to such concerns where the A-to-A method, or the T-to-T method, “cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping *may* be occurring.”²⁴ Neither the Act nor the SAA state that “targeted dumping” only occurs where there is a pattern of prices that differ significantly. In other words, the U.S. sales which constitute a pattern are not necessarily the only sales where “targeted dumping” *may* be occurring or dumping *may* be masked. As stated in the Act, the requirements for considering whether to apply the A-to-T method are that there exist a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences.

Accordingly, the Department finds that the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the subject merchandise at issue in the U.S. market.²⁵ While “targeting” and “targeted dumping” may be used as a general expression to denote this provision of the statute,²⁶ these terms impose no additional requirements beyond those specified in the statute for the Department to otherwise determine that the A-to-A method is not appropriate based upon a finding that the two statutory requirements have been satisfied. Furthermore, “targeting” implies a purpose or intent on behalf of the exporter to focus on a sub-

²¹ See SAA at 842.

²² See 19 CFR 351.414(c)(1).

²³ 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) (where the Department explained that it would now “calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations”).

²⁴ See SAA at 843 (emphasis added).

²⁵ See 19 CFR 351.414(c)(1).

²⁶ See, e.g., Samsung v. United States, Slip Op. 15-58, p. 5 (“Commerce may apply the A-to-T methodology ‘if (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and (ii) the administering authority explains why such differences cannot be taken into account using’ the A-to-A or T-to-T methodologies. Id. § 1677f-1(d)(1)(B). Pricing that meets both conditions is known as ‘targeted dumping.’”).

group of its U.S. sales. The court has already found that the purpose or intent behind an exporter's pricing behavior in the U.S. market is not relevant to the Department's analysis of the statutory provisions of section 777A(d)(1)(B) of the Act.²⁷ The CAFC has stated:

Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. Here, the {U.S. Court of International Trade (CIT)} did not err in finding there is no intent requirement in the statute, and we agree with the CIT that requiring Commerce to determine the intent of a targeted dumping respondent "would create a tremendous burden on Commerce that is not required or suggested by the statute."²⁸

As stated in section 777A(d)(1)(B) of the Act, the requirements for considering whether to apply the A-to-T method are that there exists a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences. The Department's application of a differential pricing analysis in this administrative review provides a complete and reasonable interpretation of the language of the statute, regulations and SAA to identify when pricing cannot be appropriately taken into account when using the standard A-to-A method, and it provides a remedy for masked dumping when the conditions exist.

As described in the Preliminary Results, the differential pricing analysis addresses each of these two statutory requirements. The first requirement, the "pattern requirement," is addressed using the Cohen's *d* test and the ratio test. The pattern requirement will establish whether conditions exist in the pricing behavior of the respondent in the U.S. market where dumping may be masked or hidden, where higher-priced U.S. sales offset lower-priced U.S. sales. Consistent with the pattern requirement, the Cohen's *d* test, for comparable merchandise, compares the mean price to a given purchaser, region or time period to the mean price to all other purchasers, regions or time periods, respectively, to determine whether this difference is significant. The ratio test then aggregates the results of these individual comparisons from the Cohen's *d* test to determine whether the extent of the identified differences in prices which are found to be significant is sufficient to find a pattern and satisfy the pattern requirement, *i.e.*, that conditions exist which may result in masked dumping.

When the respondent's pricing behavior exhibits conditions in which masked dumping may be a problem – *i.e.*, where there exists a pattern of prices that differ significantly – then the Department considers whether the standard A-to-A method can account for "such differences" –

²⁷ See JB F RAK LLC v. United States, 991 F. Supp. 2d 1343, 1355 (CIT 2014); aff'd JB F RAK LLC v. United States, 790 F.3d 1358 (CAFC 2015) (JB F RAK); see also Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States, 608 Fed. Appx. 948 (CAFC 2015) (Borusan).

²⁸ See JB F RAK, 790 F.3d at 1368 (internal citations omitted).

i.e., the conditions found pursuant to the pattern requirement. To examine this second statutory requirement, the “explanation requirement,” the Department considers whether there is a meaningful difference between the weighted-average dumping margin calculated using the A-to-A method and that calculated using the appropriate alternative comparison method based on the A-to-T method. Comparison of these results summarize whether the differences in U.S. prices mask or hide dumping when NVs are compared with average U.S. prices (the A-to-A method) as opposed to when NVs are compared with sale-specific U.S. prices (the A-to-T method). When there is a meaningful difference in these results, the Department finds that the extent of masked dumping is meaningful to warrant the use of an alternative comparison method to quantify the amount of a respondent’s dumping in the U.S. market, thus fulfilling the language and purpose of the statute and the SAA.

1. Whether the Department’s Differential Pricing Analysis Provides An Adequate Explanation of Why the A-to-A Method Cannot Account for Such Differences

For Falcon and the Liberty Group in these final results, the Department finds that the weighted-average dumping margins calculated using the A-to-A method and an alternative comparison method based on the A-to-T method are 0.00 percent and *non-de minimis*, respectively, for both companies. Thus, Falcon’s and the Liberty Group’s calculated results move across the *de minimis* threshold, which the Department finds to be a meaningful difference such that the A-to-A method cannot account for either respondent’s pricing behavior in the U.S. market. The CIT has affirmed the Department’s use of the “meaningful difference” test to find that the A-to-A method cannot account for such differences.²⁹

The Department disagrees with the respondents that its differential pricing analysis fails to explain why the A-to-A method cannot account for such differences. As explained above, there is no requirement for the Department to understand the reasons why there are significant price differences exhibited in the respondent’s U.S. pricing behavior. Nor does the statute require that the Department use these same reasons as the foundation for explaining why the A-to-A method cannot account for such differences. Beyond providing the two requirements in section 777A(d)(1)(B) of the Act, Congress has not detailed how the Department must address these two requirements. As noted above, the Court has already affirmed that the Department does not need to identify why price differences exist. Therefore, the respondents’ argument is misplaced.

The difference in the calculated results specifically reveals the extent of the masked, or “targeted,” dumping which is being hidden when applying the A-to-A method.³⁰ As noted by the

²⁹ See Apex, at 38-45. The Court in Apex specifically addressed the respondents’ arguments regarding zeroing and limiting the Department’s analysis to only those sales which exhibited significant price differences, finding that both lacked merit. Id. See also generally Samsung Electronics Co. v. United States, Slip Op. 15-158 (CIT June 12, 2015) (Samsung) (although Samsung involves the Department’s earlier targeted dumping analysis rather than a differential pricing analysis, the question here is the same – whether the explanation requirement has been met.).

³⁰ See Koyo Seiko, 20 F.3d at 1159 (“The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as ‘masked dumping.’ By using individual U.S. prices in calculating dumping

respondents, the difference in these two results is caused by higher U.S. prices offsetting lower U.S. prices where the dumping, which may be found on lower priced U.S. sales, is hidden or masked by higher U.S. prices,³¹ such that the A-to-A method would be unable to account for such differences.³² Such masking or offsetting of lower prices with higher prices occurs implicitly within the averaging groups and may occur explicitly when aggregating the A-to-A comparison results. Therefore, in order to understand the impact of the unmasked “targeted dumping,” the Department finds that the comparison of each of the calculated weighted-average dumping margins using the standard and alternative comparison methodologies exactly quantifies the extent of the unmasked “targeted dumping.”

The simple comparison of the two calculated results belies all of the complexities in calculating and aggregating individual dumping margins (*i.e.*, individual results from comparing EPs, or constructed export prices (CEPs), with NVs). It is the interaction of these many comparisons of EPs or CEPs with NVs, and the aggregation of these comparison results, which determine whether there is a meaningful difference in these two calculated weighted-average dumping margins. When using the A-to-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. Congress was concerned about offsetting and that concern 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.”³³ The comparison of a weighted-average dumping margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the A-to-A method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a NV that is independent from the type of U.S. price used for comparison, and the basis for NV will be constant because the characteristics of the individual U.S. sales³⁴ remain constant whether weighted-average U.S. prices or individual U.S. prices are used in the analysis.

Consider the simple situation where there is a single, weighted-average U.S. price, and 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-to-A method with offsets (*i.e.*, without zeroing) and the A-to-T method with zeroing.³⁵ The NV used to calculate a weighted-average

margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result.” (internal citations omitted)).

³¹ See SAA at 842.

³² See *Union Steel*, 713 F.3d at 1108 (“{the A-to-A} comparison methodology masks individual transaction prices below normal value with other above normal value prices within the same averaging group.”).

³³ See SAA at 842.

³⁴ These characteristics include may include such items as product, level-of-trade, time period, and whether the product is considered as prime- or second-quality merchandise.

³⁵ The calculated results using the A-to-A method with offsets (*i.e.*, no zeroing) and the calculated results using the A-to-T method with offsets (*i.e.*, no zeroing) will be identical. See Attachment II of Falcon’s Final

dumping margin for these sales will fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

- 1) the NV is less than all of the U.S. prices and there is no dumping;
- 2) the NV is greater than all of the U.S. prices and all sales are dumped;
- 3) the NV is nominally greater than the lowest U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;³⁶
- 4) the NV is nominally less than the highest U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the NV is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

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 weighted-average dumping margins calculated using offsets or zeroing and there is no meaningful difference in the calculated results and the A-to-A method will be used. Under scenario (3), there is a minimal (*i.e.*, de minimis) amount of dumping, such that the application of offsets will result in a zero or de minimis amount of dumping (*i.e.*, the A-to-A method with offsets and the A-to-T method with zeroing both results in a weighted-average dumping margin which is either zero or de minimis) and which also does not constitute a meaningful difference and the A-to-A method will be used. 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 the application of the offsets for non-dumped sales does not change the calculated results by more than 25 percent, and again there is not a meaningful difference in the weighted-average dumping margins calculated using offsets or zeroing and the A-to-A method will be used. Lastly, under scenario (5), there is a significant, non-de minimis amount of dumping and a significant amount of offsets generated from non-dumped sales such that there is a meaningful difference in the weighted-average dumping margins calculated using offsets and zeroing. Only under the fifth scenario can the Department consider the use of an alternative comparison method.

Calculation Memorandum (pages 210-212 of the SAS output); and Attachment II of the Liberty Group's Final Calculation Memorandum (pages 90-91 of the SAS output), where the calculation results of the A-to-A method and each of the alternative comparison methods are summarized. The sum of the "Positive Comparison Results" and the "Negative Comparison Results" for each of the three comparison methods (*i.e.*, the A-to-A method, the "mixed" method, and the A-to-T method, are identical, *i.e.*, with offsets for all non-dumped sales (*i.e.*, negative comparison results), the amount of dumping is identical. As such, the difference between the calculated results of these comparison methods is whether negative comparison results are used as offsets or set to zero.

³⁶ As discussed further below, please note that scenarios 3, 4 and 5 imply that there is a wide enough spread between the lowest and highest U.S. prices so that the differences between the U.S. prices and NV can result in a significant amount of dumping and/or offsets, both of which are measured relative to the U.S. prices.

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 only make this de minimis amount of dumping even smaller and have no impact on the 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 be meaningfully different under the A-to-T method with zeroing as compared to the A-to-T/A-to-A method with offsets. This difference in the calculated results is meaningful in that a non-de minimis amount of dumping is now masked or hidden to the extent where the dumping is found to be zero or de minimis or to have decreased by 25 percent of the amount of the dumping with the applied offsets.

This example demonstrates that there must be a significant and meaningful difference in U.S. prices in order to resort to an alternative comparison method. These differences in U.S. prices must be large enough, relative to the absolute price level in the U.S. market, where not only is there a non-de minimis amount of dumping, but there also is a meaningful amount of offsets to impact the identified amount of dumping under the A-to-A method with offsets. Furthermore, the NV must fall within an even narrower range of values (i.e., narrower than the price differences exhibited in the U.S. market) such that these limiting circumstances are present (i.e., scenario (5) above). This required fact pattern, as represented in this simple situation, must then be repeated across multiple averaging groups in the calculation of a weighted-average dumping margin in order to result in an overall weighted-average dumping margin which changes to a meaningful extent.

Further, for each A-to-A comparison result which does not result in the set of circumstances in scenario (5), the “meaningfulness” of the difference in the weighted-average dumping margins between the two comparison methods will be diminished. This is because for these A-to-A comparisons which do not exhibit a meaningful difference with the A-to-T comparisons, there will be little or no change in the amount of dumping (i.e., the numerator of the weighted-average dumping margin) but the U.S. sales value of these transactions will nonetheless be included in the total U.S. sales value (i.e., the denominator of the weighted-average dumping margin). The aggregation of these intermediate A-to-A comparison results where there is no “meaningful” difference will thus dilute the significance of other A-to-A comparison results where there is a “meaningful” difference, which the A-to-T method avoids.

Additionally, the extent of the amount of dumping and potential offsets for non-dumped sales is measured relative to the total export value (i.e., the denominator of the weighted-average dumping margin) of the subject merchandise. Thus, the “targeted dumping” analysis accounts for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under scenario (5) above will the Department find that the A-to-A method is not appropriate – where there is an identifiable non-de minimis amount of dumping along with an amount of offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount when those offsets are applied. Both of these amounts are measured relative to the total export value (i.e., absolute price level) of the subject merchandise sold by the exporter in the U.S. market.

Finally, we disagree with the respondents' contention that "{u}nless zeroing is used in both A-A or A-T comparisons, it is impossible to know if one comparison methodology is masking dumping." Indeed, the masking of Falcon's and the Liberty Group's dumping is such that the A-to-A method with offsets (i.e., without zeroing, the standard comparison method) showed no amount of dumping at all. By contrast, the alternative comparison method based on the A-to-T method with zeroing reveals a non-de minimis dumping.³⁷ If the A-to-A method with offsets had been the basis for these final results of review, then masking would have resulted in no antidumping duties being assessed for the respondents for their pricing behavior in the U.S. market, which was found by the International Trade Commission to be causing material injury to the domestic industry. In this situation, Congress's intent of addressing "targeted dumping," when the requirements of section 777A(d)(1)(B) of the Act are satisfied,³⁸ would be thwarted with regard to the respondents if the A-to-A method were applied. It is for this reason that the Department finds that the A-to-A method with offsets cannot take into account the pattern of prices that differ significantly for the respondents, i.e., the conditions where "targeted" or masked dumping "may be occurring."³⁹

Respondents argue that zeroing under A-to-A for purposes of the meaningful difference test is distinct from zeroing under A-to-A for the ultimate "remedy phase." However this distinction between the two is a false one. The Department would not be measuring the true difference between the two comparison methods if it modified the way they are applied solely for purposes of the meaningful difference test. The zeroing feature of the A-to-T method unmasks dumping which, when as here there are significant price differences, naturally has a different result compared to a comparison method that does not zero, such as the A-to-A method. When the calculated rate based on the A-to-A method with zeroing is used as the starting point for the meaningful difference test, some of the masked dumping has already been revealed, such that a comparison between this rate and the rate calculated with the alternative comparison method only provides a partial story regarding the amount of dumping which is being masked by the application of the A-to-A method with offsets. Respondents' proposed approach would not fully account for the amount of masked dumping which would be revealed by the application of an alternative comparison method in comparison with the standard A-to-A method used to calculate a respondent's weighted-average dumping margin. Thus, it is for this reason that the Department continues to base its meaningful difference test on comparing the calculated rates based on the A-to-A method with offsets and an alternative comparison method based on the A-to-T method with zeroing and for Falcon and the Liberty Group to find that application of the A-to-T method

³⁷ The CIT in Apex held that the "purpose" of applying the A-to-T method is to "reveal those cases where offsetting masks dumping, and that purpose is achieved by zeroing." See Apex, at 44. The Court explained that without zeroing the results of the A-to-A and A-to-T comparisons would be mathematically equivalent, obviating any benefit derived from the provision of a statutory alternative. Id. The Court therefore held that "The zeroing characteristic of A-T is inextricably linked to the comparison methodology and its effect in the meaningful difference analysis does not render the approach unreasonable." Id., at 44-45.

³⁸ See SAA at 842-843.

³⁹ See Apex, 144 F.Supp. 3d at 1333 n. 24 (affirming the Department's explanation that A-to-A (without zeroing) cannot account for the pattern of significant price differences because A-to-A masked dumping that A-to-T revealed).

for those sales which pass the Cohen's *d* test for both Falcon and the Liberty Group, is appropriate in these final results.

2. Whether the Department May Apply the A-to-T Method to All U.S. Sales

The Department disagrees with the respondents' claim that if A-to-T comparisons are permissible, the Department may undertake such comparisons for only those sales in which it has found "targeted dumping" to exist. Neither the statute nor the SAA provide guidance in determining how to apply the A-to-T method once the requirements of section 777A(d)(1)(B)(i) and (ii) have been satisfied. Accordingly, the Department has reasonably created a framework to fill the gap in the statutory language 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 with the Cohen's *d* test. As part of that gap, Congress has not set forth a prescription on how the A-to-T method must be applied as an alternative comparison method to either of the standard comparison methodologies (*i.e.*, the A-to-A method or the T-to-T method). Likewise, this discretion has been affirmed by the court.⁴⁰

As stated in the Preliminary Results, the purpose of the Cohen's *d* test is to evaluate "... all exports sales by purchaser, region, and time period to determine whether a pattern of prices that differ significantly exists."⁴¹ 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 finds that the extent of these price differences throughout the pricing behavior of the respondent does not permit the segregation of this pricing behavior which constitute the identified pattern or prices that differ significantly from that which does not. Accordingly, the Department determines that considering the application of the A-to-T method to all U.S. sales to be reasonable. 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 considers this extent of the pattern to not be significant in considering whether the A-to-A method is appropriate, and has not considered the application of the A-to-T method as an alternative comparison method. 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, the Department considers the extent of this pattern to be meaningful to consider whether the A-to-A method is appropriate, but also finds that segregating this pricing behavior from the pricing behavior which does not contribute to the pattern to be reasonable, and has then only considered the application of the A-to-T method as an alternative comparison method to this limited portion of a respondent's U.S. sales.

3. Summary

Accordingly, for all of the foregoing reasons, we find that the Department's differential pricing analysis is consistent with section 777A(d)(1)(B) of the Act and the SAA. Furthermore, the differential pricing analysis represents a reasonable framework to determine whether the A-to-A

⁴⁰ See, *e.g.*, Apex, 144 F. Supp. 3d at 1319; see also Timken v. United States, 2016 WL 2765448 at *5 (CIT May 10, 2016).

⁴¹ See Preliminary Results, and accompanying Preliminary Decision Memorandum, at 7.

method is appropriate, and if not, then how the A-to-T method may be considered as an alternative to the standard A-to-A method.

Comment 2: *Whether to Use Entry Date to Define Time Periods for the Differential Pricing Analysis*

In the Preliminary Results, we defined the time periods used in the differential pricing analysis for both respondents based upon the reported date of sale.⁴² However, we noted that Falcon and the Liberty Group in their supplemental questionnaire responses requested that the Department modify the time periods used in the differential pricing analysis, and we stated that we would consider these comments for purposes of the final results.⁴³

The respondents assert that basing time periods on the date of sale in this administrative review results in a distortion because both respondents use the date of entry, rather than the date of sale, to report their universe of U.S. sales transactions. According to the respondents, there is a lag between the time that a sale has shipped and when the sale enters the United States. As a result, the respondents note that because Falcon and the Liberty Group reported those transactions which entered the United States during the POR, certain of these sales had invoice and/or shipment dates outside of the POR (*i.e.*, before February 1, 2014, and after January 31, 2015). The respondents point out that using the Department's standard time period definition in this case resulted in sales being grouped into five "quarters," one of which predates the POR. Moreover, the respondents contend that these quarters are also unequal given that only three of them contain a full three months of data (quarters 1, 2, and 3), while the two remaining quarters (quarters 0 and 4), each contain a far shorter period of sales. The respondents maintain that this arbitrary and unequal grouping of sales distorts the Department's differential pricing analysis.

The respondents also contend that the Department's time period differential pricing results were further distorted because the weighted-average prices generally for the two "partial" quarters are not representative of the total sales in that quarter. Specifically, the respondents point out that Falcon and the Liberty Group made other U.S. sales during quarters 0 and 4 which were not reported because they did not enter the United States during the POR. According to the respondents, if these sales were included in the Department's analysis, they would significantly change the weighted-average sales prices calculated in those quarters.

The respondents note that the Department can eliminate this distortion by simply defining its time periods for differential pricing using entry date. According to the respondents, the Department's standard time period definition appears designed to divide the POR into four equal quarters. The respondents point out that their proposed change would create four equal quarters of three months' each,⁴⁴ which would ensure uniform pricing comparisons. Further, the respondents assert that, not only does the Department specifically encourage parties to argue for

⁴² See Preliminary Results, and accompanying Preliminary Decision Memorandum at 7.

⁴³ *Id.*, at 8.

⁴⁴ According to the respondents, the Department would have grouped Falcon's and the Liberty Group's sales in this manner if they had not been the importers of record and known the entry dates of their U.S. sales.

modifications to the group definitions used in its differential pricing analysis,⁴⁵ but the Department has also modified its default time period definitions in other cases where there it found that there was a logical basis to do so.^{46,47} Therefore, the respondents maintain that, in situations where the respondents are the importers of record, the Department should modify its practice to define the time periods for differential pricing using entry date.

The petitioner disagrees, arguing that it would be inappropriate for the Department to base its differential pricing analysis on time periods which differ from the dates when the respondents set their sales terms. According to the petitioner, entry date is only relevant in this proceeding because this is the date used to define the respondents' universe of sales. The petitioner notes that it is not unusual in administrative reviews to base the sales universe on entry date and, as a result, have dates of sale outside the POR.⁴⁸ The petitioner points out that the respondents have not explained how a sale's entry date correlates to the time period when the pricing for that sale was established. Therefore, the petitioner contends that it would be arbitrary to use entry date (or payment date, or any date other than sale date) to group sales based on time period. As a result, the petitioner claims that the Department should reject the respondents' request.

The petitioner argues that the respondents' request demonstrates their fundamental misunderstanding of the Department's differential pricing practice. According to the petitioner, the Department is evaluating the manner in which sales prices vary by a given time period and, thus, it uses date of sale to organize sales within time periods. The petitioner contends that the respondents' request to organize sales by entry date would remove the date when the sales price was determined from the Department's analysis. The petitioner claims that this would create an arbitrary standard, demonstrating that the respondents' primary concern here is outcome driven. The petitioner points out that the Department has consistently defined quarterly time periods based on the date of sale in its differential pricing analysis, providing an orderly and predictable approach.⁴⁹ Thus, the petitioner contends that, while the Department encourages parties to argue for modifications in the group definitions used in the differential pricing analysis, this does not

⁴⁵ See Preliminary Results, and Preliminary Decision Memorandum at 8.

⁴⁶ See the respondents' case brief, at 18 (citing Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012, 79 FR 23324 (April 28, 2014) (Copper Pipe from the PRC), and accompanying Issues and Decision Memorandum at Comment 6).

⁴⁷ In the alternative, the respondents assert that, if the Department insists on continuing to define its time periods in this review based on the date of sale, it can create four equal quarters by dividing the total number of days on a date of sale basis by four.

⁴⁸ See the petitioner's rebuttal brief, at 6 (citing, e.g., Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 75 FR 64696 (October 20, 2010), and accompanying Issues and Decision Memorandum at Comment 4).

⁴⁹ See the petitioners rebuttal brief, at 7 (citing Large Residential Washers From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review; 2012-2014, 80 FR 55595 (September 16, 2015) (Washers from Korea), and accompanying Issues and Decision Memorandum at Comment 7; and Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 20197 (April 15, 2015) (Tires from the PRC), and accompanying Issues and Decision Memorandum at Comment 25).

mean that the Department will alter its practice simply because a party prefers the use of different time periods.

The petitioner acknowledges that the Department has altered the time periods it uses in its differential pricing analysis based on case-specific facts.⁵⁰ However, the petitioner also points out that the Department has rejected arguments to alter these time periods in other cases. Specifically, the petitioner notes that in Washers from Korea, the Department declined to modify its time periods because the petitioners could not establish a correlation between the requested periods and the pricing of the subject merchandise.⁵¹ Similarly, the petitioner states that in Tires from the PRC, the Department also rejected the petitioner's request to use monthly time periods, finding that there was insufficient reasoning to depart from its standard analysis.⁵² According to the petitioner, in the instant proceeding the respondents have neither provided a meaningful justification to depart from the Department's existing analysis nor demonstrated that this alternative would be superior to the existing analysis. The petitioner claims that the respondents' time period argument in this case, which would decrease the incidence of differential pricing, is the opposite of that made by the petitioners in Tires from the PRC, which would have increased the incidence of differential pricing. The petitioner argues that differences in outcome in the differential pricing analysis are not a sufficient justification to alter the Department's standard time periods.⁵³ The petitioner claims that, absent a justification rooted in external pricing changes linked to the time period examined, the Department should not adjust the time periods used in this administrative review.

Department's Position:

We agree with the respondents and, for purposes of the final results, redefined the time periods for Falcon and the Liberty Group based on entry date. In the Preliminary Results, we invited from interested parties regarding our differential pricing approach, including arguments for modifying the group definitions used in this review based on the record of this review. The respondents' position that the time periods should be defined using entry date, rather than the date of sale, is supported by record evidence.⁵⁴ Because the universe of Falcon's and the Liberty Group's sales is based on entry date, the respondents' sales are divided into more than four quarters when we define time period using the date of sale. Therefore, there exists a logical basis

⁵⁰ See the petitioners' rebuttal brief, at 7-8 (citing Copper Pipe from the PRC at Comment 6).

⁵¹ See the petitioners' rebuttal brief, at 8-9 (citing Washers from Korea at Comment 7).

⁵² See the petitioners' rebuttal brief, at 9 (citing Tires from the PRC at Comment 25).

⁵³ The petitioner also takes issue with the respondents' proposed alternative of dividing the total number of days reported on a date of sale basis by four, noting that not only would these periods vary by respondent but also the overall periods examined could be longer or shorter than the POR. Thus, according to the petitioner, establishing this methodology as the Department's default practice when the universe of sales is based on entry date would decrease uniformity and predictability.

⁵⁴ See Falcon's submission entitled "Certain Frozen Warmwater Shrimp from India: Falcon Marine Response to Supplemental Sections A/B/C Questionnaire," dated November 12, 2015, at pages 27-29; and the Liberty Group's submission entitled "Certain Frozen Warmwater Shrimp from India: Liberty Group Response to Supplemental Sections B/C Questionnaire," dated November 25, 2015, at pages 39-42.

to redefine the time period based on entry date when examining whether there are prices that differ significantly among time periods.

We disagree with the petitioner's contentions that it is arbitrary to use entry date to define the time periods or that this modification is unjustified. In administrative reviews where the universe of reported transactions is based on entry date, rather than sale date, defining the time periods using entry date permits respondents' sales to be grouped into four quarters, eliminating distortion from our analysis.⁵⁵ Thus, we find that in such cases it is appropriate to define the time periods using entry date, rather than the date of sale.

Finally, we disagree with the petitioner that either Washers from Korea and Tires from the PRC support its argument to use the date of sale to define time periods in this case. In both of those cases, the petitioners argued for the use of monthly, not quarterly, time periods.⁵⁶ However, we are not departing from the Department's standard practice of employing quarterly time comparisons in this administrative review.

Company-Specific Issues

Comment 3: *Ministerial Errors for the Liberty Group*

The Liberty Group claims that the Department made three ministerial errors in the Preliminary Results. Specifically the Liberty Group argues the Department failed to: 1) treat all of the companies in the Liberty Group as a single entity, despite the fact that it collapsed these companies in prior segments in this proceeding;⁵⁷ 2) convert certain inventory carrying costs from kilograms into pounds; and 3) convert certain demurrage expenses from Indian rupees to U.S. dollars. The Liberty Group requests that the Department correct these errors for the purposes of the final results.

The petitioner disagrees that the Department made a ministerial error when it decided to treat the companies within the Liberty Group as separate entities. According to the petitioners, the Department has the discretion to treat individual producing companies within a single entity as separate for the purposes of some parts of the antidumping analysis based on the facts of the case. For instance, the petitioner notes that the Department has calculated separate financial expense ratios for each individual producing company within the Liberty Group in past segments of the proceeding.⁵⁸

⁵⁵ As noted above, where the universe of sales is based on entry date, sales will not be divided into four quarters when the time periods are defined using the date of sale because of the lag between the date of shipment and the date of entry.

⁵⁶ See Washers from Korea at Comment 7; and Tires from the PRC at Comment 25.

⁵⁷ See the Respondents' Case Brief at 3 (citing, e.g., Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, 72 FR 52055, 52058 (September 12, 2007) (Indian Shrimp AR1)).

⁵⁸ See the Petitioner's Case Brief at 3 (citing Indian Shrimp AR1, 72 FR at 52058).

Department's Position:

We reviewed our calculations and agree with the Liberty Group that the Department made the three errors noted above. It is the Department's long-standing practice to treat all companies within a collapsed group as a single entity for purposes of our margin calculations. Further, we followed this practice with respect to the Liberty Group in all segments of this proceeding where the Liberty Group has been selected as a mandatory respondent. Therefore, we revised our calculations for the final results accordingly.

Moreover, we find that the petitioner's argument regarding the financial ratios is not on point. The Department's normal practice is to calculate the financial expense ratio based on the respondent's audited financial statements at the highest level of consolidation.⁵⁹ Because the Liberty Group does not prepare consolidated financial statements, we are unable to base the calculation of the financial expense ratio on the financial results of the corporate group.⁶⁰ Nonetheless, in this review, as in past segments of this proceeding, the Department calculated a single cost for each product and computed a single financing expense for the corporate group as a whole.

⁵⁹ See Indian Shrimp AR1 at Comment 9; Notice of Final Results of First Antidumping Duty Administrative Review: Certain Softwood Lumber from Canada, 69 FR 75921 (December 20, 2004), and accompanying Issues and Decision Memorandum at Comment 17; and Certain Steel Concrete Reinforcing Bars from Turkey: Final Results of Antidumping Duty Administrative Review, 70 FR 67665 (November 8, 2005), and accompanying Issues and Decision Memorandum at Comment 15.

⁶⁰ See Indian Shrimp AR1 at Comment 9.

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 _____



Christian Marsh

Deputy Assistant Secretary

for Antidumping and Countervailing Duty Operations

9/6/16

(Date)