UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-583-837
Administrative Review
POR: 07/01/2012-06/30/2013
Public Document
Office VII: MK

February 18, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan; 2012-2013

SUMMARY

We analyzed the comments from interested parties in the 2012-2013 administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip ("PET film") from Taiwan. A case brief was filed by the respondent, Nan Ya Plastics Corporation ("Nan Ya"). A rebuttal brief was filed by DuPont Teijin Films, Mitsubishi Polyester Film, Inc. and SKC, Inc. ("petitioners"). As a result of this analysis, we have made no changes to the preliminary margin calculations for Nan Ya. We recommend that you approve the position described in the "Discussion of the Issue" section of this memorandum.

Background

On August 21, 2014, the Department published the Preliminary Results of this administrative review.[1] The administrative review covers one producer and exporter of the subject merchandise to the United States, Nan Ya. The period of review ("POR") is July 1, 2012, through June 30, 2013. We invited parties to comment on the Preliminary Results. Nan Ya timely filed a case brief on September 29, 2014; however, the Department rejected the case brief for containing new

[1] See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2013, 79 FR 49496 (August 21, 2014), and accompanying Preliminary Decision Memorandum ("PDM") ("Preliminary Results").

factual information. Nan Ya resubmitted its case brief on October 14, 2014.[2] Petitioners timely filed a rebuttal brief on October 21, 2014.[3]

Scope of the Order

The products covered by the antidumping duty order are all gauges of raw, pretreated, or primed polyethylene terephthalate film, sheet, and strip, whether extruded or coextruded. Excluded are metalized 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 polyethylene terephthalate film, sheet, and strip 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: Selecting an Appropriate Comparison Method

A) Whether the Department Is Permitted By Statute to Consider an Alternative Comparison Method

Nan Ya argues:

- The Department lacks statutory authority to conduct a "targeted dumping"[4] analysis in this administrative review. Section 777A(d)(2) of the Tariff Act of 1930, as amended (the Act), details how calculations for administrative reviews are to be conducted. It contains no provision for alternative comparison methods as provided for investigations in section 777A(d)(1)(B) of the Act.

Petitioners' rebuttal:

- The Court of Appeals for the Federal Circuit (CAFC)[5] and the Court of International Trade (USCIT)[6] have both upheld the Department's statutory authority to employ

[2] See Case Brief of Nan Ya Plastics Corporation of September 29, 2014, re-submitted October 14, 2014 (Nan Ya's case brief).
[3] See Petitioners' Rebuttal Brief of October 21, 2014 (Petitioners rebuttal brief).
[4] As an initial matter, the Department has applied a differential pricing analysis in this administrative review, and not the Nails test. See Preliminary Results, and accompanying PDM at "Determination of Comparison Method," and See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, "Nails"), as modified in more recent investigations, e.g., Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011); see also Mid Continent Nail Corp. v. United States, Slip. Op. 2010-47 (Ct. Int'l Trade May 4, 2010) and Mid Continent Nail Corp. v. United States, Slip. Op. 2010-48 (Ct. Int'l Trade May 4, 2010). See, e.g., Polyethylene Terephthalate (PET) Film from Korea, Inv. No. 731-TA-459 (Third Review), Publication 4254 (August 2011) at 12, 14, IV-11, and V-2.
[5] Petitioners cite to Union Steel v. United States, 713 F.3d 1101, 1107-1110 (CAFC 2013).
[6] Petitioners cite to CP Kelco Oy v. United States, 978 F. Supp. 2d 1315, 1321-24 (USCIT 2014)(CP Kelco).

alternative methods in administrative reviews. The same argument Nan Ya makes was recently rejected in JBF RAK LLC v. United States.[7]

Department's Position:

We disagree with Nan Ya's assertion that the Department has no authority to consider the application of an alternative comparison method in administrative reviews. In a "swelling chorus" of cases, the USCIT has upheld the Department's statutory authority to employ an alternative comparison method in administrative reviews and has rejected all of the arguments Nan Ya makes in this review regarding this point.[8]

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal ("NV") value exceeds the export price or constructed export price of the subject merchandise." By definition, a "dumping margin" calls for a comparison of NV and export price ("EP") or constructed export price ("CEP"). Before making the comparison called for, it is necessary for the Department to determine how to make the appropriate comparison.

Nan Ya states that Congress made no provision in section 777A(d)(2) of the Act for the Department to apply an alternative comparison method in administrative reviews; otherwise it would have framed the Act accordingly. The Department agrees that the statute is silent on this question. Indeed, section 777A(d)(1) of the Act applies to "Investigations" and section 777A(d)(2) of the Act applies to "Reviews." Section 777A(d)(1) discusses, for investigations, the standard comparison methods (i.e., average-to-average ("A-to-A"), and transaction-to-transaction ("T-to-T")), and then provides for an alternative comparison method (average-to-transaction ("A-to-T")) that is an exception to the standard comparison methods when certain criteria have been met. Section 777A(d)(2) discusses the maximum length of time over which the Department may calculate the weighted-average NV in administrative reviews when using the A-to-T method. Section 777A(d)(2) has no provision for the comparison method to be employed in administrative reviews.

However, we find that, contrary to Nan Ya's claim, the silence of the Act with regard to application of the A-to-T method, or any comparison method, in administrative reviews does not preclude the Department from applying such a practice in reviews. Indeed, the USCIT has agreed with the Department's interpretation.[9] Moreover, the CAFC has stated that the "court must, as we do, defer to {the Department's} reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the

[7] Petitioners cite to JBF RAK LLC v. United States, 991 F. Supp. 2d 1343, 1347-48 (USCIT 2014) (JBF RAK).
[8] See, e.g., Apex Frozen Foods Private Ltd. v. United States, slip op. 14-138, at 8-9 (USCIT December 1, 2014); DuPont Teijin Films China Ltd. v. United States, 7 F. Supp. 3d 1338, 1355-56 (USCIT 2014); JBF RAK at 1347-49; CP Kelco at 1321-24.
[9] See, e.g., Apex, at 9 ("the legislature's silence does not manifest an intent to withhold the {targeted dumping} inquiry from reviews. The silence just as readily betokens Congress's benign inattention to the matter"). Although Apex analyzed whether the Department had statutory authority to employ an alternative comparison method in reviews at the time the Department was applying the Nails test, this holding applies equally when the Department employs a differential pricing analysis.

agency's generally conferred authority and other statutory circumstances."[10] Further, this "silence has been interpreted as 'an invitation' for an agency administering unfair trade law to 'perform its duties in the way it believes most suitable' and courts will uphold these decisions '{s}o long as the {agency's} analysis does not violate any statute and is not otherwise arbitrary and capricious."[11]

To fill this gap in the statute, the Department promulgated regulations to specify how comparisons between NV and EP or CEP will be made in administrative reviews.[12] The Department's regulations at 19 CFR 351.414(b) describe the methods by which NV may be compared to EP or CEP in antidumping investigations and administrative reviews (i.e., A-to A, T-to-T, and A-to-T). These comparison methods are distinct from each other. When using the T-to-T method or the A-to-T method, a comparison is made for each export transaction to the United States. When using the A-to-A method, a comparison is made for each group of comparable export transactions for which the EPs or CEPs have been averaged together (i.e., for an averaging group).[13] The Department does not interpret the Act or the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") to prohibit the use of the A-to-A comparison method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T method in administrative reviews. 19 CFR 351.414(c)(1) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another methodology is appropriate in a particular case." Because Congress did not specify the comparison method for administrative reviews, the Department has discretion in selecting the appropriate comparison method in such proceedings.[14] Therefore, the Department finds that it has authority to consider the application of an alternative comparison method in reviews.

Comment 2: Differential Pricing Analysis

A) Explanation Provided for under Section 777A(d)(1)(B)(ii) of the Act

Nan Ya argues:

- Section 777A(d)(1) of the Act sets forth an "exception" to the statutorily mandated preference for using the standard comparison method.

[10] See United States Steel Corp. v. United States, 621 F.3d 1351, 1357 (CAFC 2010) (U.S. Steel (CAFC)) (internal citations omitted).
[11] See Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1376-77 (USCIT 2010) (quoting U.S. Steel CAFC, 621 F.3d at 1362).
[12] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) ("Final Modification for Reviews").
[13] See 19 CFR 351.414(d)(2).
[14] See Apex, at 9; JBF RAK, 991 F. Supp. 2d at 1348 ("The fact that the statute is silent with regard to administrative reviews does not preclude Commerce from filling gaps in the statute to properly calculate and assign antidumping duties. In fact, this is precisely the type of the situation where Commerce would be expected to establish comparison method to apply in administrative reviews. This deliberate policy choice by Commerce does not violate the statute or SAA"); CP Kelco at 1322-23.

- The statutory language in section 777A(d)(1)(B)(ii) of the Act also states that the Department must explain why the use of the default A-to-A method cannot account for the pricing differences. The Department's perfunctory explanation in other cases that simply stating there were differences in the weighted-average dumping margins using the A-to-A method as compared to the A-to-T method does not constitute a reasonable explanation. The mere fact that the Department found a difference does not in any way prove why the significantly different pricing of exports "cannot be taken into account," by the A-to-A method. The USCIT has held that "if no other explanation other than the bare-bones invocation of the differing natures of the A-to-A and A-to-T methods {e.g., different dumping margins} would suffice to satisfy {section 777A(d)(1)(B)(ii)} . . . that statutory provision would be superfluous."[15]
- Therefore, if the Department finds that Nan Ya engaged in "differential pricing," the Department must adhere to the statutory requirement and provide a sufficient explanation as to why the standard comparison method cannot be utilized.
- Furthermore, one CONNUM in Nan Ya's U.S. sales database generally has identical or extremely similar U.S. prices in the same month, except those having an order in different quarters, given Nan Ya's quarterly pricing practice, and the monthly weighted-average U.S. price is very close to individual transaction U.S. prices.

Petitioners' rebuttal:

- The Department sufficiently explained its decision to use an alternative comparison method. The Department's goal is to identify a pattern of prices for comparable merchandise that differs significantly among purchasers, regions, or time periods. The analysis shows that a pattern of prices that differ significantly does exist for the period of review and, in fact, that there is masked dumping in this review.

Department's Position:

As explained in the Preliminary Results, if the difference in the weighted-average dumping margins calculated using the A-to-A comparison 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 comparison method would be appropriate.[16] 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 the de minimis threshold; or 2) the resulting weighted-average dumping margin moves across the de minimis threshold.[17]

Here, such a meaningful difference exists for Nan Ya because, when comparing Nan Ya's weighted-average dumping margin calculated pursuant to the A-to-A method and an alternative comparison method based on applying the A-to-T method only to those U.S. sales that passed the Cohen's *d* test, Nan Ya's weighted-average dumping margin moves across the de minimis

[15] Nan Ya cites to Beijing Tianhai Indus. Co. v. United States, 7 F. Supp. 3d 1318, 1332 (USCIT 2014) (Beijing Tianhai).
[16] See Preliminary Results, and accompanying PDM at "Determination of Comparison Method."
[17] Id.

threshold.[18] The Department's approach in evaluating the second statutory requirement 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 (i.e., masked dumping). For Nan Ya, where the results between the two comparison methods cross the de minimis threshold means either an affirmative or negative finding of dumping during the POR. There is a meaningful difference in the results in that dumping is being masked to an extent that it is invisible. The USCIT has sustained the Department's practice of comparing weighted-average dumping margins using the A-to-A and alternative comparison methods to determine whether A-to-A can account for a pattern of significant price differences, specifically where the margin of dumping moves across the de minimis threshold.[19] Therefore, for these final results, the Department continues to find that the A-to-A method cannot take into account the observed differences in Nan Ya's pricing behavior during the POR, and the Department continues to apply an alternative comparison method to calculate Nan Ya's weighted-average dumping margin.

The Department disagrees with Nan Ya's reliance on Beijing Tianhai as support for its effort to invalidate the Department's examination of the calculated results between the two comparison methods to determine whether the second statutory requirement has been met. In the underlying investigation to that case, the Department did not explain why the A-to-A method could not account for such differences:

> the Department finds that the pattern of price differences identified cannot be taken into account using the standard A-to-A method because the A-to-A method conceals differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Thus, the Department finds, pursuant to section 777A(d)(l)(B) of the Act, that application of the standard A-to-A method would result in the masking of dumping that is unmasked by application of the alternative A-to-T method when calculating BTIC's weighted-average dumping margin.[20]

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

> Further, the Department preliminarily determines that applying solely the average-to-average method to all sales cannot appropriately account for such differences because there is a meaningful difference between the weighted-average dumping margin

[18] See Analysis Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Nan Ya Plastics Corporation (Nan Ya), dated August 18, 2014, unchanged for these final results in Analysis Memorandum for the Final Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Nan Ya Plastics Corporation (Nan Ya), dated concurrently with this notice (Final Results Analysis Memorandum)
[19] See Apex, at 13-14, 18-20.
[20] See High Pressure Steel Cylinders From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 26739 (May 7, 2012), and accompanying Issues and Decision Memorandum at Comment IV.

calculated using the average-to-average method and when using the alternative method, i.e., the resulting weighted-average dumping margin using the mixed method moves across the de minimis threshold as compared to the average-to-average method.[21]

Therefore, the facts underlying the USCIT's decision in Beijing Tianhai are not present in this case. The facts and explanation discussed here and in the Preliminary Results of this review demonstrate that the A-to-A method is insufficient and an alternative comparison method is appropriate.

With regard to Nan Ya's factual arguments related to its U.S. sales database, as discussed below in section B, the statute does not require 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, but simply requires that the agency identify that a pattern exists. The Department engages in this analysis through the differential pricing analysis.

B) Application of Differential Pricing Analysis

Nan Ya argues:

- Quarterly "targeted dumping" findings should not be made in administrative reviews because in a month-to-month comparison, it is not possible to "level-off dumping margins by averaging high and low prices over a twelve month {POR}." The difference in price between the high and low price quarters has already been detected and fully accounted for in the monthly A-to-A comparison.
- Nan Ya contends that section 777A(d)(1)(B) of the Act was added to address a specific problem – i.e., "targeted dumping."[22] Nan Ya states that, "instead of simply mathematically identifying price variations, Commerce is required by law to investigate the reasons (i.e., is it really targeted dumping?) and explain why the A-A method cannot take account any targeted dumping in calculating the dumping margin."[23] Simply claiming, without more, that one comparison method yields a higher weighted-average dumping margin than another is insufficient to satisfy the statutory requirement that the A-to-A method does not address "targeted dumping."
- Nan Ya contends that the changes in price between quarters reflect changes in cost of the main raw material input for PET film, not "targeted dumping."
- In the past, the Department has recognized that it may take into account other factors that may be responsible for any pricing pattern that are not related to "targeted dumping," but did not do so in the Preliminary Results.[24]

[21] See Preliminary Results, and accompanying PDM at 5.
[22] Nan Ya cites to the SAA at 843; U.S. Steel Corp. v. United States, 637 F. Supp. 2d 1199, 1216 (USCIT 2009) (U.S. Steel (USCIT)); Borden, Inc. v. United States, 4 F. Supp. 2d 1221, 1228 (USCIT 1989).
[23] Nan Ya's Case Brief at 4.
[24] Nan Ya cites to Polyvinyl Alcohol from Taiwan: Final Determination of Sales at Less Than Fair Value, 76 FR 5562 (February 1, 2011) (PVA from Taiwan), and accompanying Issues and Decision Memorandum at Comment 1; Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 17029 (Mar. 23, 2012), and accompanying Issues and Decision Memorandum (Nails from the UAE); Wood Flooring from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 33977 (June 16, 2008) and accompanying Issues and Decision Memorandum at 33. Regarding its final citation, Nan Ya's

- The Department's reliance on the Cohen's *d* test is misplaced:
    - The Department's analysis determines groups arbitrarily. For example, the Department defined time periods by quarter as a default but provided no reasoning or support for such groupings. Furthermore, using quarterly groups results in artificially small standard deviations being used for the denominator of Cohen's *d*. Measuring the ratio of difference of means to pooled standard deviation based on quarter groups can easily make U.S. sales made under Nan Ya's quarterly sales agreement exceed the threshold of the Cohen's *d* test because sales made in one quarter have the same price and, thus, a very small standard deviation. A small denominator makes marginal differences in prices pass the 0.8 threshold and result in a finding of "targeted dumping," even where Nan Ya contends no dumping occurred.
    - Moreover, it should only be lower prices that constitute "targeted dumping," and the Department should explain why slight invoicing differences results in a finding of "targeted dumping."
    - Cohen's *d* measures differences based on standard deviations, making the results difficult to interpret for "targeted dumping."

Petitioners' rebuttal:

- Nan Ya is mistaken that the Department uses Cohen's *d* to identify "targeted dumping." Rather, the Cohen's *d* test is used to determine whether the A-to-A method is the appropriate tool for evaluating the extent of dumping by the respondent.
- The statute does not require the Department to consider only lower priced sales in the differential pricing analysis as Nan Ya contends. The Department's analysis is meant to uncover a pattern of pricing differences and uses both high and low prices.
- The burden is on the respondent if they wish to use a time period other than quarters. Nan Ya could have submitted an alternative field for time, but did not. Nan Ya forfeited the opportunity to make this argument now.

Department's Position:

As an initial matter, we note that Nan Ya's arguments regarding the Department's differential pricing analysis have no grounding in the language of the statute. Nan Ya does not argue that the Department's reliance on the Cohen's *d* test violates the statutory language. There is nothing in the statute that mandates how the Department measures whether there is a pattern of prices that differs significantly. To the contrary, carrying out the purpose of the statute here is a gap filling exercise by the Department. As explained in the Preliminary Results and below, the Department's differential pricing analysis is reasonable, and the use of the Cohen's *d* test as a component in this analysis is in no way contrary to the law.

---

reference incorporates the date and Federal Register citation to Nails. For the sake of argument, the Department presumes Nan Ya intended to cite to Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011), and accompanying Issues and Decision Memorandum at 33 (Wood Flooring From China), because nothing at page 33 of the Issues and Decision Memorandum for Nails from China potentially references the company's argument.

Furthermore, Nan Ya confuses a determination of "targeted dumping" (i.e., whether there exists a pattern of prices that differ significantly) with a determination of whether the A-to-A method can account for such differences (i.e., whether dumping is being masked to a sufficient extent that there is a meaningful difference in the results). For the first requirement, the Department uses the Cohen's *d* and ratio tests to examine whether there exists a pattern of prices that differ significantly. The Cohen's *d* coefficient is a statistical measure which gauges the extent (or "effect size") of the difference between the means of two groups. "Effect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone."[25] In Xanthan Gum, we stated as follows:

> Effect size is the measurement that is derived from the Cohen's *d* test. Although Deosen argues that effect size is a statistic that is "widely used in meta-analysis," we note that the article also states that "{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference*." The article points out the precise purpose for which the Department relies on Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant.[26]

The ratio test aggregates the results of the comparisons of the means between the test and comparison groups to gauge the extent of the significant differences in prices. The results then inform the Department whether consideration of an alternative comparison method is warranted, and if so, to what extent the A-to-T method should be applied in place of the standard A-to-A method. A determination that there exists a pattern of prices that differ significantly in no way indicates that dumping is being masked in a meaningful way. The results of the Cohen's *d* and ratio tests merely recognize that conditions may exist which could lead to the masking of dumping. Only when conditions exist that might lead to masked dumping, does the Department consider whether the varying pricing behavior of the respondent would render the A-to-A method not appropriate.[27]

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

> (1) there is a 25 percent relative change in the weighted-average dumping margin between the average-to-average method and the appropriate alternative method when both results are above the de minimis threshold, or (2) the resulting weighted-average dumping margin moves across the de minimis threshold.[28]

---

[25] See Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33350 (June 4, 2013) (Xanthan Gum) and the accompanying Issues and Decision Memorandum at Comment 3 (quoting from Coe, Robert, "It's The Effects Size, Stupid: What effect size is and why it is important," presented at the Annual Conference of British Educational Research Association (September 12-14, 2002)).
[26] Id. (footnote omitted and emphasis originally included).
[27] See 19 CFR 351.414(c).
[28] See Preliminary Results and the accompanying PDM at 4.

As discussed above, for Nan Ya in this review, the Department has found masked dumping because there is a meaningful difference in the weighted-average dumping margins between the A-to-A method and an alternative comparison method.

The Department disagrees with Nan Ya' argument that the Department's use of monthly averages in the A-to-A method abrogates the results of the Cohen's *d* analysis with respect to time periods when those time periods are based on quarters during the POR. Nan Ya claims that the "difference in price between the high and low price quarters is already fully accounted for in the monthly average-to-average comparison."[29] As discussed above, the Cohen's *d* and ratio tests examine whether conditions exist (i.e., there exists a pattern of prices that differ significantly) where dumping could be masked. In making this examination, the Department has established an approach which assesses whether such conditions exists. This analysis is independent of the bases on which U.S. prices are averaged when using the A-to-A method.

The Department disagrees with Nan Ya's argument that the Department must explain why "targeted dumping" exists. Nan Ya conflates the two requirements provided in section 777A(d)(1)(B) of the Act. As described above, the first requirement provided in the statute is that there must exist a pattern of prices that differ significantly. These prices are export prices into the U.S. market, and the question of whether there exists a pattern includes no comparisons with normal values.[30] Accordingly, "dumping" – the amount by which normal value exceeds the export price – is not part of the analysis as to whether there exists a pattern of prices that differ significantly.

Furthermore, 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 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 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 USCIT has sustained this interpretation, albeit in the context of cases employing the Nails test.[31] 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

[29] See Nan Ya Case Brief at 3.
[30] See section 771(35) of the Act.
[31] 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 (USCIT 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.").

such that the A-to-A method would not be appropriate to gauge an exporter's possible dumping in the U.S. market.

Only under the second requirement, section 777A(d)(1)(B)(ii), and not the first requirement, is the Department required to provide an explanation why one of the standard comparison methods under section 777A(d)(1)(A) of the Act cannot account for the exporter's varying pricing behavior – *i.e.*, whether dumping is being masked. The Department has addressed this question above in responding to Nan Ya's argument that the Department has failed to provide such explanation.

Nan Ya's reliance on Borden and U.S. Steel (USCIT) to buttress its argument that the Department must explain why "targeted dumping" exists are inapposite.[32] Those cases merely describe the concept of "targeted dumping" and neither case holds that the Department may apply an alternate comparison method only in response to strategic pricing behavior. Furthermore, Nan Ya's reliance on Wood Flooring from China, PVA from Taiwan, and Nails from UAE, are unavailing as well. Although in those cases the Department discussed flaws in interested parties' arguments that other commercial reasons explained the observed patterns of prices that differed significantly, the Department never indicated that it would have changed its determinations had those arguments been factually correct.[33] Regardless, to interpret the statute as containing an intent-based requirement to engage in masked dumping, or to require the Department to discern why a pattern of significant price differences by time period otherwise exists, "would likely create an unmanageable standard for the Department."[34] In addition, Nan Ya's pricing behavior may be influenced by changing costs, but changing pricing behavior – regardless of what motivates it – may give rise to dumping to the extent that normal value winds up exceeding export prices. It is for this reason that the Department should not speculate why a pattern of prices that differ significantly exists.

Further, the Cohen's *d* and ratio tests do not examine whether masked dumping is present. This analysis is performed once conditions exist which warrant the question of whether the A-to-A method is appropriate. It is at this stage, once conditions exist, where the Department uses the standard A-to-A method and the appropriate alternative comparison method to determine whether dumping is being masked by the A-to-A method. As part of the relevant comparison methods, the Department uses the appropriate period over which to average U.S. sale prices as well as comparison market sale prices if these are used as a basis for normal value. Therefore, Nan Ya's conflates the Department's distinct tests which address the two separate requirements under section 777A(d)(1)(B) of the Act.

We reject Nan Ya's claim that the Department's comparisons are made using monthly averages in an administrative review and, as a result, that the A-to-A method will necessarily account for price differences among time periods. The USCIT recently rejected a similar argument, and held that the Department, by comparing that respondent's A-to-A and A-to-T margins, "already

[32] See Borden, 4 F. Supp. 2d at 1228-31; U.S. Steel (USCIT), 637 F. Supp. at 1216.
[33] See Wood Flooring from China at Comment 4; PVA from Taiwan at Comment 1; Nails from the UAE at Comment 1.
[34] See Nails from UAE at Comment 1.

showed that {the A-to-A method} with monthly averages could not account for targeted dumping."[35] The fact that the results of A-to-A comparisons are aggregated with offsets for non-dumped sales means that results of those comparisons would offset each other in the calculation of the weighted average dumping margin, thereby permitting dumped prices that reflect pricing decisions made during a distinct period to be masked by the non-dumping pricing behavior of other distinct periods.[36] Indeed, in the Preliminary Results, and in these final results, the Department found that Nan Ya had a 0.00 percent weighted-average dumping margin when applying the A-to-A method to Nan Ya's sales, but when it applied the appropriate alternative comparison method, it found a weighted-average dumping margin of 1.57 percent.[37] Similar to the facts of Apex, the disparity between Nan Ya's rates demonstrates that the A-to-A method based on monthly weighted averages accounts for none of the masked dumping found in Nan Ya's pricing behavior, whereas application of the alternative comparison method exposes this masked dumping.[38] Therefore, the Department continues to apply the appropriate alternative comparison method to calculate Nan Ya's weighted-average dumping margin for these final results.

The Department disagrees with Nan Ya's specific argument that the Department defined time periods by quarter without explanation and in an arbitrary manner. In the Preliminary Results, the Department stated that interested parties may present arguments and justifications in relation to the differential pricing approach, including arguments for modifying the group definitions (i.e., purchaser, region, time period and comparable merchandise) used in this review based upon the factual information on the record of this review.[39] Nan Ya claims that the use of time periods by quarter is arbitrary and leads to "small standard deviations." We do not find that this provides a reason to support changing the time period simply because Nan Ya disagrees with the results of the test. First, the pricing data which Nan Ya refers to in its case brief is based on Nan Ya's reported gross unit price.[40] This unadjusted data is not used for either the calculation of Nan Ya's individual dumping margins or for the Cohen's *d* test. Since the results of the differential pricing analysis in this review informs the Department as to whether the A-to-A method is appropriate pursuant to 19 CFR 351.414(c), Nan Ya's reliance on its reported gross unit price is misplaced.

Second, there is no reasonable linkage between the use of quarters to define the time period in the Cohen's *d* test and the fact that Nan Ya's pricing behavior shows only small variations over these periods. Nan Ya implies that using some other unspecified definition of time period would result in larger variances in the prices within each test and comparison group, or result in fewer sales passing the Cohen's *d* test. However, Nan Ya has made no recommendation as to what that

[35] See Apex at 21.
[36] See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 9668 (February 11, 2013), and accompanying Issues and Decision Memorandum at Comment 1.
[37] See Final Results Analysis Memorandum.
[38] See Apex at 21.
[39] See Preliminary Results, and accompanying PDM at "Determination of Comparison Method."
[40] See Nan Ya's Case Brief at NY-BR-Exhibit-1.

definition should be[41] nor has it proffered any factual information to support such a change in methodology. Therefore, Nan Ya has failed to provide adequate information and argument for the Department to adjust the definition of time period in the Cohen's *d* test.

Nan Ya also argues that the Department should use a weighted average rather than a simple average of the variances for the test and comparison groups when calculating the pooled standard deviation of the Cohen's *d* coefficient.[42] Nan Ya claims that the correct approach is a weighted-average, based on the frequency of observations, which would somehow correct for the fact that there are small variances in the test and comparison groups (i.e., in different quarters during the POR).[43] As explained above, there is no statutory directive with respect to how the Department should determine whether a pattern of prices that differ significantly exists, let alone how to calculate the pooled standard deviation of the Cohen's *d* coefficient. The Department's intent is to rely on a reasonable approach that affords predictability. The Department finds here that the best way to accomplish this goal is to use a simple average (i.e., giving equal weight to the test and comparison groups) when determining the pooled standard deviation. By using a simple average, the respondent's pricing practices to each group will be weighted equally, and the magnitude of the sales to one group does not skew the outcome. Accordingly, the Department finds it reasonable to use a simple average.

Contrary to Nan Ya's claim, the statute does not require that the Department consider only lower priced sales in the differential pricing analysis. The Department has the discretion to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. In addition, 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 as capable as lower priced sales to create a pattern of prices that differ significantly. Further, higher priced sales will offset lower priced sales, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, that can mask dumping. The statute states that the Department may apply the A-to-T comparison 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. The statute directs the Department to consider whether a pattern of prices 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.[44]

The statute does not provide that the Department considers 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

[41] We note that Nan Ya contends that a monthly differential pricing analysis would result in a different finding. However, Nan Ya does not argue that this, or any other, alternate time period should be used in employing the differential pricing analysis for these final results. Rather, Nan Ya has simply argued that because the Department has not adequately explained why it is applying quarters as the time period in its differential pricing analysis, it should not apply a differential pricing analysis *at all* in this review. See Nan Ya's Case Brief at 8-9.
[42] See Nan Ya's Case Brief at 9.
[43] Id.
[44] See section 777A(d)(1)(B)(i) of the Act.

has explained that higher priced sales and lower priced sales do not operate independently; all sales are relevant to the analysis.[45] Higher or lower priced sales could be dumped or could be masking other dumped sales – this is immaterial in the Cohen's *d* test and in answering the question of whether there is a pattern of EPs that differ significantly because this analysis includes no comparisons with NVs 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 practice and to identify whether there is a pattern of prices that differs significantly. Moreover, finding such a pattern of prices that differs significantly among purchasers, regions, or periods of time, signals that the exporter is discriminating between purchasers, regions, or periods of time within the U.S. market rather than following a more uniform pricing behavior. Where the evidence indicates that the exporter is engaged in a discriminating pricing behavior, there is cause to continue with the analysis to determine whether the A-to-A method (or the T-to-T method, if applicable) can account for such pricing behavior, as opposed to an alternative comparison method. Accordingly, both higher and lower priced sales are relevant to the Department's analysis of the exporter's pricing behavior.

Furthermore, the SAA recognizes that with "targeted dumping," "an exporter may sell at a dumped {e.g., perhaps lower} price to particular customers or regions, while selling at higher prices to other customers or regions."[46] Thus, Congress, in recognizing the concerns regarding targeted, or masked, dumping, recognized that this not only included lower-priced sales which may be dumped, but also higher-priced sales which could conceal or mask dumping. Congress provided a remedy which is permitted to address these concerns when the two statutory requirements have been satisfied. The first of these requirements identify the potential pricing behaviors in the U.S. market which may lead to masked dumping, namely a pattern of prices that differ significantly. Without such a fact pattern, masked dumping cannot occur. The second requirement then must demonstrate that one of the two standard comparison methods cannot account for such differences, such that this potential for masked dumping is actually being fulfilled by the exporter's pricing behaviors in the U.S. market. Therefore, the Department's consideration of both lower and higher priced sales as being part of a pattern of prices that differ significantly is consistent with the SAA, and Nan Ya's contention that differential pricing can only refer to lower-priced sales is without merit.

[45] See, e.g., Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013, 79 FR 70163 (November 25, 2014), and accompanying Issues and Decision Memorandum at Comment 2.B.
[46] See the SAA, H.R. Doc. 103316, Vol. 1, at 842 (1994).

Recommendation

Based on our analysis of the comment received, we recommend adopting the above position. If this recommendation is accepted, we will publish the final results of the review and the final weighted-average dumping margin in the Federal Register.

✓
Agree

Disagree

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

18 February 2015
(Date)